

THE HIGH COURT

[2022] IEHC 292

[Record No. 2013/3158 P]

BETWEEN:

SAMUEL FIELD

PLAINTIFF

-AND-

ANNE CRONIN, ANNE, DENIS AND DANIEL CRONIN LIMITED, COH TRANSPORT LIMITED, GREAT GAS PETROLEUM (IRELAND) LIMITED AND CORK COUNTY COUNCIL

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered ex tempore on 9th day of May, 2022.

Introduction.

1. The plaintiff is a labourer. He was born on 10th January, 1982.
2. The first defendant is a businesswoman, who is the owner of the land on which there is a petrol station known as Cronin's Filling Station, Reenadisert, Ballylickey, Bantry, Co. Cork.
3. The second defendant is a limited liability company, which was at all material times the operator of the filling station.
4. The third defendant is a limited liability company with registered offices at Ballynaborthagh, Carrignavar, Co. Cork. The company operates a haulage delivery business and at all material times transported and delivered fuel products to Cronin's Filling Station.
5. The fourth defendant is a limited liability company with registered offices at Market House, Churchtown, Mallow, Co. Cork. At all material times, the fourth defendant supplied fuel products to Cronin's Filling Station.
6. The fifth defendant is the local authority with responsibility for the maintenance and upkeep of the public road, namely the N71, and in particular that area of the public road in proximity to Cronin's Filling Station, which was the locus of the plaintiff's accident.
7. This is an application by the first, second and fifth defendants for an order striking out the plaintiff's proceedings against them for want of prosecution, on the grounds of inordinate and inexcusable delay on the part of the plaintiff in prosecuting his action against them.
8. The event the subject matter of these proceedings occurred on 3rd August, 2011. It is the plaintiff's case that on the public highway at or near Cronin's Filling Station, his vehicle suddenly and without warning encountered an unknown contaminant on the surface of the road, causing the plaintiff to lose control of his vehicle and collide with a stationary vehicle, which was in the forecourt of Cronin's Filling Station.
9. The plaintiff submits that the accident and consequent personal injury, loss and damage suffered by him, was caused by reason of the negligence and breach of duty of the defendants, and each or either of them, their servants or agents.

10. The plaintiff's case against the third and fourth defendants in this action was struck out by orders of Cross J. on 14th May, 2018, for want of prosecution and on the ground of inordinate and inexcusable delay. It was submitted on behalf of the first, second and fifth defendants that the plaintiff's case against them should be struck out on the same grounds.

Background.

11. As outlined above, the plaintiff was driving on the N71 on 3rd August, 2011, when at approximately 11:30am, the plaintiff's vehicle collided with a stationary vehicle in the forecourt area of Cronin's Filling Station. It is the plaintiff's case that his vehicle suddenly and without warning encountered an unknown contaminant on the surface of the public road, causing him to lose control of his vehicle and collide with the stationary car.
12. After the accident, the emergency services attended the scene and were required to cut the plaintiff out of his vehicle. He was taken by ambulance to the Emergency Department of Cork University Hospital.
13. The plaintiff has pleaded in his personal injury summons that multiple injuries arose from this accident. Dr. Christopher Luke of Cork University Hospital stated that the plaintiff had polytrauma, with bilateral lung contusions; pneumothorax (a collapsed lung with haemothorax causing bleeding into the thoracic cavity); a fractured right clavicle; multiple rib fractures; a fracture of the 12th thoracic vertebra; a fractured sternum; a fracture of the right mandible and zygomatic arch; and a fracture in the orbit surrounding the plaintiff's eye.
14. The plaintiff has pleaded that he spent five days in the Intensive Care Unit of Cork University Hospital, wherein he underwent operative fixation of his mandibular jaw fracture. It was also pleaded that the plaintiff required chest drains on both sides of his thoracic cavity for approximately one week and was administered analgesia through nursing care.
15. The plaintiff came under the care of Mr. C.J. Cotter, Consultant Oral and Maxillofacial Surgeon, who noted that the plaintiff has complete absence of sensation on his lower lip. Mr. Cotter also stated that the plaintiff has permanent loss of sensation in his lower lip, meaning he cannot identify when saliva is present on his lower lip, which causes him to burn himself occasionally when smoking and renders kissing less pleasurable than previously.
16. It was pleaded that, upon further examination by Dr. Luke, he found an obvious deformity about the plaintiff's right sterno-clavicular joint, his upper sternum, the 1st, 2nd, 3rd, 4th and 5th costochondral junctions; tenderness about the upper 4 cervical vertebrae with reduced range of movement to approximately 80-90% of what would be expected; moderate tenderness about the thoraco-lumbar junction in the vicinity of the fractured 12th vertebra and both sides of the chest wall. Dr. Luke stated that the plaintiff will require continued painkilling medication for the next number of months and

physiotherapy for the foreseeable future. He opined that it would take the plaintiff 18 months to recover from his injury.

17. The plaintiff was reviewed on the 27th September, 2012 by Dr. Cotter who advised the plaintiff to attend hydrotherapy to help the dysfunctional syndrome the plaintiff was experiencing in his upper girdle.
18. The plaintiff has pleaded that his outlook has become very negative and he has suffered from panic attacks as a result of his extensive injuries. As a result of this, he was referred to Mr. Pat Bracken, Consultant Psychiatrist at Bantry Hospital.

Chronology of the Proceedings to date.

19. These proceedings involve five defendants, and, therefore, have incurred a complex chronology. For that reason, it is necessary to set out the chronology in the following way:

27th March, 2013	Plaintiff issues his plenary summons referring to the aforementioned accident occurring on 3rd August, 2011.
8th April, 2013	The first and second defendants enter an appearance in the action.
11th April, 2013	The fifth defendant enters its appearance.
16th April, 2013	The fifth defendant makes a request for particulars to the plaintiff, including detailed particulars of the negligence alleged against all defendants.
24th May, 2013	The plaintiff furnished replies to the fifth defendant's notice for particulars.
25th July, 2013	The first and second defendants deliver their defences.
13th August, 2013	The plaintiff furnishes a reply to the first and second defendants' defence.
13th August, 2013	The plaintiff issues a notice for particulars of details set out in the first and second defendant's defence.
21st August, 2013	The first and second defendant issue a notice for particulars to the plaintiff with regard to his personal injury summons.

4th September, 2013	The fifth defendant issues a notice of indemnity and/or contribution against the first and second defendant.
5th September, 2013	The first and second defendant issue replies to the plaintiff's request for particulars.
5th September, 2013	The fifth defendant delivers its defence.
16th September, 2013	The third defendant issues a notice of indemnity and/or contribution against the first defendant, second and fifth defendants.
25th September, 2013	The plaintiff furnishes replies to the first and second defendants.
18th October, 2013	The fourth defendant delivers its defence.
24th October, 2013	The plaintiff serves notices of trial and notices to produce on the third, fourth and fifth defendants.
25th October, 2013	The plaintiff replies to the fifth defendant's defence.
25th October, 2013	The plaintiff issues a notice for particulars seeking further and better particulars from the fifth defendant.
31st October, 2013	The fifth defendant serves the plaintiff with a notice to produce.
6th November, 2013	The third defendant serves the plaintiff with a notice to produce.
7th November,	The plaintiff issues a motion a notice of motion seeking to compel the third defendant to reply to particulars.

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20th November, 2013	The fifth defendant replies to the plaintiff's request for further and better particulars of 25th October, 2013.
21st November, 2013	The plaintiff makes a request for voluntary discovery from all five defendants.
5th December, 2013	The third defendant furnishes its replies to particulars.
18th December, 2013	The plaintiff issues a notice of motion seeking discovery against all five defendants.
20th February, 2014	Orders for discovery are made against each of the defendants.
11th March, 2014	The plaintiff issues supplemental particulars of personal injury.
28th April, 2014	The fourth defendant issues a notice of indemnity and/or contribution against the first, second and fifth defendant.
13th January, 2015	The plaintiff issues a notice of motion seeking third party discovery from An Garda Síochána in respect of the matters the subject of the proceedings.
18th May, 2015	An order for third party discovery is made against An Garda Síochána.
18th May, 2015	An order for discovery is made against the first and second defendants.
23rd September, 2015	An affidavit of discovery is sworn by Brendan Fogarty on behalf of An Garda Síochána.
10th February, 2016	An order for discovery is made against the fifth defendant.

15th March, 2016	The matter is transferred to the Dublin Personal Injuries List from the Cork Personal Injuries List, on consent of the parties.
16th January, 2018	The third defendant issues a notice of motion to have the proceedings against it struck out for want of prosecution.
22nd March, 2018	The fourth defendants issue a notice of motion seeking to have the proceedings against it struck out for delay.
16th April, 2018	O'Hanlon J. makes an order giving solicitors for the plaintiff, C.W. Ashe & Co., liberty to come off record.
14th May, 2018	Cross J. makes orders dismissing the plaintiff's claim against the third and fourth defendants for want of prosecution and on the ground of inordinate and inexcusable delay.
28th June, 2019	The first and second defendants issue a notice of motion seeking to have the plaintiff's proceedings against them struck out for want of prosecution.
3rd July, 2019	The fifth defendant issues a notice of motion seeking to have the plaintiff's proceedings against them struck out for want of prosecution.
29th September, 2021	The fifth defendant makes an application to re-enter the notice of motion dated 3rd July, 2019.
24th January, 2022	The first and second defendants make an application to re-enter the notice of motion dated 28th June, 2019.
14th February, 2022	Messrs. Dylan Green Solicitors come on record for the plaintiff.

Submissions on behalf of the First, Second and Fifth Defendants.

20. Counsel for the first and second defendants and counsel for the fifth defendant adopted the submissions of one another, and therefore it is appropriate to outline their submissions together.
21. It was submitted to the court that, given the that the accident the subject matter of these proceedings occurred over 11 years ago, there was significant inherent prejudice to the defendants in defending this action due to the extent of the time elapsed since the accident.

22. Counsel for the fifth defendant conceded that the employees of the fifth defendant in employment at the time of the accident, remained in employment at the time of the hearing of this motion. However, it was submitted that the memories of the employees were considerably strained as the accident had occurred so long ago.
23. Counsel rejected the assertion of the plaintiff that the delay in the proceedings was excusable, owing to the personal circumstances of the plaintiff, in circumstances where the considerable delay could not be solely explained by various familial matters in the plaintiff's personal life.
24. Counsel pointed to the orders of the High Court, made by Cross J. in May 2018 in striking out the proceedings against the third and fourth defendants, in support of their own applications.
25. It was submitted to the court that the delay in this case satisfied the Primor test; in that the delay was inexcusable and inordinate, and that the balance of justice indicated that the proceedings against the remaining defendants should be struck out, as there existed significant prejudice in defending the action 11 years post-accident.

Submissions on behalf of the Plaintiff.

26. In resisting the defendants' application, Mr. McCarthy BL submitted that the court should take account of a number of factors that were in favour of allowing the action to proceed. Firstly, there was medical evidence before the court that the plaintiff had suffered very serious injuries as a result of the accident. Secondly, there had been no pre-commencement delay. Thirdly, the plaintiff's solicitor had diligently progressed the action against multiple defendants, up to the time when his relationship with the plaintiff broke down and he was given liberty to come off record. It was also noteworthy that the plaintiff had not contested the application brought by the third and fourth defendants to have the proceedings against them struck out. Counsel stated that he did not have instructions, as to why those applications had not been contested, but it appeared that the orders had been made in the absence of the plaintiff.
27. Counsel accepted that there had been delay on the part of the plaintiff in the period after his solicitor had come off record in 2016 and the issuing of the defendants motions in the present application in July and October 2019. However, it was submitted that this delay of approximately three years between 2016 and 2019, was preferable to the position that the plaintiff found himself in, suffering from serious physical and psychological injuries, being unable to work and in addition he had had the significant issues regarding the custody of his daughter and the steps that he had to take to secure her safety, having regard to the fact that her mother was a heroin addict. To that end, the plaintiff had had to travel to Wales to secure the custody of his daughter.
28. In addition, counsel submitted that the court should take account of the fact that given that there were five defendants in the action and as the plaintiff had suffered very serious personal injuries as a result of it, the case would have taken a long time to come on for trial, even if there had been no delay on the part of the plaintiff. The present situation

was that the case was ready for trial. Insofar as there had been any delay after the issuance of the motions in 2019, that was due to the restrictions on court work imposed due to the Covid-19 pandemic. It was not due to any fault on the part of the plaintiff. It was submitted that other than a fairly vague and generic assertion of prejudice made in the affidavits grounding the motion, in fact there was no evidence that the defendants had suffered any real prejudice as a result of the delay in this case. In these circumstances it was submitted that the balance of justice lay in favour of allowing the action to proceed.

The law.

29. The principles of law applicable to applications to strike out proceedings on grounds of delay are very well known. Accordingly, the court proposes to only set out a brief summary of the relevant principles that are pertinent to the present case.
30. The classic statement of the relevant principles, was that given by Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459, where he stated as follows at p.475/476:
- "(a) *the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
 - (b) *it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
 - (c) *even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
 - (d) *in considering this latter obligation the court is entitled to take into consideration and have regard to*
 - (i) *the implied constitutional principles of basic fairness of procedures,*
 - (ii) *whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*
 - (iii) *any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,*
 - (iv) *whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
 - (v) *the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his*

discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) *whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,*

(vii) *the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."*

31. In *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J. (as she then was) gave the following summary of the test that has to be applied in such applications: -

"18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay."

32. In *Mangan v. Dockeray & Ors.* [2020] IESC 67, McKechnie J. stated as follows at para. 105: -

"To this day, the dicta of Hamilton C.J. in Primor Plc v Stokes Kennedy Crowley [1996] 2 I.R. 459 ("Primor") is without doubt the most generalised statement of the law on this topic. Whilst it has been joined by many other authoritative decisions, it remains, as described by McMahon and Binchy, the "locus classicus", in this area (Law of Torts, 4th ed., [46.115]. As the relevant passages from the judgment of the Chief Justice are well known, it will be sufficient to simply indicate the following:-

- *The delay complained of must be both inordinate and inexcusable: it is for the moving party to so prove.*
- *Even where such is established, the balance of justice test must be applied: does it favour the continuation or termination of the proceedings?*

- *In considering the latter, there may be several diverse factors at play, but in essence all lead to an assessment of whether it is unfair to allow the action to proceed or is unjust to strike the action out.*
 - *The individual circumstances of every case and the conduct of each party feeds into this assessment. The earlier cases of Dowd v. Kerry County Council [1970] I.R. 27 and the authorities therein relied upon, as well as Rainsford v. Limerick Corporation [1995] 2 I.L.R.M. 561: (judgment date: 31st July, 1979), were highly influential in the formation of these principles.”*
33. Where a defendant establishes that there has been inordinate and inexcusable delay on the part of the plaintiff in prosecuting the action, the onus of proof shifts to the plaintiff to establish that the balance of justice lies in favour of allowing the action to proceed: see *Gibbons v. N6 (Construction) Limited* [2021] IEHC 138 (para. 29).
 34. Where a defendant establishes that there has been culpable delay on the part of the plaintiff, then moderate prejudice to the defendant will suffice to prevent the action being allowed to continue: see *McNamee v. Boyce* [2016] IECA 19 (para. 35); *Flynn v. Minister for Justice* [2017] IECA 178.
 35. The conduct of both parties is relevant to the issue of the balance of justice. If a defendant has caused delay, or has acquiesced in the delay, that is a matter that can be considered by the court.
 36. When considering the likely effect of delay on a defendant, the court must look at the period from the date of the events giving rise to the proceedings, up to the likely date for the hearing of the action.
 37. In considering where the balance of justice lies, the court can have regard to the nature of the cause of action and also to the question of whether the plaintiff may have an alternative remedy, either against an existing defendant, or against some other party, such as his or her solicitor, in the event that the proceedings are struck out against one of the defendants.
 38. In considering the balance of justice, the court can have regard to whether liability will turn exclusively, or to a large extent, on oral evidence. If it will turn on such evidence, then delay of itself is more relevant, because it is well established that people’s memories fade and become less reliable as time passes. If the action will turn on documentary evidence and where the relevant documents are available for use at the trial of the action, the prejudicial effect of delay may be less: see *O’Reilly v National Document Management Group Ltd & Anor.* [2022] IEHC 37.
 39. Similarly, if liability will turn on expert evidence, rather than on the evidence of witnesses as to fact, the prejudicial effect of delay will be lessened. The court is also entitled to have regard to the question of whether all relevant witnesses and documents remain available to give evidence or be used at the trial of the action.

40. Finally, the case law makes it clear that each case must be examined on its own particular circumstances; for that reason the authority of other cases where delay of a particular length may have been found not to have been overly prejudicial, will not be determinative of the issue in subsequent cases with similar periods of delay. Each case will turn on its own facts.

Conclusions.

41. The court is satisfied that in reaching a conclusion on the applications brought by the defendants herein, the court must have regard to the factual matrix in which these proceedings are grounded. This was not a simple action to bring to trial. The issue of causation for the accident is likely to be hotly disputed. This is not a simple RTA where one vehicle collided into another at a junction, or on the highway. In this action, the plaintiff is faced with the formidable hurdle of establishing on the balance of probabilities that there was a contaminant on the road surface and that despite the fact that he was driving with reasonable care, he lost control of his vehicle when it came into contact with the contaminant and as a result, collided with the stationary vehicle in the forecourt of the second defendant's garage.
42. The plaintiff will also have to establish which of the defendants were responsible in law for the presence of the contaminant on the road at the time of the accident. Thus, on the liability front, it has to be accepted that this will be a difficult case for the plaintiff.
43. In this regard, the court accepts the submission made by Mr. McCarthy BL that the plaintiff's former solicitor instituted proceedings in a timely manner against five separate defendants, each of whom might have a liability in the matter. Whether they in fact have any liability for causation of the accident, will turn on the evidence that is presented at the trial of the action. That evidence will be made up of the oral evidence of witnesses, who were present at the time of the accident and also on the documentary evidence that will exist in relation to the occurrence of the accident.
44. In this regard, given that the plaintiff had to be cut out of his vehicle and given that he had suffered very serious injuries, it is inevitable that the circumstances of the accident will have been investigated by the gardaí. The gardaí, who attended at the scene, will have carried out a detailed scene of accident investigation and, in particular, if there was a contaminant on the road surface in the vicinity of the garage, they would have had to have taken steps to ensure that further accidents did not occur and that the contaminant was removed from the road surface as soon as possible. They may have had to have closed the road for a period to enable that to have been done. All of that will have been documented in the notebooks of the investigating gardaí. Their evidence will be crucial in relation to the issue of liability at the trial of the action.
45. The court is satisfied that having regard to the complexities in the case, the action was progressed diligently by the plaintiff's former solicitor. There was no pre-commencement delay prior to the institution of the proceedings, nor was there any delay in his carriage of the action up to the time that he came off record. The court notes that an order for discovery of documents was obtained against the first and second defendants on 18th

May, 2015 and against the fifth defendant on 10th February, 2016. The court notes that third-party discovery has been obtained against the gardaí.

46. The real issue in relation to delay in this case relates to the period after the plaintiff's former solicitor came off record in 2016 and the issuance of the notices of motion by the first, second and fifth defendants in 2019. Any delay that occurred thereafter, was not due to any fault on the part of the plaintiff. He could not progress the action until those motions were heard, when they came before this court in May 2022.
47. In considering the period of delay between 2016 and 2019, the court accepts the evidence tendered on behalf of the plaintiff that when his former solicitor came off record, he was very much left adrift. He had suffered serious physical and psychological injuries, as documented in the medical report furnished by Dr. Kingston. The court accepts that due to his injuries, the plaintiff was unable to work for a very prolonged period. As a result, he would not have had the funds to engage an alternative solicitor.
48. In addition, it is reasonable to have regard to the fact that during this period, the plaintiff was embroiled in a dispute with his former partner in relation to the custody of their daughter. The evidence before the court is to the effect that the plaintiff had to travel to Wales to secure the custody of his daughter, as his former partner was unsuitable to have custody of her, due to her heroin addiction. In considering the issue of delay and culpability for that delay, the court has to have regard to the actual personal circumstances of the litigant.
49. In all of the circumstances, the court holds that there was no delay in the prosecution of the action up to the time when the plaintiff's former solicitor came off record in 2016. Such delay as there was in the three-year period thereafter, was excusable in light of the fact that the plaintiff was severely injured; had little or no private funds and had other pressing matters of a family nature to attend to. In the circumstances, the court finds that the delay in the period 2016 to 2019 was excusable. As such, that is sufficient to dispose of the defendants' application herein.
50. However, even if the court is wrong in that conclusion, and if the court were mandated to go on and consider the third question under the Primor test, being the balance of justice, the court would still refuse the defendants' application, as the court is not satisfied that the balance of justice would lie in favour of dismissing the plaintiff's action against the first, second and fifth defendants.
51. The court accepts the very candid concession that was made by Mr. Hughes BL on behalf of the fifth defendant, to the effect that the county engineer and all other relevant witnesses are still in the employment of the fifth defendant. Thus, this is not a case in which crucial, or even relevant witnesses for one party have become unavailable for one reason or another. There is no claim to specific prejudice having arisen due to the delay.
52. While it is undoubtedly true that the memories of witnesses will fade over time and that therefore where the accident occurred over ten years ago, the ability of the defendants to

defend themselves by means of oral evidence from witnesses who witnessed the accident, may have been adversely affected by the passage of time. However, as stated earlier, this is not a case that revolves around the happening of an accident in a split second, where there will be divergent accounts by various witnesses. While this accident happened in a split second, the key issue on liability will be whether or not there was any contaminant on the road at the relevant time. Thus, any employees of the first and second defendants, who were working in the garage on the morning in question, or who came on the scene shortly after the occurrence of the accident, will not have to give evidence as to something that happened in a split second, but rather their evidence will be in relation to a static state of affairs, being whether there was any contaminant on the road surface that morning.

53. More importantly, that issue is likely to be determined by the evidence of the investigating gardaí. One of the most important functions of a Garda who comes on a scene of an accident, after he or she has cared for people injured in that accident, is to take all necessary steps to ensure that no further accident occurs at the locus. The Garda will carry out an inspection of the locus and if he or she observes the presence of a contaminant on the road surface, they will take the necessary steps to ensure that other vehicles do not come in contact with the contaminant. They will radio back to the station to obtain the necessary assistance, either from the fire brigade, or from the local authority, to remove the contaminant from the road surface as quickly as possible. Thus, the evidence of the gardaí in this case, will be crucial. There is no reason to suspect that the accuracy or availability of their evidence has been adversely affected by the three-year delay between 2016 and 2019.
54. Insofar as the fifth defendant will apparently make the case in its defence, that no report of any contaminant on the road surface was ever made to it, that evidence will be established by a witness giving evidence to the effect that the necessary records and logbooks, where any such occurrences are recorded, do not disclose any reports of a contaminant being at the locus on 3rd August, 2011. Thus, the key evidence to be given on behalf of the fifth defendant, will not turn on the oral evidence of any employee of the fifth defendant, who was at the scene on the day in question, but will turn on whether any records exist in the possession of the fifth defendant to show that a report of a contaminant being on the road was made to it. If those records are silent in that regard, that of itself will be significant evidence in relation to the issue of whether there is any liability on the part of the fifth defendant for the occurrence of the accident. The ability to give that evidence has not been affected by any delay that there was in this case.
55. The court also considered the issue as to whether the defendants are prejudiced by virtue of the fact that the third and fourth defendants have already been let out of the proceedings. In the event that the present defendants had taken the precaution of serving notices of indemnity/contribution on the third and fourth defendants prior to their being let out of the proceedings, their position will have been protected. The fact that the plaintiff no longer has a right of action against the third and fourth defendants, does not mean that they are let out of the proceedings altogether, as they will remain in the

proceedings on foot of the notices of indemnity/contribution served on them by the existing defendants. Thus the position of those defendants has not been adversely affected by virtue of the order made by Cross J. in 2016. If the existing defendants had not served notices of indemnity/contribution on the third and fourth defendants, they will have to take other steps to protect their positions in the event that they wish to make any case against the third and fourth defendants.

56. For these reasons, the court is satisfied that the first, second and fifth defendants have not been prejudiced in any real sense in their defence of the action due to any delay on the part of the plaintiff. Therefore, the court is satisfied that the balance of justice, had it arisen, would have been in favour of allowing the action to proceed.
57. For the reasons set out in this judgment, the court refuses the applications brought by the first, second and fifth defendants.