THE HIGH COURT

[2024] IEHC 365

[Record No. 2012/3326P]

BETWEEN

HUGH MCGIVERN

PLAINTIFF

AND

IVOR FITZPATRICK, JENNIFER BLUNDON, DEIRDRE COURTNEY, JOHN KING, ANN MCHALE, DYMPNA MURPHY, MARGARET SCULLY, SUSAN R. STAPLETON, PRACTISING UNDER THE STYLE AND TITLE OF IVOR FITZPATRICK & COMPANY SOLICITORS

DEFENDANTS

JUDGMENT of Mr Justice Barr delivered electronically on the 17th day of June 2024.

Introduction.

1. This is an application brought by the defendants to have the plaintiff's action against them struck out on grounds of inordinate and inexcusable delay, pursuant to O122 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court.

2. Put at their simplest, these proceedings concern an action for alleged professional negligence on the part of the defendants when they were acting as solicitor for the plaintiff in relation to a share sale agreement that he entered into in November 2006. The essence of the plaintiff's case is that he had retained the defendants to act for him in relation to the sale of his shares in a number of companies, to his fellow shareholder, a Mr Kelly. The plaintiff had entered into a number of personal guarantees with third parties in respect of any liabilities that the companies may have with them, as creditors of the companies.

3. The plaintiff's case is that, contrary to the instructions that he had furnished to his solicitors, they permitted him to sign a draft share purchase agreement, without first ensuring that he was removed as a guarantor in respect of the debts and liabilities of the companies.

4. The events which are the subject matter of the action between the parties occurred in the period from in or about April 2006, when the defendants were retained by the plaintiff to act for him in relation to the sale of his shares to Mr Kelly, until November 2006, when the plaintiff executed the share purchase agreement that had been drawn up in draft form by the defendants. The plaintiff alleges that due to the negligence of the defendants in failing to ensure that it was a term of the agreement that he would be removed as guarantor of the companies upon the sale of his shares to Mr Kelly, he remained liable as guarantor of the

companies' debts, after the date on which he had transferred his shares to Mr Kelly; as a result whereof, it is alleged that he has suffered significant loss and damage, in excess of €2m.

5. The defendants deny all allegations of negligence made against them in the pleadings.

6. The proceedings were commenced by plenary summons issued on 30 March 2012. The pleadings closed with delivery of a defence in June 2014. In June 2015, the plaintiff made discovery of documents. In January 2017, the defendants furnished their affidavit of discovery. The plaintiff served a number of notices of trial, the first of which was dated 03 July 2023. The defendants issued their notice of motion seeking to strike out the action on grounds of delay on 17 July 2023.

Chronology of the Proceedings.

7. The relevant dates leading up to the institution of proceedings and thereafter, can be summarised as follows:

April 2006	Defendants are retained to act for the plaintiff in relation to the sale of his shares.
06 November 2006	Plaintiff executes a draft share purchase agreement, which had been drawn up by the defendants. This was done without the knowledge of the defendants.
July 2009	Solicitors acting for the plaintiff send pre-litigation warning letter to the defendants, threatening an action for professional negligence.
30 March 2012	Plenary summons is issued.
21 March 2013	Plenary summons served on the defendants.
04 April 2013	Appearance is entered on behalf of the defendants.
20 December 2013	Statement of claim is delivered.
18 March 2014	Notice for particulars raised by the defendants.
12 June 2014	Plaintiff furnishes replies thereto.
28 July 2014	Defence filed on behalf of the defendants.
June 2015	Plaintiff makes discovery of documents.

20 January 2017	Defendants serve their affidavit of discovery. Documents furnished on 13 June 2017.
06 August 2021	Plaintiff files notice of change of solicitor.
12 August 2021	Plaintiff serves notice of intention to proceed.
13 February 2023	Plaintiff serves second notice of intention to proceed.
03 July 2023	Plaintiff's first notice of trial.
18 July 2023	Defendants' notice of motion seeking to strike out on grounds of delay.
26 July 2023	Plaintiff's second notice of trial.
18 August 2023	Plaintiff's third notice of trial.
30 May 2024	Hearing of defendant's motion.

Submissions of the Parties.

8. Mr O'Neill SC, on behalf of the defendants, submitted that there had been delay by the plaintiff in the following areas: First, the plaintiff had delayed to almost the very end of the limitation period prior to instituting his proceedings in 2012; secondly, the plaintiff had for some unknown reason, delayed in serving the plenary summons for almost one year after it had issued; thirdly, apart from serving a number of notices of intention to proceed, the plaintiff had done nothing from receipt of the defendants' discovery in June 2017, to July 2023, when it had purported to issue its first notice of trial and when the defendant had issued its notice of motion seeking to strike out the action on grounds of delay.

9. It was submitted that having regard to the fact that the events in respect of which complaint is made by the plaintiff in his proceedings, occurred as far back as April/November 2006, there was clear prejudice to the defendants, because their witnesses were going to have to attempt to recall meetings and events that took place some seventeen years previously. The partner in the firm who had dealt with the plaintiff in relation to the share sale agreement, was Ms McHale, who had retired from the firm in 2017. It was submitted that it was unrealistic to expect her to be able to recall events with clarity and precision, and in particular, to recall meetings and what may have been said at such meetings, at such a remove in time. It was submitted that this constituted significant prejudice to the defendants in the conduct of their defence of the action.

10. It was submitted that where there had been a delay of almost six years in instituting the proceedings, followed by a further delay of almost one year in serving the writ that had

issued; followed by a lapse of fourteen years from the date of issue of the plenary summons in 2012, to the present time, the court should hold that such delay was inordinate.

11. It was further submitted that the delay was inexcusable. While the plaintiff had attempted to excuse his inactivity over such a protracted period of time by reference to his ill health, both physical and mental, as set out in the medical report exhibited on his behalf from Dr Blennerhassett; it was submitted that this evidence did not go nearly far enough to explain the inordinate delay that had occurred.

12. In particular, there was no assertion therein that the plaintiff was unable to manage his affairs for any appreciable period of time during the years in which the litigation had been in being. Counsel referred to the grounding affidavit that had been sworn by the first named defendant on 15 July 2023, wherein reference had been made to evidence which suggested that the plaintiff had been able to conduct business affairs and engage in other activities in the years subsequent to 2013. In particular, at para. 27 thereof, it was averred that the plaintiff had been active in the company McGivern Flynn Limited, where he had co-signed the financial statements of the company, as director on behalf of the Board, for the year 2015 on 23 September 2016, and for the year 2021, on 30 June 2022. It also appeared that he was the principal shareholder in the company.

13. It was further averred that a Courts Service online search, had revealed that Mr McGivern, or his company had been involved in eleven cases in the period 2007 to 2022. The relevant extracts from the online search had been exhibited. Reference was also made to a newspaper article concerning a case brought by McGivern Flynn & Company Limited against a former chief executive, Mr Stephen Patterson. That case had settled in 2017. The online search also revealed that the plaintiff had been involved in two further sets of litigation, as defendant, at the suit of a Mr Jones in one action, and a Ms Doyle in another action.

14. At para. 30 of the affidavit it was averred that in or about 2013, the plaintiff had purchased a luxury home in Cannes in the South of France for a sum in the region of €2.1m. It also appeared that he had expended considerable sums on alterations and improvements to the property. The property had subsequently been put on the market for sale with an asking price of €3m. It was further averred that the plaintiff had purchased an individual site for development in a gated community in Mougins, France, in or about 2020.

15. In the affidavit it was further averred that the plaintiff co-owned a five year old race horse, called Flemensreva, which had been raced on approximately nine occasions, the most recent of which was on 06 July 2023 in Tipperary. It was submitted that these matters demonstrated that the plaintiff was capable of carrying on significant activity in the years when he had done nothing to progress his litigation against the defendants.

16. Counsel submitted that this was not a "documents only" case, in which the issue of liability would turn exclusively on the construction of documents. It was submitted that oral evidence would be required from Ms McHale and other witnesses in the defendants' firm, in relation to the following: what instructions were actually given by the plaintiff at various meetings; and what advices were given orally by the defendants at such meetings, or on other occasions by means of telephone communication.

17. In addition, it was pointed out that the defendants would seek to rely on a letter dated 08 June 2006, in which they had made it clear to the plaintiff that the sale of his shares to Mr Kelly, would not of itself divest him of his liability on foot of the contracts of guarantee that he had executed in favour of the companies. It was noted that that letter had not been discovered by the plaintiff in his affidavit of discovery. That may mean that the plaintiff would contend that he had never received that letter. If that was the case, that would require oral evidence from members of the defendants' firm in relation to both the general practice that existed at the time in respect of sending letters to their clients and the sending of that particular letter to the plaintiff.

18. It was submitted that having regard to the length of time that had elapsed between the date of the events which were going to be the subject matter of inquiry at the trial and the likely date for the hearing of the action, witnesses would be asked to recall things that had been said at meetings, or otherwise, almost twenty years prior to the likely date for the hearing of the action. It was submitted that where it was well established on the caselaw that the memory of witnesses will diminish significantly over time; it was inevitable that the defendants would be severely prejudiced in the conduct of their defence at the trial of the action. It was submitted that in such circumstances, the balance of justice favoured the defendant and it was appropriate for the court to exercise its inherent jurisdiction to strike out the action on grounds of delay.

Submissions on behalf of the Plaintiff.

19. Mr Gaffney BL on behalf of the plaintiff submitted that there were three periods of alleged delay on the part of the plaintiff. The first of these was alleged pre-commencement delay in the period 2006-2012. It was submitted that that period was not inexcusable, due to the fact that the case had almost unique facts, which centred on the advices sought and received by the plaintiff in connection with the sale of his shares in the companies to Mr Kelly, and in particular, in relation to the necessity to extract himself from the contracts of guarantee in respect of the companies' liabilities to creditors.

20. It was pointed out that the defendants had been aware of a potential claim in relation to their alleged negligence in failing to ensure that he obtained a release from the contracts of guarantee, because a prelitigation warning letter had been sent to the firm in 2009. Thus, they had been aware of the case that was going to be made against them. Therefore, they had had an opportunity to obtain statements from the relevant witnesses and to secure the relevant documents at a reasonably early stage, well in advance of the commencement of the proceedings.

21. The second alleged period of delay concerned the period from the institution of proceedings in 2012 to the delivery of discovery of documents by the defendant in 2017. It was submitted that having regard to the chronology of events that had occurred during that period, there had been no undue delay by the plaintiff in prosecuting his claim against the defendants. It was submitted that there had been culpable delay on the part of the defendant in making discovery of documents because, while the defendants had agreed to make discovery of documents on 17 June 2015, they had not delivered their affidavit of discovery until 20 January 2017 and did not actually deliver the discovery documents until 13 June 2017. It was submitted that this period of two years' delay, was not the fault of the plaintiff, but was culpable delay on the part of the defendant.

22. The final period of alleged delay was the period from June 2017 to July 2023. Counsel submitted that the plaintiff had not been inactive during that period. He had changed his solicitor, which had entailed the new solicitor spending some time familiarising himself with the documents and issues in the case. The plaintiff had served notices of intention to proceed. In response thereto, the defendants had merely indicated that if the plaintiff attempted to proceed with the action, they would issue a motion seeking to strike out the proceedings on grounds of delay. However, they had not done so, until after issuance of the

first notice of trial on 03 July 2023, when they had issued their notice of motion fourteen days later.

23. It was submitted that the court should have regard to the serious physical and mental health issues, which had been faced by the plaintiff in the years 2013, to date, which had been set out in the comprehensive medical report furnished by Dr Blennerhassett, Consultant Psychiatrist, in his report dated 06 December 2021. It was submitted that the court was entitled to have regard to the significant ill health suffered by the plaintiff in the years following 2013 as providing an excuse for the lack of progress in the action in the years 2017 to 2023.

24. It was submitted that even if the court were to hold that the delay in this case was inordinate and inexcusable, the balance of justice was in favour of permitting the action to proceed. It was submitted that this was due to the fact that no real prejudice had been suffered by the defendants in the conduct of their defence, due to the fact that liability at the trial of the action would turn on the evidence of expert witnesses, as to the adequacy of the services provided by the defendants to the plaintiff in relation to the sale of his shares in the companies. It was submitted that such expert evidence would be primarily based on the documentary evidence in the case. In this regard it was significant that the combined discovery made by the parties amounted to almost 700 documents.

25. Furthermore, it was submitted that in the present case there was no assertion by the defendants that any relevant witnesses had died, or were otherwise unavailable, or incapable of giving evidence. In particular, there was no assertion that the critical witness, Ms McHale, was not in a position to give relevant evidence on behalf of the defendants at the trial of the action.

26. It was submitted that having regard to the fact that the defendants had been put on notice of a potential claim as far back as 2009, and having regard to the fact that Ms McHale had remained intimately involved with the litigation up to her retirement in 2017, as she had sworn the affidavit of discovery on behalf of the defendants; she had had ample time to clarify her recollection of relevant events and to make the necessary memoranda concerning relevant events and meetings. It was submitted that in these circumstances, there was no real prejudice to the defendants in the conduct of their defence.

27. Finally, it was submitted that having regard to the size of the claim and the huge prejudice that would be suffered by the plaintiff if his action were to be struck out; and

having regard to the fact that notice of trial had been served in 2023, and that the action was ready for hearing, the balance of justice was in favour of permitting the action to proceed.

The Medical Evidence on behalf of the Plaintiff.

28. As the plaintiff's response to the defendant's application herein rests primarily on the state of his physical and mental health in the years after 2013, it is necessary to set out in some detail the evidence that he has produced in that regard. This evidence was set out in the comprehensive medical report furnished by Dr Richard Blennerhassett on 06 December 2021.

29. Taken in chronological order, the injuries and health difficulties suffered by the plaintiff can be summarised as follows: In 2013, the plaintiff suffered a fall, leading to a fracture of the metatarsals in one foot. While recovering therefrom, he had a second fall, resulting in further fractures to the metatarsals on his other foot. This required surgery. Dr Blennerhassett noted that the plaintiff had been unwell and immobile for several months following these falls.

30. In 2014, the plaintiff had undergone open reduction and internal fixation and a bone graft, in respect of a fracture to his left tibia. He had again been rendered immobile for a period after that operation. In 2015, the plaintiff attended Dr Hyland Maguire, Consultant in Emergency Medicine, complaining of pain and swelling in his feet and ankles. It was suspected that he may have had gout. He was referred for review by a vascular surgeon, Mr Stephen Sheehan, who in turn referred him on to Professor Veale. When seen by Professor Veale in January 2016, the specialist was of the opinion that the plaintiff's symptoms were consistent with rheumatoid arthritis. Upon further assessment being carried out, Professor Veale reached the opinion in March 2016, that the plaintiff was likely suffering from rheumatoid arthritis. He was treated successfully by the administration of a drug that was then at an experimental stage in Ireland.

31. On 30 June 2016, the plaintiff was referred by his GP to Dr Blennerhassett, due to the fact that he had been treating the plaintiff for depression for a significant period. He had been prescribing Lexipro, which is an antidepressant. The plaintiff was first seen by Dr Blennerhassett on 02 August 2016, at which stage, his opinion was that the plaintiff had become depressed over the preceding three years in response to significant stresses in his

life: being the injuries that he had received, the onset of rheumatoid arthritis, and his increase in alcohol consumption.

32. Dr Blennerhassett arranged for the plaintiff to be admitted for further assessment in St John of God's Hospital in Dublin from 16 to 23 August 2016, where he came under the care of Dr Cian Denihan. During his inpatient stay, Mr McGivern was treated with the antidepressant, Escitalopram, 20mg once daily, together with vitamin supplements and antibiotics for treatment of a UTI, together with his regular medication for treatment of different medical conditions. At the time of discharge, he was improved, however it was considered that his memory function needed further assessment.

33. On 23 January 2017, the plaintiff was assessed by Dr Ruth Loane, Consultant in Later Life. She noted that he scored 30/30 on the Montreal Cognitive Assessment Scale, indicating no cognitive impairment. He scored 17/30 on the Geriatric Depression Scale, indicating that he was suffering from a mild level of depression.

34. The plaintiff continued to attend Dr Blennerhassett on an outpatient basis. He arranged for a further admission of the plaintiff to hospital from 14 to 16 August 2019, to deal with stress issues. On further assessment on 24 June 2020, Dr Blennerhassett noted that the plaintiff was continuing well, but had difficulty sleeping.

35. In January 2021, the plaintiff underwent an open right hemicolectomy, for a colonic tumour, which turned out to be benign. By 16 February 2021, he was noted to have made a good recovery. Dr Blennerhassett also noted that he had ceased taking the Lexipro, but was taking Stillnoct at night to help him sleep.

36. The plaintiff was reviewed by Dr Blennerhassett on 18 November 2021 and on 02 December 2021 for the purpose of compiling his report. The plaintiff advised him that he was due to return to St Vincent's University Hospital on 06 December 2021, due to a complication in the form of infection following the bowel surgery that had been carried out in January 2021, which infection had resulted in a hernia like bulging at the wound site, which required surgical repair.

37. Dr Blennerhassett noted that the plaintiff's GP had been of opinion that the plaintiff had been unfit for work for the period 2014 to 2016. Dr Blennerhassett noted that in the initial years, the plaintiff had suffered a marked loss of mobility and pain, which resulted in him being out of work for a significant period. He was depressed when he had seen him on initial assessment in August 2016; at which time he was also drinking more heavily. His

focus and concentration were impaired. There was a concern with regard to his memory function and whether that may have been an indication of early dementia. Dr Blennerhassett noted that the impaired concentration present in a major depressive disorder, may mimic the effects of dementia. He was satisfied that the plaintiff had been suffering from a major depressive disorder in 2016.

38. Dr Blennerhassett gave his overall opinion in the following way in his report:

"I consider it is likely that the major disruption that Mr McGivern experienced in his physical health from 2014, with significant immobility and pain resulted in the development of depressive illness which in turn significantly impaired his concentration.

He has had lengthy periods of sick leave since 2014 and it is only now that his overall health appears to be stabilising.

He remains under the care of Professor Douglas Veale for maintenance treatment of rheumatoid arthritis. He currently requires surgical follow up in the aftermath of the removal of the colonic tumour in January 2021. He will also remain under my outpatient care for the foreseeable future.

In conclusion, Mr McGivern has suffered significant physical and psychiatric illness since 2014. He had long periods of sick leave, suffered immobility and pain and developed a depressive illness. His condition has required significant specialist treatment. Mr McGivern, while he continued to seek to work over the years was significantly limited and in particular, due to the presence of depressive illness with cognitive impairment, his concentration and memory were impaired and in turn resulted in him not giving his usual attention to his business affairs which may account for his not progressing the litigation matter involving himself and solicitor's negligence that he commenced in 2014.

He is currently well. His depressive disorder is in remission and his concentration and memory are normal. Understandably he now views it as a matter of urgency to resolve any matters that may not have received his attention in recent years. He recognises that it is critical to address this matter, which, as long as it remains unresolved, will be a source of stress in his life.

If it may please the court to have the case heard expeditiously it will assist in maintaining Mr McGivern's current sense of wellbeing which has proved so difficult to achieve."

The Law.

39. The law in relation to applications to strike out an action on grounds of delay and want of prosecution is well settled. The principles were set out in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR 459. It is not necessary to set out those principles again.

40. Since the decision in the *Primor* case was handed down, there have been multiple decisions applying those principles to various factual situations. This has given rise to a plethora of decisions, which sometimes differ one from the other, in emphasis and tone.

41. In *Cave Projects Limited v. Gilhooley & Ors*. [2022] IECA 245, the Court of Appeal carried out an extensive review of the principles and summarised the case law on which they were based. That summary is set out at para. 36 of the judgment; which is itself, a very long paragraph. For that reason, I will not quote it in full, but instead, I will highlight some of the relevant principles that were identified by Collins J. (then sitting as a judge of the Court of Appeal) in the course of that judgment. He outlined the following principles as being applicable in applications such as the present one before the court:

- The onus is on the defendant to establish all three limbs of the *Primor* test i.e., that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable and that the balance of justice weighs in favour of dismissing the claim.
- An order dismissing a claim is a far reaching one; such order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed.
- Case law has emphasised that defendants also bear a responsibility in terms of ensuring the timely progress of litigation; while the contours of that responsibility have yet to be definitively mapped out, it is clear that any culpable delay on the part of the defendant will weigh against the dismissal of the action.
- The issue of prejudice is a complex and evolving one. It is central to the determination of the balance of justice. It is clear from the authorities that absence of evidence of specific prejudice, does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice.

• The authorities suggest that even moderate prejudice may suffice where the defendant has established that there was inordinate and inexcusable delay on the part of the plaintiff. However, Collins J. stated that marginal prejudice, if interpreted as being of a lesser standard than moderate prejudice, would not be sufficient.

• Collins J. noted that notwithstanding certain dicta in the *Millerick* case, which suggested that even in the absence of proof of prejudice, it may still be appropriate to dismiss an action, it had to be remembered that the jurisdiction was not punitive or disciplinary in character and the issue of prejudice had been acknowledged as being central to the court's consideration of the balance of justice.

42. Collins J. concluded his summary of the relevant principles by stating as follows at para 37:

> "*It is entirely appropriate that the culture of "endless indulgence" of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the Primor test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant*."

43. Two days prior to the delivery of the Court of Appeal judgment in the *Cave* case, the Court of Appeal also delivered judgment in *Kirwan v. Connors* [2022] IECA 242. One of the issues which arose for decision in that case, was whether the plaintiff could excuse the delay in the case due to the failure of the defendant to reply to a notice for particulars that had been raised by the plaintiff. Delivering the judgment of the court, Power J. held that this was

not a good excuse for some of the delay that had occurred in the proceedings. She stated as follows at paras. 131–132:

> "*131. … In the absence of any reply to his alleged notice for particulars, Mr. Kirwan was not entitled to simply 'sit on his hands' and allow the proceedings to stagnate. He had tools available to him to compel the replies he sought and his status as a litigant in person does not absolve him from his responsibilities in this regard. Irvine J's observations in Flynn (albeit in that case on the failure to cooperate in seeking full and proper discovery) are apposite. She stated (at para. 33):*
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> > *'… the onus is on a plaintiff to prosecute their claim with reasonable diligence and if a defendant fails to co-operate, for example by ignoring correspondence in relation to discovery, the rules of court provide a method whereby that co-operation can be secured. Mr. Flynn had, as was considered material in O'Domhnaill, the ability to control any such delay.'*
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> *132. The appellant in this case also retained the ability to control the delay that ensued. Faced with the lack of response to the notice for particulars, he was obliged to use the machinery of the rules of the court to move matters on. His failure to do so cannot be relied upon as a valid ground for excusing the delay and the trial judge was correct so to find*."

44. The court notes that on 16 March 2023, the Supreme Court allowed leave to appeal in the *Kirwan* case: see [2023] IESCDET 34. A more recent decision of the Court of Appeal is *Beggan v Deegan* [2024] IECA 4, where the court applied the recent jurisprudence in the delay cases as set out in the *Cave Projects* case. The court recognised that under the test in *Primor*, it had been repeatedly stated that moderate prejudice to the defendant due to a delay on the part of the plaintiff in prosecuting the case, may suffice to entitle the defendant to an order striking out the action against it.

45. The court noted that under this test, a case could be dismissed, even though a fair trial was still possible. The court went on to state:

> "*One would have thought that for a plaintiff to suffer the draconian remedy of having their case dismissed, notwithstanding that a fair trial is still available, the level of prejudice suffered by the defendant as a result of delay, even if described as "moderate", must be significant enough to make it unfair to the defendant for a trial to proceed*."

46. The court stated that while what constituted moderate prejudice, may be a matter of debate; it had to be prejudice that was sufficient to make it unfair to call on the defendant to meet the case at trial. If such unfairness was not established, the court stated that it was difficult to see how the balance of justice could favour dismissal of the action (see para. 25).

47. The court also considered to what extent delay on the part of the defendant in progressing the action, was relevant to the consideration of the balance of justice. It had been submitted by counsel on behalf of the defendant in that case, that only culpable delay on the part of the defendant was relevant. The court did not accept that as an accurate statement of the law. In that case, there had been a delay on the part of the defendant in responding to a request to make discovery of documents. At para. 34 of the judgment, Noonan J stated:

> "*I accept entirely that there was no procedural obligation on the defendants to progress discovery at that time but their failure to respond meaningfully in accordance with their correspondence is in my view clearly something to be taken into account in weighing the balance, as it was in McCarthy. Accordingly, I reject the defendants' submission that the judge was wrong to consider that this was a factor that counted against dismissal and I agree entirely with the view she expressed in that respect*."

48. In *McGuinness & Wilkie v Flanagan Solicitors* [2020] IECA 111*,* the defendants were being sued in relation to an alleged breach of a partnership agreement. While some of the terms had been recorded in writing, the terms upon which the plaintiffs relied, were alleged to have been additional terms that had been agreed orally. Delivering the judgment of the Court of Appeal, Noonan J stated as follows in relation to the issue of prejudice and the recollection of witnesses over a considerable period of time:

> "*If this matter proceeds to trial, each of the witnesses to these transactions and events will be asked to recollect from memory events occurring some fifteen to sixteen years in the past. I cannot see how that could amount to other than a facsimile or parody of justice, as one judgment describes it. Furthermore, it is not a case where witnesses could even be said to have the benefit of written statements of their recollections made at an early juncture because the defendant had no idea of what case was being made against it before it received the statement of claim in March 2013, already seven to eight years after the relevant events*."

49. A similar conclusion was reached in *Doyle v Foley* [2022] IECA 193, where the plaintiff was relying on terms in a management agreement concerning a horse, which were said to have been implied into the agreement, arising either from oral agreement between the parties, or from use and practice within the particular industry.

50. The original agreement had been concluded in 2008. The plenary summons had issued on 28 January 2013, with the statement of claim being delivered a year later, on 15 January 2014. The High Court had struck out the action against the defendant on 09 November 2021. In dealing with the issue of prejudice, Costello J stated as follows at para. 73:

> "*I am satisfied that the defendant has met that threshold based on general prejudice arising from the passage of time. If this case were to proceed to trial, there would necessarily be a contest between the plaintiff and the defendant as to what was agreed between them in 2008. This can only be resolved on oral evidence as it is the plaintiff's case that the syndicate agreement does not comprise the entire agreement reached between the parties in 2008. Each of the parties will be required to give their evidence in respect of events which occurred fourteen years ago*."

51. The court went on to hold that, while some of the evidence would involve expert evidence, which may not be as susceptible to the vulnerabilities that can arise due to the passage of time; nonetheless, it could not be said to be free from, or immune to such frailties. The court held that the quality of the evidence for both parties, would be impacted, with increased risk to the fairness of the trial. While the judge accepted that the requirement was that there be a fair trial, not a perfect one; the threshold of prejudice which the defendant was required to pass, was that of moderate or marginal prejudice. She held that that had been met in the case before her.

52. This Court reached a similar conclusion in *Kernan v Sweeney and Bank of Ireland* [2024] IEHC 225, where the plaintiff's action against the defendants concerned alleged fraudulent representations and fraudulent conduct on the part of the first defendant in the period 2006-2011. The plaintiffs alleged that the fraud on the part of the first defendant first came to their attention in 2012. The proceedings issued in March 2018. A defence and counterclaim were filed on behalf of the first defendant in April 2018. The second defendant raised a detailed notice for particulars in respect of the statement of claim on 30 May 2018. No reply had been furnished thereto when the second defendant issued its notice of motion

seeking to strike out the action on grounds of delay on 16 November 2022. The plaintiff furnished replies to the notice for particulars on 14 June 2023.

53. The court held that given the lapse of time between the events which were said to have given rise to the cause of action and the date when the second defendant had issued its motion to strike out the action on grounds of delay, there was a real risk that the second defendant would be prejudiced in its defence of the action, due to the inability of witnesses to properly recall events which were to be the subject matter of the trial of the action. On this basis, the court struck out the plaintiff's action against the second defendant on grounds of delay.

54. In argument at the Bar, counsel on behalf of the plaintiff submitted that each case must turn on its own individual facts. In particular, it was submitted that the court should have regard to the particular difficulties faced by a particular plaintiff. It was submitted that in this case, the court should have regard to the serious health difficulties suffered by the plaintiff in the years 2013 and subsequently. In this regard, counsel relied on the following dicta of Fennelly J in *Anglo Irish Beef Processors Limited v Montgomery & Ors.* [2002] 3 IR 510, at p.518:

> *"There may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of a claim."*

55. While there are now very many cases on the principles that should be applied when dealing with an application to strike out an action on grounds of delay, the court is satisfied that the above represents a reasonable summary of the relevant principles that have to be applied in this case.

Conclusions.

56. In approaching the three stage test set down in the *Primor* case, I am satisfied that the delay in this case has been inordinate. The events which give rise to the alleged cause of action on the part of the plaintiff, are alleged to have occurred in the period April/November 2006. The proceedings did not issue until 2012. They were not served on

the defendants until 2013. It is now twelve years since the institution of the proceedings. One cannot but hold that that represents an inordinate delay.

57. Turning to the second issue, being the excusability of that delay, I find that in the circumstances of this case, the delay was inexcusable.

58. It was submitted on behalf of the plaintiff that the facts in this case were unique. That can be said of almost every case. Perhaps with the exception of some simple road traffic accidents, or other accident cases, it will rarely be the case that the facts of a particular matter are not unique to that case. I am not satisfied that the facts in this case were particularly complex. Indeed, the case that the plaintiff wishes to make against his former solicitors, is relatively straightforward. He says that he gave them instructions that there was not to be a sale of his shares in the companies, until either he had been extricated from all the contracts of guarantee that he had entered into in favour of the companies, or at the very least, that a mechanism had been put in place whereby that would be secured for him. He alleges that in the events that transpired, his former solicitors did not secure that that would occur prior to his selling the shares to Mr Kelly; and as a result whereof, he lost control of the companies and therefore lost control of the means by which his exposure under the contracts of guarantee could be controlled; thereby leading to his exposure to significant losses in his capacity as guarantor of the companies' debts. I do not regard those facts as particularly complex.

59. While the plaintiff was entitled to use up almost all of the time that was available to him under the limitation period to institute his proceedings; it is well settled that where there is a late start to litigation, it is all the more incumbent on the plaintiff to proceed with expedition thereafter: see *McNamee v Boyce* [2016] IECA 19 (para. 36). In this case, the plaintiff did the very opposite, having issued his plenary summons in 2012, he then delayed for almost a year in serving it on the defendants. There was no explanation forthcoming for his delay in serving the summons on the defendants.

60. Once served, I accept that the proceedings were prosecuted with reasonable expedition up to the date on which the pleadings closed, with delivery of a defence on 28 July 2014. Thereafter, the plaintiff made discovery within a reasonable period. However, as was correctly conceded by Mr O'Neill SC, the defendants did not do likewise. The plaintiffs had requested voluntary discovery from the defendants on 15 April 2015. On 17 June 2015, the defendants had agreed to make discovery in the terms requested. However, they did

not deliver their affidavit of discovery until 20 January 2017 and did not actually furnish the documents until 13 June 2017. The delay of two years from date of agreement to make discovery in June 2015, to furnishing the documents in June 2017, cannot be laid at the door of the plaintiff. That was culpable delay on the part of the defendants.

61. However, thereafter, the plaintiff did nothing from receipt of the documents from the defendants in June 2017, until service of the notice of trial in July 2023, with the exception of the service of a number of notices of intention to proceed in the interim.

62. The court has had careful regard to the extensive medical evidence delivered on behalf of the plaintiff. While it is certainly the case that the plaintiff has had multiple health difficulties of both a physical and mental variety, the court is not satisfied that these were of such severity as to prevent him proceeding with his litigation.

63. The court notes that he had fractures of his toes in 2013, which required surgery. More significantly, he had surgery for a fracture to his left tibia in 2014. However, he appears to have made a reasonably good recovery therefrom.

64. While the plaintiff appeared to be suffering from a major depressive episode in August 2016, when first seen by Dr Blennerhassett; the court notes that on assessment by Dr Loane in January 2017, it was noted that he had no ongoing cognitive impairment and his ongoing depression was noted to be at a mild level. The court also notes that he was treated for rheumatoid arthritis by Professor Veale, which treatment appears to have been successful with the use of an experimental drug.

65. The plaintiff seems to have had a reasonably good level of health in the period after 2017 up to January 2021, when he had operative treatment for a colonic tumour. It was noted that he had made a good recovery therefrom by 16 February 2021. While there is some reference in the medical report to subsequent infection at the wound site, causing a hernia like growth, which was going to require surgical treatment; there is no further evidence in this regard.

66. Taking all the medical evidence in the round, the court is not satisfied that the plaintiff was so disabled that he was unable to give instructions to his solicitors to proceed with his litigation against the defendants. The court notes that at all times the plaintiff has been legally represented.

67. In addition, the court has had regard to the averments in the affidavit sworn by the first defendant in relation to the business activities, other litigation and purchases of property

abroad, that were engaged in by the plaintiff and his wife during the relevant period. The court is not persuaded that his level of disability from his mental and physical health difficulties, were of such severity as to prevent him proceeding with the litigation. Accordingly, the court finds that the delay in this case was inexcusable.

68. Turning to the third question under the *Primor* test, being the balance of justice, the court is satisfied that the dicta in the *McGuinness & Wilkie* case and in the *Doyle v Foley* case, as applied by this Court in *Kernan v Sweeney*, are relevant to the present case. The court finds that this case is not a "documents only" case. Oral evidence will be required in relation to the instructions that were given by the plaintiff to Ms McHale and in relation to any oral advices that may have been given by her, or others in the firm, to the plaintiff, either at various meetings that may have been held between them in the months leading up to the execution of the share sale agreement in November 2006, or such advices as may have been given orally over the telephone. In addition, oral evidence may be required in relation to the procedure for sending the disputed letter of 08 June 2006, to the plaintiff.

69. It is well settled in the caselaw, that the memories of witnesses diminish over time. With the best will in the world, this case will not get on for hearing until Q1 of 2025, at the earliest. That would mean that the defendants' witnesses would be required to accurately recall things that were said at meetings, or on the telephone, almost twenty years previously. The court is satisfied that it is unrealistic to expect witnesses to do that with any degree of accuracy or reliability. In these circumstances, the court holds that the defendants have suffered significant prejudice, certainly amounting to moderate prejudice in the conduct of their defence, such that it is appropriate to grant the relief sought of striking out the proceedings on grounds of delay.

70. The court is satisfied that if the action were to proceed, there is a significant risk that the defendants would suffer an unfair trial due to the lapse of time that has occurred between the events complained of in the proceedings and the likely date for the hearing of the action. In these circumstances, the court will grant the reliefs sought by the defendants at para. 1 of their notice of motion dated 17 July 2023 and will strike out the plaintiff's action against the defendants on grounds of delay.

71. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may occur.

72. The matter will be listed for mention at 10.30 hours on 11th July 2024 for the purpose of making final orders.