THE HIGH COURT

[2023] IEHC 221

[Record No. 2017/8867P]

BETWEEN

RN

PLAINTIFF

AND

PEARSE COMMUNITY COLLEGE NURSERY LIMITED, TUSLA CHILD AND FAMILY AGENCY AND HEALTH SERVICE EXECUTIVE

DEFENDANTS

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[Record No. 2017/8866P]

BETWEEN

HF

PLAINTIFF

AND

PEARSE COMMUNITY COLLEGE NURSERY LIMITED, TUSLA CHILD AND FAMILY AGENCY AND HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 28th day of April 2023.

Introduction.

1. This is an application by the second and third defendants, who are jointly represented, to have the two actions brought by the plaintiffs against them struck out on grounds of inordinate and inexcusable delay and for want of prosecution.

2. While it will be necessary to go into the background to each of these actions in more detail later in the judgment, the net issue in the application can be stated in the following way: the two plaintiffs were in a committed relationship in 2015. Their two children were attending the creche operated by the first defendant. In or about April 2015, there was an outbreak of hepatitis A in the creche. In May 2015, each of the plaintiffs contracted hepatitis A, requiring treatment in hospital.

3. Each of the plaintiffs claim that the outbreak of hepatitis A and, in particular, their contracting that disease, was caused by the negligence and breach of duty of the first

defendant in and about its operation of the creche, which was attended by their children. In particular, it is alleged that the first defendant, through its servants or agents, acted negligently by failing to adhere to proper health, safety and hygiene requirements.

4. The case against the second and third defendants is based on the assertion that they were the entities which had statutory responsibility for inspection and supervision of childcare facilities, including the creche, which was attended by the children of the two plaintiffs. It is alleged that the second and third defendants acted negligently in failing to inspect, supervise and monitor the first defendant's creche adequately or at all; and/or in the alternative, they acted negligently in dealing with the outbreak of hepatitis A, by failing to notify parents, whose children attended the creche, once the outbreak of the said disease had been notified to them.

5. In this application, the second and third defendants applied for an order dismissing the two actions brought by the plaintiffs against them, on grounds of inordinate and inexcusable delay. This was based on two primary periods of delay, being: first, a delay of eleven months pre-commencement of the action, in the placing of an FOI request by the plaintiff's solicitors, after they had been informed of the identity of the body responsible for provision of such documentation; and secondly, a delay of 4.5 years in furnishing replies to the notices for particulars raised on behalf of the second and third defendants. It is submitted that having regard to the passage of time since the occurrence of the events giving rise to the cause of action in April 2015, the delay must be seen as being inordinate and inexcusable and that the balance of justice is in favour of striking out the proceedings against the second and third defendants.

6. It was accepted that, subject to some slight variation in the personal circumstances of the two plaintiffs, who have since separated, the two actions are otherwise identical. Accordingly, it is appropriate to deal with the application brought by the defendants in each action, in a single judgment. The court will refer to the relevant differences between the circumstances of the individual plaintiffs, as and where necessary.

Background.

7. As already noted, in April 2015, the two plaintiffs were in a committed relationship. Their two children were attending the creche or nursery operated by the first defendant. At that time, HF was pregnant with the couple's third child, who was born in July 2015. In or

about September 2016, HF became pregnant again, with twins, who were delivered in May 2017.

8. The plaintiffs plead that at some time prior to 24th April, 2015, a case of hepatitis A infection in a child attending the nursery, appeared to have been notified to the third defendant. It is pleaded that on or about 29th April, 2015, the third defendant made a declaration that there had been an outbreak of hepatitis A associated with the nursery. It is pleaded that on 30th April, 2015, the second defendant had received a telephone call from a parent of another child attending the nursery, regarding the presence of hepatitis A in the nursery and raising a query as to whether that posed a risk to small children and to pregnant women. The plaintiffs have pleaded that from records which they have managed to obtain, the second defendant was, at that stage, unaware of the outbreak of the disease. It is pleaded that on 28th and 29th May 2015, the nursery was closed for a "deep clean", with concerns having been raised by the second defendant, prior to that date, with regard to "basic health hygiene practices".

9. Each of the plaintiffs have pleaded that as a result of the outbreak of hepatitis A in the creche operated by the first defendant and due to the failure to notify them adequately, or at all, as to the precautions that should be taken, they contracted hepatitis A. Each of them required treatment in hospital. It was pleaded by the plaintiff, HF, that she was advised that her labour would have to be induced at 37 weeks gestation, due to the fact that she had a diagnosis of obstetric cholestasis/hepatitis A. She was admitted to hospital on 1st July, 2015 for induction of labour, leading the birth of her son on 3rd July, 2015.

10. Each of the plaintiffs have pleaded that as a result of contracting the disease, they were greatly affected in all aspects of their lives, including in the work aspects thereof. In addition, they each suffered from distressing personal circumstances, which will be outlined later in the judgment. The two plaintiffs separated temporarily in or about Autumn 2017, and finally separated in January 2018.

11. The plaintiff HF was born in 1991, making her 24 years of age at the time of the matters complained of. The plaintiff RN was born in May 1993, making him 23 years of age at the relevant time.

12. The plaintiff HF received her authorisation from PIAB on 22nd March, 2017, her personal injury summons issued on 3rd October, 2017. The plaintiff RN received his authorisation on 4th April, 2017. His personal injury summons issued on 3rd October, 2017.

13. Appearances having been entered on behalf of the second and third defendants to the two summonses, a notice for particulars was raised in each case on 11th December, 2017 on behalf of the second and third defendants. In each case, a notice of intention to proceed was furnished by the plaintiffs' solicitors on 26th May, 2022. Replies to the notices for particulars were delivered in each case on 9th June, 2022.

14. By notices of motion issued in each case on 18th August, 2022, the second and third defendants brought the within application to have the proceedings against them struck out. That application was heard by this Court on 31st March, 2023.

Chronology of Key Dates.

15. A brief chronology of the key dates in the progress of the litigation to date is set out hereunder: -

24th-29th April 2015	Outbreak of hepatitis A in the creche and notification thereof to the defendants.
5th October 2015	Plaintiffs instruct solicitors.
12th October 2015	Plaintiffs' solicitors make an FOI request to third defendant.
21st October 2015	Third defendant advises plaintiffs' solicitor what is required to make a consolidated request for access to documents.
16th September 2016	Plaintiffs' solicitor writes to National Lead Freedom of Information Record Management seeking documentation.
31st January 2017	FOI documentation furnished.
7th March 2017	Plaintiffs' solicitors send letter of claim to defendants.
8th March 2017	Applications lodged to PIAB.
22nd March 2017	PIAB authorisation issued to HF.
4th April 2017	PIAB Authorisation issued to RN.
3rd October 2017	Personal injury summonses issued in each action.
11th December 2017	Second and third defendants served notice for particulars.
1st February 2018	Second and third defendants' solicitors send letter seeking replies.
26th February 2018	Notice for particulars issued by first defendant.

7th March 2018	Further letter from solicitors from second and third defendants seeking replies; to which plaintiffs' solicitor responds saying that replies will be furnished within a number of weeks.
19th September 2018	First defendant files its defence.
19th September 2018	Request for voluntary discovery made by first defendant of both plaintiffs.
16th January 2019	Request for voluntary discovery repeated.
30th January 2019	Motion issued by first defendant seeking discovery from HF.
11th March 2019	Consent order for discovery made in favour of first defendant against HF.
22nd May 2019	Affidavit of discovery sworn by HF.
14th June 2019	Motion for discovery issued by first defendant against RN.
10th October 2019	Affidavit of discovery furnished by RN.
26th May 2022	Plaintiffs' solicitors file a notice of intention to proceed in each action.
9th June 2022	Replies furnished by plaintiffs to second and third defendants.
18th August 2022	Notices of motion seeking to strike out action against second and third defendants on grounds of delay are issued.
31st March 2023	Hearing of motion to strike out against second and third defendants on grounds of delay.

The Evidence.

16. In each case, the application on behalf of the second and third defendants was grounded on an affidavit sworn by Ms. Cora Fitzsimons on 12th August, 2022. Ms. Fitzsimons is the solicitor acting for the second and third defendants in each action. She stated that her clients first became aware of a potential claim by the plaintiffs, when they received a letter of claim dated 7th March, 2017. She referred to the fact that having entered an appearance on behalf of her clients, she proceeded to raise a notice for particulars in respect of the matters pleaded in each summons. In each case, the notice for particulars was dated 11th December, 2017. She stated that despite reminder letters being sent in February and March 2018, neither of the plaintiffs responded to the notice for particulars until 9th June, 2022.

17. She pointed out that by letter dated 1st June, 2022, she had written to the plaintiffs' solicitor to acknowledge receipt of their notice of intention to proceed dated 26th May, 2022, but had gone on to indicate that, as no step had been taken by the plaintiff in the proceedings for approximately 4.5 years, the action would have to be struck out on grounds of delay. She had invited the plaintiffs to withdraw the proceedings at that stage. When they did not do so, the defendants issued the within motion on 18th August, 2022.

18. Ms Fitzsimons dealt with the issue of prejudice at paras. 11 and 12 of her affidavit:

> *"11. I say and believe that the delay in commencing the proceedings was inordinate and inexcusable. I further say and believe that it was inexcusable not to have notified the defendants of the possibility of a claim until almost two years after the subject incident. No reason has been offered for the delay or the failure to put the defendants on notice. I further say and believe that in addition to the delay by the plaintiff in commencing proceedings, there has been significant delay in progressing these proceedings. I say and believe that given the earlier delay, prior to the issue of proceedings, it was incumbent on the plaintiff to progress this claim in a timely manner once the writ was issued, which he has failed to do.*
>
> *12. I say and believe that there is no justification for any of this delay which has prejudiced the defendants in their defence of these proceedings so that a fair trial of these proceedings is no longer possible."*

19. In response to the grounding affidavit sworn by Ms. Fitzsimons, the plaintiffs' solicitor, Mr. Anthony Hanahoe, swore an affidavit in each case on 18th November, 2022. In those affidavits, he set out in considerable detail the correspondence and other steps that had been taken, both prior to the commencement of the proceedings, and subsequent thereto; both in relation to the moving party defendants and also in relation to the first defendant. It is not intended to set out all of these steps in detail. It will suffice to note that having made preliminary inquiries in relation to production of documents under an FOI request, he was advised on 21st October, 2015 by Ms. Niamh McAlinden of the HSE, that he could make a collated request for documents from all relevant bodies *via* the National Lead of FOI Record Management.

20. Mr. Hanahoe went on to state that on 16th September, 2016, he wrote to that body seeking a copy of all documents relating to the hepatitis A outbreak in or around April - June 2015. He exhibited a copy of the letter. He went on to outline how decisions were made by

the second and third defendants in relation to his request for production of documents. It was only on 31st January, 2017, that he received all outstanding FOI records from the principal environmental officer of the HSE.

21. On 7th March, 2017, initiating letters were sent on behalf of the plaintiffs to each of the defendants. Thereafter, applications were lodged with PIAB. Authorisations were subsequently issued by them authorising the plaintiffs to commence the within proceedings.

22. Mr. Hanahoe went on in the affidavit to outline the various items of correspondence that had passed between the parties in relation to various matters, requesting the nomination of solicitors to represent the first defendant and other correspondence relating to various matters concerning the second and third defendants. Mr. Hanahoe accepted that on 11th December, 2017, his firm had received a letter from the solicitors acting for the second and third defendants enclosing a notice for particulars in each case. Upon receipt of that letter, he wrote to the plaintiffs requesting that they should come in and have a consultation with him. A consultation was held on 27th February, 2018, with a view to furnishing the replies. However, there were a number of outstanding matters on which the plaintiff, RN had to make enquiries prior to furnishing his replies.

23. Mr. Hanahoe went on to state that from the date of institution of the proceedings, down to the date of swearing of his affidavit, there had been considerable continuous activity in progressing the plaintiffs' actions; particularly with the first defendant, which involved obtaining medical records, arranging doctors' visits, and obtaining documentation concerning loss of earnings and other matters. He outlined the correspondence that he had issued seeking documentation that would be necessary for inclusion in the affidavits of discovery, which would have to be furnished to the first defendant. He outlined how on 19th September, 2018, a defence had been filed on behalf of the first defendant and a request for voluntary discovery had been made by them. He went on to set out in some detail the correspondence that passed between his firm and various parties in relation to preparation of the affidavit of discovery. This is set out in detail between paras. 42-64 of his affidavit.

24. In relation to the plaintiff RN, Mr. Hanahoe outlined how the plaintiff had been admitted to hospital due to the hepatitis A infection in May 2015. At that stage the plaintiffs' partner, HF, was in the third trimester of pregnancy. She was also admitted to hospital at that time. Upon discharge from hospital, RN returned to live with his mother. His partner and two children returned to live with her mother, as their living accommodation had to be

deep cleaned and all contents had to be disposed of and replaced. HF delivered their third child in July 2015, who had facial palsy. Mr. Hanahoe stated that that was a traumatic and stressful time for both plaintiffs. In 2016, HF became pregnant with twins, who were delivered in May 2017. Thus, the period of alleged pre-commencement delay, had been an extraordinarily busy time for the plaintiffs personally.

25. He went on to outline how the plaintiffs shared a two-bedroomed apartment with their five children under the age of six years. The twins were prone to illness, and following infant vaccinations, had necessitated hospital admissions. The relationship between the plaintiffs was under a lot of strain. They temporarily separated in August/September 2017. They finally separated in January 2018.

26. Initially, the plaintiffs shared joint custody of their son and twin daughters. However, the plaintiff HF developed severe personal problems. Firstly, she entered into a further relationship with a man. That was an abusive relationship, in which she was seriously assaulted. This resulted in criminal proceedings and a conviction against her second partner. At or about that time, the plaintiff RN was given custody of his son and twin daughters, who reside with him and his mother to the present day.

27. Mr. Hanahoe stated that the plaintiff RN, had developed a drug addiction problem in or about 2012, when he was 19 years of age. He had successfully overcome that problem by the age of 24, being in or about 2017. He has made a full recovery. The plaintiff HF had suffered a lot of personal problems, culminating with admission to a rehabilitation programme in the summer of 2021.

28. It was pointed out that insofar as the defendant had asserted that there was no case properly pleaded against the second and third defendants, he referred to paras. 9 and 10 of the statement of claim, wherein the case against the second and third defendants was fully pleaded. In addition, particulars of negligence pleaded at K-S inclusive, applied to each of the defendants.

29. Mr. Hanahoe accepted having received the notices for particulars dated 11th December, 2017, and the follow-up correspondence dated 1st February, 2018, and 7th March, 2018, but pointed out that since that time, there had been no correspondence from the defendants' solicitors, nor any warning letter, or motion to compel the production of replies to the notice for particulars. He stated that it was not until after the service of the plaintiffs'

notice of intention to proceed on 27th May, 2022, that the defendant took issue with the alleged delay.

30. Finally, he stated that it was noteworthy that the defendants' solicitor had not identified a single incident of actual prejudice arising from the passage of time in this case. He stated that given that this was an outbreak of a serious disease at a creche, there would undoubtedly be considerable documentation in the possession, power or procurement of the defendants, which would enable them to adequately defend themselves at the trial of the action. Accordingly, he prayed the court to refuse the reliefs sought by the defendants in their application herein.

Submissions on behalf of the Defendants.

31. Mr. Sheridan BL on behalf of the second and third defendants, stated that there were two key periods of delay in this case. The first, was the eleven-month period between 21st October, 2015, when the third defendant had given the relevant information to the plaintiffs' solicitor in relation to how to go about making a collated request for all FOI documentation from the relevant State bodies; and 16th September, 2016, when the plaintiffs' solicitors wrote to the National Lead FOI Record Management seeking the documentation. It was submitted that there was absolutely no justification for this eleven-month delay, when the plaintiffs' solicitor had been in possession of the identity of the relevant body from whom the documentation could be sought.

32. The second period of delay was the period of over 4.5 years from issuance of the personal injury summons on 3rd October, 2017 to service of the notice of intention to proceed on 27th May, 2022. In particular, a notice for particulars had been raised by the second and third defendants on 11th December, 2017. This was not replied to until 9th June, 2022. It was submitted that this delay was both inordinate and inexcusable. While it was accepted that the individual plaintiffs had considerable personal difficulties during this time, it was submitted that these could not excuse such an inordinate period of delay in replying to what was, in reality, a fairly standard notice for particulars arising out of the personal injury summons in each case.

33. Insofar as the defendants had submitted that their delay in progressing the claim against the second and third defendants, was due to the fact that they had been progressing their action against the first defendant to an advanced stage, it was submitted that that was not a good excuse for the inordinate delay that had occurred. In this regard counsel referred

to the decisions in *Comcast International Holdings v. Minister for Public Enterprise & Ors.* [2012] IESC 50; *Bagnall v. McCarthy Commercials* [2012] IEHC 205.

34. It was submitted that having regard to the scant documentation that had been produced as a result of the FOI request, it would appear that this was a case that was going to be determined largely on the basis of oral evidence. That being the case, it was submitted that it was well established at law that the memories of witnesses would likely deteriorate with the passage of time: see *J. McH v. JM* [2004] 3 IR 385; *O'Connor v. John Player* [2004] 2 ILRM 321.

35. It was further submitted that in this case the second and third defendants had not been guilty of any culpable or active delay; in that, they had not failed to take any steps that they were obliged to take: see *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 IR 510; *Rogers v. Michelin Tyre plc.* [2005] IEHC 294; *Millerick v. Minister for Finance* [2016] IECA 206 and *Leech v. Independent Newspapers (Ireland) Limited* [2009] 3 IR 766.

36. It was submitted that when one looked at the inordinate delay that had occurred in this case, not only since the occurrence of the events complained of, but since the institution of the proceedings and indeed, since the furnishing of the notice for particulars in each case; it was clear that a substantial passage of time had elapsed since the date of the events complained of by the plaintiffs. In addition, counsel submitted that it did not appear from the replying affidavit that had been furnished by Mr. Hanahoe, that the plaintiffs had yet obtained any expert's report to back up their claim that there had been negligence, or breach of duty, on the part of the second or third defendants.

37. That being the case, it was submitted that the action was not ready for hearing and would not be ready for hearing for a considerable period of time into the future. It was submitted that the court was entitled to take this into account when assessing the overall delay that would occur between the events complained of and the likely date of the hearing and the effect that that delay would have on the memories of witnesses, who might be called to give evidence by the defendants at the trial of the action. It was submitted that in all the circumstances, the balance of justice was in favour of striking out the action against the second and third defendants.

Submissions on behalf of the Plaintiffs.

38. Mr. McGagh BL on behalf of the plaintiffs in each case, submitted that there had been no pre-commencement delay on the part of the plaintiffs in instituting their proceedings. Such delay as there had been, was due to the fact that it was necessary for the plaintiffs' solicitor to undertake considerable investigation to try and obtain documentation which was relevant to the pleading of the cause of action. It was submitted that that documentation had only come to hand in January 2017. Thereafter, applications had been submitted to PIAB within a short period of time and upon the obtaining of authorisations from PIAB in March and April 2017, the proceedings had issued without delay in October 2017.

39. It was submitted that while it had taken the plaintiffs a considerable period to reply to the notices for particulars raised on behalf of the second and third defendants, when one looked at the personal circumstances of the plaintiffs, and at all the extraneous matters that were going on at that time, such as the fact that their relationship had broken down; the plaintiff HF, had found herself in an abusive relationship, wherein she had been seriously assaulted; which had ultimately lead to criminal proceedings against her subsequent partner; the removal from her of custody of three of the children into the care of RN; and his difficulty with drugs in the period 2012-2017; these were all circumstances which rendered it excusable that the replies had not been forthcoming in a more timely manner.

40. It was submitted that while there had been a considerable passage of time in this case, longer periods of time had been found to be excusable; such as in *Michael Mansfield v. Roadstone Provinces Limited* [2022] IEHC 223, where the accident had occurred on 6th November, 2006 and the plaintiffs' solicitors had not served a notice of intention to proceed until March 2019; yet the judge (Bolger J.) had held that while the delay in that case had been both inordinate and inexcusable, the balance of justice nevertheless lay in favour of allowing the action to proceed.

41. Counsel further submitted that while the plaintiffs had not replied to the notices for particulars raised by the defendants; other than the two letters that had been sent seeking the replies in the early stages, the defendants had not pressed at all for delivery of replies. It was submitted that this was something that the court was entitled to take into account when considering the balance of justice: see *Bergin v. McGuinness* [2022] IEHC 151.

42. It was submitted that the court was entitled to take into account that the plaintiffs' solicitor had been engaged in considerable correspondence and interlocutory applications in

relation to progressing the action against the first defendant. That had taken up a considerable amount of the time during which the replies had not been furnished.

43. Finally, it was submitted that when considering the balance of justice, the crucial question for determination was whether there was any prejudice caused to the defendant as a result of the delay in the prosecuting of the proceedings by the plaintiff. It was submitted that in this case there was only the most vague assertion of prejudice having been suffered by the defendants. There was no concrete evidence at all that the defendants had suffered any prejudice in their defence of the proceedings. It was submitted that this was likely to be a documents case, in that the second and third defendants, as statutory authorities, would have recorded any notifications received by them and recorded any steps taken by them as a result thereof. It was submitted that in these circumstances, there was no specific, or even general, prejudice suffered by the defendants: see *Irish Water v. Hypertrust Limited* [2021] IEHC 323.

44. Finally, it was submitted that having regard to the very difficult and distressing personal circumstances of the plaintiffs; the complexity of the action against the first defendant; and the inactivity on the part of the defendants in seeking replies to the notices for particulars; together with the absence of any prejudice on their part due to the passage of time; this was a case in which the balance of justice lay in favour of allowing the actions to proceed against the second and third defendants.

The Law.

45. The principles which the courts must apply when considering an application to strike out a plaintiff's action on grounds of delay and want of prosecution are well known. They were set out in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR 459. It is not necessary to set out those principles again.

46. 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.

47. 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. 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.

48. 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."

49. The Court noted that on 6th March, 2023, the Supreme Court accepted an appeal in a delay case: see *Kirwan v. Connors* [2023] IESCDET 34. However, until judgment is delivered in that appeal, the principles laid down by the Court of Appeal in the *Cave Projects Ltd* case, remain binding on this court.

Conclusions.

50. I have considered all the documentation submitted in this case, together with the helpful oral and written submissions of counsel.

51. It is undoubtedly the case that these plaintiffs were in a very precarious position at the time of the events giving rise to the proceedings in April 2015. They were a young couple, who had young children in the creche operated by the first defendant. They were expecting the birth of their third child in the summer of 2015. In addition, the events of April 2015 occurred at a time when the plaintiff, RN, was dealing with his addiction to drugs, which lasted from 2012 to 2017. At that time, he was aged between 19 years and 24 years.

52. After the breakdown of her relationship with RN, HF started a relationship with another man, which was an abusive relationship, in which she was subjected to serious assaults, which resulted in a criminal conviction for her subsequent partner. Allied to that, custody of her children, which had been on a shared basis with RN, was transferred into the sole custody of RN.

53. Notwithstanding these undoubted difficulties faced by the plaintiffs, the court cannot hold that the eleven-month period of pre-commencement delay was anything other than inordinate and inexcusable. That delay occurred after the plaintiffs' solicitor had been

informed of the name of the entity to which he should address a consolidated FOI request for documentation. For some unknown reason, which has not been explained in the affidavits filed on behalf of the plaintiffs, the plaintiffs' solicitor did nothing for eleven months. All he had to do, was address a letter to the nominated body. When he eventually did so, eleven months later, the documentation was forthcoming within a relatively short period of approximately four months. I have to hold that this period of eleven months delay, was both inordinate and inexcusable.

54. Thereafter, I am satisfied that the plaintiffs' solicitor moved with reasonable speed to progress the litigation, until receipt of the notices for particulars from the second and third defendants. I have read each of these notices for particulars. They are not unduly long, nor do they ask particularly difficult questions arising out of the personal injury summonses delivered in each case. They appear to me to be in a somewhat standard form, asking questions that would normally be expected arising out of the personal injury summons in each case. A delay of 4.5 years approximately in replying to these notices for particulars, has to be regarded as both inordinate and inexcusable. Accordingly, the court finds that the first two limbs of the test in *Primor v. Stokes Kennedy Crowley plc* [1996] 2 IR 459 have been met in this case. The court finds the delay in prosecuting these actions, is both inordinate and inexcusable.

55. Turning to the balance of justice, the court is satisfied that applying the principles in the *Cave Projects* case, the court has to find that the balance of justice is in favour of allowing these proceedings to continue.

56. The court has reached that conclusion for the following reasons: First, the court is satisfied that when considering the balance of justice, it is entitled to have regard to the difficult personal circumstances of each of the plaintiffs. It has been stated in numerous cases, that in examining the balance of justice, the court has to have regard to the particular circumstances that arise in each case. In *Truck & Machinery Sales Limited v. General Accident Fire and Life Assurance Corporation plc* [1999] IEHC 201, Geoghegan J. stated as follows at pp. 4-5:

> *"Strictly speaking it would seem to me that the excuses relied on should relate in some way to the actual proceedings in hand because an opposing party can hardly be expected to stand aside and wait while the other party resolves its problems which have nothing to do with the litigation. Nevertheless I am satisfied that all the*

surrounding circumstances including so called excuses based on extraneous activities must to some extent be taken into account and weighed in the balance in finally considering whether justice requires that the action be struck out or allowed to proceed."

57. While there has undoubtedly been considerable delay on the part of the plaintiffs in furnishing replies to the notices for particulars raised on behalf of the second and third defendants, it has often been stated that when examining the balance of justice, the court must have regard to the conduct of both parties to the litigation. In particular, while one party may be in breach of its obligations to take a particular step in the proceedings, the court can also have regard to the fact that the other party had options available to it under the rules to force the offending party to comply with its obligations thereunder.

58. In *Cassidy v. Martin Butterly & Company Limited & Ors.* [2014] IEHC 203, Ryan J. (as he then was) stated:

"Any question of prejudice is therefore central to the court exercising its discretion. But the role of the defendant is also relevant and a defendant who has sat back and done nothing may, in some circumstances, be considered to have acquiesced in the plaintiff's delay. It follows that where there has been a long delay and the defendant is unable to demonstrate prejudice and/or where he has not taken active steps to bring the case forward, it may be difficult to succeed in an application to dismiss a plaintiff's claim for want of prosecution."

59. Similar comments were made by Dignam J. in *Bergin v. McGuinness* in relation to the obligation on a defendant to avail of the mechanisms under the rules to have the plaintiff move the proceedings on (see paras. 42-44). In the present case, the inactivity on the part of the defendants in securing replies to their notices for particulars, has to be characterised as acquiescence by the defendants in that delay.

60. Thirdly, the court is satisfied that the plaintiffs in each of the actions did not sit back and do nothing. The court is satisfied, having regard to the matters averred to by Mr. Hanahoe in his affidavits, that the plaintiff's solicitor was engaged in protracted negotiations with the first defendant in each case, in relation to progressing their claims against that defendant. While that does not excuse the plaintiffs' inaction in relation to replying to the notices for particulars that had been raised by the second and third defendants, it does show that they had not allowed the action to "lie fallow" for any appreciable period of time.

61. Fourthly, and perhaps most importantly, when looking at the balance of justice, the key determination is whether there has been prejudice to the defendant in the conduct of its defence, due to the delay on the part of the plaintiff. In this case, there is only a bare assertion of prejudice contained in the affidavit sworn by Ms. Fitzsimons on behalf of the defendants. There is no evidence that they have actually suffered any prejudice, or are likely to do so, due to the lapse of time that will have occurred between the date of the events complained of and the likely date for the hearing of the action. There is no averment that any relevant witnesses or documents are unavailable for production at the trial of the action.

62. When one considers the essence of the case that is being made by the plaintiffs against the second and third defendants, which is to the effect that (a) they failed to inspect and supervise the operation of the first defendant's creche adequately or at all; and/or (b) they failed to act appropriately once notified of the outbreak of hepatitis A in the creche; it is clear that this aspect of the plaintiffs' case will turn on documentary evidence.

63. In other words, the case against the second and third defendants is that they failed to carry out their statutory duty adequately or at all, both prior to the outbreak of the hepatitis A in the creche and subsequent thereto. The resolution of that issue, will turn on the existence of documentation showing what inspections, if any, were carried out by the second and third defendants of the first defendant's premises prior to the outbreak in April 2015; and secondly, what steps, if any, were taken by the second and/or third defendants once the outbreak of the disease was notified to them. All of that will have been recorded by the statutory defendants in the carrying out of their statutory duties. In these circumstances, the court is satisfied that this is a case that will turn on documentary evidence, rather than on the oral evidence of people who were involved in the events at or around April 2015. There is no averment that any relevant documentation has been lost or destroyed.

64. The court notes that in the *Michael Mansfield* case, where there was a delay of approximately thirteen years between the date of the accident and the date of service of the notice of intention to proceed on behalf of the plaintiff, and where the particular facility had closed in 2009 and the location manager, who had been employed there, no longer worked for the defendant, Bolger J. held that, while there had been both inordinate and inexcusable delay, the balance of justice nevertheless lay in favour of allowing the plaintiff's action to proceed.

65. Similarly, in *Irish Water v. Hypertrust Limited* [2021] IEHC 323, Creedon J. stated as follows at paras. 83-85:

> "*83. The Court is satisfied that the first named defendant has not identified any issues which would adversely affect its entitlement to a fair trial. This is particularly so in the light of the fact that the first named defendants have never indicated that there is any dispute of fact and that the main point of dispute concerning the first named defendant's liability is its claim that the land on which the drilling occurred was not owned by it. No specific issues have been identified to support the first named defendants contention that it is prejudiced by a general decline in recollections.*
>
> *84. The statement of Cross J. in Clavert v. Stollznow [1980] 2 N.S.W.L.R.749 was approved by Mc Kechnie J in Mangan (APUM) v. Dockery [2020] IESC 67 at para 110: -*
>
> *"Considerations of justice transcend all other considerations in these matters. Of course justice is best done if an action is brought on whilst the memory of the witnesses is fresh but surely imperfect justice is better than no justice".*
>
> *85. In circumstances where the Court can identify no prejudice under the second limb of the test , it would seem justice is best done by the action proceeding*."

66. When one balances the very great prejudice that would be suffered by the plaintiffs if their actions were to be dismissed against the second and third defendants, as against the absence of any discernible prejudice having been suffered by those defendants in establishing their defence at the trial of the action, the court is satisfied that the balance of justice weighs in favour of allowing the actions to proceed.

67. Accordingly, the court refuses the applications on behalf of the second and third defendants in each case.

68. The court is concerned by the fact that there does not appear to be an expert's report in the possession of the plaintiffs' solicitor to the effect that there was negligence, or breach of duty, on the part of the second or third defendants. It may be that such report cannot be obtained until discovery of documents is obtained by the plaintiffs from these defendants. However, there should be no delay in progressing the matter at this stage.

69. To that end, the court directs that if the plaintiffs wish to obtain discovery of documents from the second or third defendants, a request for voluntary discovery must be

delivered within three weeks of delivery of a defence on behalf of the second and third defendants in each case.

70. While the court has refused the application on behalf of the second and third defendants to be let out of the proceedings on grounds of delay at this stage, the order of the court will reserve the right to the second and third defendants to remake their application, should the action not be set down for hearing within a reasonably short period of time.

71. As this judgment is being delivered electronically, the parties will 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 arise.

72. The matter will be listed for mention before this Court at 10.30 hours on 23rd May, 2023 for the purpose of making final orders.