THE COURT OF APPEAL - UNAPPROVED

Appeal Number: 2022/131
Neutral Citation Number [2023] IECA 276

Noonan J.
Binchy J.
Allen J.

BETWEEN/

JULIE WALSH

PLAINTIFF/ RESPONDENT

- AND –

MATER MISERICORDIAE UNIVERSITY HOSPITAL

FIRST NAMED DEFENDANT

- AND -

ASHLEY POYNTON

SECOND NAMED DEFENDANT/ APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 10th day of November 2023

1. This is an appeal from the decision of Barr J. in the High Court, [2022] IEHC 126 whereby he refused the application of the second named defendant, the appellant in this appeal, to strike out these proceedings as against the appellant on the grounds of the respondent's inordinate and inexcusable delay in progressing the proceedings.

2. In these proceedings, the respondent (who is the plaintiff in the proceedings) claims damages from the defendants arising by reason of their alleged negligence in their care and treatment of her between 1st April 2011 and 23rd May 2011. In her Personal Injury Summons issued on 28th March 2013, the respondent claims that on 1st April 2011 she attended with the appellant at his private rooms, and made specific complaints about severe pain, numbness

and loss of power in her left leg. She claims that following this consultation, an MRI scan of her lower back was arranged and carried out on 26th April 2011. She continued to have pain in her leg and attended at the accident and emergency department of the first named defendant on 19th May 2011, and was discharged home on the same date. She claims that on 23rd May 2011, following an urgent referral made by her General Practitioner, she again attended with the appellant, and it is claimed that she once again explained to the appellant that her left leg was severely painful. It is claimed that the appellant again examined the respondent and arranged for a further MRI scan to be carried out the following day. Thereafter, it is claimed, the respondent became very unwell, and on 26th May 2011, she again attended the accident and emergency department of the first named defendant. She was admitted and had surgery involving a femoral embolectomy/multiple femoral embolectomies. On 1st June 2011, a below the knee left leg amputation was carried out on the respondent.

3. The respondent claims that as a result of the negligence, breach of duty and/or breach of contract of the defendants in or about their failure to diagnose and/or treat the respondent's complaints/symptoms/condition on the 1st April 2011, 19th May 2011 and 23rd May 2011, she has suffered severe personal injuries, pain and suffering, loss and damage, inconvenience and expense.

4. At para. 14 of his judgment, Barr J. sets out the relevant chronology of the proceedings as follows:

22/3/2013	A pre-litigation letter is sent to the second defendant.
28/3/2013	A personal injury summons is issued on behalf of the plaintiff on a protective basis.
29/4/2013	Messrs Hayes Solicitors write to the plaintiff's solicitors advising that they have authority to accept service of the proceedings on behalf of the second defendant. The letter also seeks copies of the plaintiff's relevant medical records.
2/5/2013	The plaintiff's solicitor sends a holding letter in response, advising that they are not in a position to release the plaintiff's medical records.

7/5/2013	The plaintiff's solicitor sends a letter to a medical consultant, Mr. Getty, based in Sheffield asking if he could act in the case.
5/6/2013	Mr. Getty is advised by email of the identity of the defendants.
13/6/2013	Mr. Getty agrees to act in the case and outlines his fees.
27/3/2014	Personal injury summons expires.
28/7/2014	Ex parte application is made to renew summons under O.8, r.1 of RSC.
27/1/2015	The plaintiff serves the renewed summons on the second defendant personally. This was on the last day before it expired.
2/2/2015	The second defendant's solicitor writes to the plaintiff asking for copies of the papers which grounded the application to renew the summons.
3/3/2015	The plaintiff's solicitor sends Mr. Getty the plaintiff's medical records and requests an expert opinion from him.
5/3/2015	Mr. Getty advises the plaintiff's solicitor by letter that he is unable to act in the matter, as he is a friend and colleague of the second defendant.
November 2015	Mr. Pearse in the UK is engaged to provide an expert medical opinion.
5/2/2016	A report is received from Mr. Pearse.
14/2/2020	The plaintiff's solicitor serves a notice of intention to proceed.
17/2/2020	The plaintiff's solicitor writes to Mr. Stephen Brearley, Consultant Vascular Surgeon, requesting him to prepare an expert report.
21/2/2020	The plaintiff's solicitor writes to St. James's Hospital requesting the plaintiff's medical records and in particular, the plaintiff's blood analysis results from 2011.
16/3/2020	Professor O'Donoghue is contacted by the plaintiff's solicitor for the purpose of preparing a medical report. The report is provided by him on 10th May, 2020.
27/5/2020	The plaintiff's solicitor sends medical records to Dr. Mary Kennedy of Minerva Medical Legal to prepare a typed transcript of the plaintiff's medical records and/or provide a summary of treatment received by her from November 2004 until March 2020.
15/7/2020	The plaintiff's solicitor instructs Mr. Brearley to complete a medical report on behalf of the plaintiff.
5/8/2020	The plaintiff's solicitor arranges for a notice of updated particulars of negligence to be drafted.
18/11/2020	An appearance is entered on behalf of the second defendant.
7/1/2021	The present motion is issued by the second defendant.
12/4/2021	Further particulars of negligence are served on the defendants.

8/7/2021	A motion is issued by the plaintiff seeking judgment in default of appearance against the first defendant.
22/11/2021	Order of the High Court extending time for entry of an appearance by the first defendant, and an appearance was subsequently entered on behalf of the first defendant

5. It is apparent from this chronology that there have been very significant delays in the progression of the proceedings. These delays led the appellant to issue the motion referred to in the chronology on 7th January 2021, seeking, *inter alia*, an order striking out the claim for want of prosecution on the grounds of the respondent's inordinate and inexcusable delay and/or an order striking out the proceedings pursuant to O.122, r.11 of the Rules of the Superior Courts for want of prosecution having failed to proceed within two years of the last proceeding and/or an order striking out the proceedings on the grounds that they are an abuse of process. The motion was grounded upon an affidavit sworn by the appellant's solicitor, Mr. Peter Devitt of Hayes Solicitors, of 7th January 2021. In his affidavit, Mr. Devitt summarises the history of the proceedings. He refers to the commencement of the proceedings by the issue of the Personal Injuries Summons 28th March 2013, the renewal of that summons pursuant to an *ex parte* application moved by the respondent on 28th July 2014, and the service of the summons thereafter, on 27th January 2015. He avers that since serving the proceedings, the only step taken by the respondent to advance them was to issue a notice of intention to proceed on 14th February 2020. He refers to the fact that the proceedings were issued by way of protective writ, in circumstances where the respondent did not have an expert report supporting the proceedings, and the limitation period for the issue of the proceedings was about to expire. However, he expresses concern that he still is unaware whether or not the respondent has obtained an expert report in support of her claim.

6. He avers that on 29th April 2013, his firm wrote to the solicitors for the respondent advising them that Hayes Solicitors had authority to accept service of the proceedings. They

also sought the respondent's medical records. No reply was received to this letter, nor to reminder letters sent on 29th May 2013 and 20th November 2013.

7. Mr. Devitt refers to the order renewing the personal injury summons made *ex parte* on 28th July 2014, and observes that the respondent served the appellant personally with the summons (notwithstanding the letter from Hayes Solicitors informing the respondent's solicitors that they had authority to accept service of proceedings) and he also observes that the summons was not served until the day before the time for serving it would have expired. Mr. Devitt refers to a letter sent to the solicitors for the respondent enquiring why the appellant had been personally served with the papers in these circumstances, and also requesting a copy of the papers relied upon to apply for the renewal of the summons. He received no response to that letter, and nor did he receive any response to ten further letters sent in the course of 2015, and another letter sent on 25th May 2016, informing the solicitors for the respondent that if they did not receive a response within twenty-eight days, they would close their file on the basis that the respondent was not intending to prosecute her claim. Nothing further was then heard from the respondent until a notice of intention to proceed was served on 14th February 2020.

8. Mr. Devitt avers that the appellant is prejudiced by the delay on the part of the respondent in progressing the proceedings. He points out that the events to which the proceedings relate occurred nearly ten years prior to the date of his affidavit. He says that the appellant does not know the specific acts of negligence that he is being accused of, as the respondent has failed to provide full particulars of the negligence alleged. He says that the appellant is entitled to have his good name cleared in a timely fashion.

9. Furthermore, Mr. Devitt avers, since Hayes Solicitors had informed the solicitors for the respondent that they would accept service of proceedings, some reason other than difficulties with service must have been advanced to the High Court in support of the

application to renew the summons, but the respondent had failed to provide the papers relied upon by the respondent in moving that application, in spite of having been requested to do so. Moreover, it remains unclear to the appellant whether or not the respondent had an expert report supporting her claim of negligence as against the appellant. If there is no such expert report, then the respondent is engaging in an abuse of process.

10. The affidavit of Mr. Devitt was replied to by the solicitor for the respondent, Ms. Una O'Donnell by way of replying affidavit of 19th May 2021, but not before the solicitors for the respondent had, on 12th April 2021, served a letter providing further particulars of negligence relating to both defendants. In these particulars, it is alleged that the defendants failed to diagnose properly and adequately the condition of the respondent notwithstanding her complaints of left leg pain, and that each of the defendants failed to understand the respondent's complaints of *"pain extending down her left leg to the foot with pins and needles and loss of sensation together with a change of colour and notwithstanding a finding recorded in her medical notes that the left foot was 'cold and numb' and failed to perform or adequately examine or conduct a vascular examination to ascertain the true problem causing the plaintiff's complaints"*. It is alleged that each of the defendants were negligent in failing to consider a cause for the complaints of the respondent other than low back pain, even though the MRI scan of her lower back, carried out on 26th April 2011, was normal, and in light of the results of the MRI scan, in failing to carry out a vascular examination. It is alleged that the defendants failed to consider that the clinical features of the respondent *"became more in keeping with vascular claudication from January 2011 onwards… and that the respondents should have known the calf pain complained of by the respondent after walking for 100 yards or so was classic for vascular claudication."*

11. As would be expected, Ms. O'Donnell in her affidavit addresses the delays in progressing the proceedings. It will be necessary later on - in the context of the appellant's

appeal from the order for costs made by the trial judge – to give some consideration to the explanations offered by Ms. O'Donnell for the various periods of delay. However, it is unnecessary to summarise these explanations in detail at this juncture because at the opening of the hearing of this appeal, counsel for the respondent accepted that the delay on the part of the respondent in progressing the proceedings was both inordinate and inexcusable, and focussed his submissions on where the balance of justice lay in respect of the application. Suffice to say for present purposes, that the explanations offered by the respondent for the delay – which the trial judge did not find persuasive – included asserted difficulties in obtaining medical records, obtaining a report from an appropriate expert, staffing difficulties in the offices of the solicitor for the respondent and certain health issues experienced by the solicitor for the respondent. Ms. O'Donnell made it clear that the respondent herself had not contributed in any way to the delay in progressing the case. She acknowledged that there had been considerable delay in doing so but averred in that in light of the reasons provided, the delay was, in the circumstances excusable.

12. As regards the balance of justice, Ms. O'Donnell averred that the appellant has not suffered any specific serious prejudice by virtue of the delay, and there will be nothing to deny him the opportunity to defend the claim if he wishes to do so. In response to Mr. Devitt's averment that the appellant does not even know the specific acts of negligence that he is been accused of, Ms. O'Donnell avers that this is addressed by the updated particulars of negligence served on 21st April 2021.

13. Ms. O'Donnell avers that she had not provided the solicitors for the appellant with the papers relating to the application to renew the personal injuries summons, because they had not yet entered an appearance: had they done so, then she would have provided the papers on request.

14. Ms. O'Donnell avers that the appellant has known about the claim of the respondent since March 2013 and that his ability to defend the claim has not been seriously prejudiced by the delay; on the other hand, she says, the respondent lost half of her left leg as a result of the alleged negligence of the defendants and if the court were to decide to dismiss her claim she would lose the opportunity for redress. Ms. O'Donnell says that she received an expert report from a Mr. Pearse on 5th February 2016, and she describes it as being a very positive liability report from the point of view of the respondent.

15. Mr. Devitt swore a further affidavit in reply to that of Ms. O'Donnell. For the most part, this is taken up with responding to Ms. O'Donnell's explanations for the lengthy delay in progressing the proceedings. As already explained however, it is unnecessary to address these explanations at this juncture, other than to say that Mr. Devitt expresses considerable doubt as to whether the excuses proffered by Ms. O' Donnell withstand scrutiny and offers reasons for his scepticism. As regard to the balance of justice, Mr. Devitt observes that it is over ten years since the date on which the medical procedure, the subject of the proceedings, took place. He avers that this is a significant period of time for a professional to have a case hanging over him where little progress has been made through no fault of his own. He says that the respondent has still failed to provide copies of relevant medical records, notwithstanding having been requested to do so as far back as 29th April 2013. If the proceedings are not dismissed, he says, the appellant will be required to give evidence in relation to events that took place more than 10 years previously. Furthermore, he says, there is a suggestion made by Ms. O' Donnell in her affidavit that the condition of the respondent may have pre-dated 2011, as Ms. O'Donnell averred to the preparation of a chronological timeline of the care and various treatments received by the respondent between November 2004 until March 2020. Given the passage of time, Mr. Devitt avers, it will be difficult for the appellant to recollect how the respondent presented to him as far back as 2011.

16. Mr. Devitt also avers that it is evident that if the court does accede to this application, it will do so because of the delay caused by the respondent's solicitor, and so therefore the respondent would have a remedy as against her solicitor.

17. Ms. O'Donnell provided a second replying affidavit on 7th July 2021. In this affidavit, Ms. O'Donnell further seeks to explain certain periods of delay, in response to criticisms made by Mr. Devitt in his affidavit. She also avers that the respondent has been advised by a competent medical expert that the standard of care received by the respondent fell below the standard expected of a consultant Orthopaedic Surgeon in that the defendants ought to have considered vascular claudication as a cause of the respondent's leg pain and the failure to perform a basic vascular examination was indefensible on and after April 2011. As to the delivery of the respondent's medical records, Ms. O'Donnell says that no formal request for discovery of the same had been made, but in any case, those records had now been made available to the appellant's solicitors.

Judgment of the High Court

18. Barr J. delivered a detailed, comprehensive and well considered judgment on 8th March 2022. He considered several of the leading authorities governing applications of this kind, specifically *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459, *Millerick v Minister for Finance* [2016] IECA 206, *McNamee v Boyce* [2016] IECA 19, *Flynn v Minister for Justice* [2017] IECA 178 and *Mangan v Dockeray & Ors.* [2020] IESC 67. I will come to the principles established by these authorities in due course, but for now it is sufficient to say that the appellant does not assert that the judge failed to have regard to any relevant authorities or to the applicable principles; rather the appellant's case is that he failed to apply the applicable principles correctly.

19. The judge noted that the respondent had conceded that the delay was inordinate, and went on to consider whether or not it was excusable. He then conducted a detailed analysis of the various reasons offered by the respondent's solicitor. In view of the fact that it was conceded at the hearing of this appeal that the delay was also inexcusable, as I mentioned above, it is not necessary for the purpose of the substantive issue to consider this aspect of the matter in any detail, but it is necessary to say something of the judge's conclusions on the issue because it has a relevance to the appeal of the appellant from the costs order made by the motion judge. I will therefore summarise briefly the conclusions of the motion judge in this regard.

20. The judge expressed himself as being unimpressed by the fact that the respondent's solicitor failed to reply to all bar one of sixteen letters sent to her by the appellant's solicitors in the period 2013 – 2016. He noted that while the respondent's solicitor had said that she was having significant difficulties with staffing during this period, that excuse was inconsistent with averments she had made that she was working long days at the time, and doing all of the administration work because of staffing difficulties. While the respondent's solicitor also suggested that she may have been impeded during this period by health related issues, specifically palpitations, she did not exhibit any proof of these complaints, and the judge dismissed this excuse as being nothing more than vague assertions. He also described as a vague assertion a suggestion that some of the delay might have been caused by a change in Ms. O'Donnell's email address (in 2018), an excuse which he considered to be unconvincing.

21. The judge noted that no excuse at all was offered for the period of delay between February 2016 (when an expert report was obtained) and the serving of further particulars of negligence in April 2021 (other than the change of email address in 2018). Finally, the motion judge noted that Ms. O'Donnell placed some reliance on a complaint made by the

respondent to the Law Society in relation to Ms O'Donnell's delay in the prosecution of the proceedings. While that complaint was apparently resolved in or about August 2020, and the respondent was satisfied to retain the services of Ms. O'Donnell, the judge commented that it was somewhat ironic that a complaint made by the respondent about delay on the part of her solicitor in the prosecution of the proceedings should be offered as an excuse by her solicitor in response to this motion.

22. It is apparent from the foregoing that the motion judge was both unimpressed by and unpersuaded by any of the excuses offered by the respondent's solicitor for the delay in the prosecution of the proceedings, leading him to conclude that the delay was both inordinate and inexcusable.

23. The judge then proceeded to consider the where the balance of justice lay. He noted that there were a number of factors in favour of acceding to the application: the appellant had not been responsible for any of the delay; the appellant had suffered reputational damage in the years since the commencement of the action; if the application were allowed, the respondent would still have her action against the first defendant; and having regard to the frank admissions made by her own solicitor, she would probably have a cause of action against her solicitor for the loss of her cause of action as against the appellant.

24. The judge noted that as the appellant has established inordinate and inexcusable delay on the part of the respondent, it is only necessary for the appellant to satisfy the court that he has, as a result, suffered moderate prejudice in the defence of the proceedings in order for the court to grant his application. The judge expressly stated that it is not necessary for the appellant to establish that he cannot get a fair trial - he stated that that threshold must only be met where there has not been inordinate or inexcusable delay and has no application in this case.

25. The judge then referred to the submissions made on behalf of the respondent that the appellant would not suffer even moderate prejudice in this case because he still has his own notes and he has access to all other relevant medical records of the respondent. He noted that the respondent had submitted that in nearly all medical negligence cases it was accepted that a treating doctor would not recall treating an individual patient on a particular day, and would rely on his or her notes, and that liability would turn almost exclusively on expert evidence.

26. However, the judge did not agree that this is solely a documents case. He observed that while it is true that the appellant will rely on his notes to a large extent, it does not follow that the respondent will accept the accuracy of the appellant's notes or the hospital records. If the respondent were to argue that the appellant's notes did not properly record her complaints, the appellant would be at a disadvantage in dealing with any such allegations some twelve years or more after the events. Nonetheless, the judge concluded, liability in the case will to a large extent turn on the medical notes made by the doctors and on the actions taken by the doctors in response to the complaints of the respondent as recorded by the doctors (including the appellant).

27. At para. 71, the judge summarised the task facing him in the following terms: *"What the court must do, is look at the particular circumstances of this medical negligence action and ask whether the second defendant has really suffered even moderate prejudice as a result of the delay that has occurred to date and will occur pending the hearing of the action*?*"*. He noted that in *Mangan* McKechnie J. had stated that, in considering the balance of justice, *"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"*.

28. The judge placed significant reliance upon *Mangan*. While he noted that the facts of *Mangan* were almost unique, McKechnie J. had concluded that the action should be allowed to proceed notwithstanding that the delay between the date of the events complained of in 1995 and the probable hearing date of the action would be in excess of twenty five years. In arriving at this conclusion, the judge noted, McKechnie J. took into account a range of factors. These included the fact that the applicant in that case, as here, was insured; that no specific prejudice had been advanced; the availability of what appeared to be full and complete records; and the *"likelihood that, irrespective of the passage of time* [my emphasis], *the evidence of both the second and third defendants and any experts called on their behalf would be heavily, if not almost entirely reliant on those medical records."* For these and other reasons, McKechnie J. considered that, on the evidence then available, there was not a risk of a serious injustice being done to either the second or third defendants in allowing the action to proceed, whereas on the other hand the prejudice to the plaintiff in not being allowed to proceed would be enormous.

29. In this case, the judge was of the view that oral evidence would have a very minor role to play, and that insofar as any evidence of the respondent might contradict the contemporaneous notes of the appellant, it would take very convincing evidence from the respondent to persuade the court that the appellant's contemporaneous note was inaccurate or incomplete, not least because medical practitioners are trained to keep accurate records and appreciate the importance of so doing. Therefore, the judge concluded, the liability of the appellant would turn upon the reasonableness of his diagnosis and the investigations he directed, having regard to the history and presentation of the respondent on the occasions that she attended with the appellant, all of which would be based upon the appellant's own notes.

30. At para. 75 the judge concluded:

"In essence, the case will boil down to whether, having regard to the matters pleaded in the further particulars of negligence, the second defendant ought to have considered an alternative possible cause for the plaintiff's leg pain and directed that a vascular investigation be carried out by an appropriate expert. I am satisfied that resolution of that issue will turn on the expert evidence given in relation to the notes and records and the actions taken thereon by the treating doctors, including the second defendant."

31. The judge also had regard to the likely period of time that it would have taken to bring the proceedings on for hearing even if there had been no delay. He expressed the opinion that it would be unlikely that the proceedings could have been brought on for hearing any sooner than four years from the date of the events giving rise to the complaint, and at that remove the appellant was, in any event, going to be entirely reliant upon his notes.

32. For all of these reasons, the judge concluded that there was not sufficient prejudice to tip the balance in favour of striking out the action against the appellant, notwithstanding the inordinate and inexcusable delay in the prosecution of the proceedings.

Costs Ruling

33. Following upon delivery of his judgment, the judge subsequently received submissions in relation to costs. The respondent sought an order for payment of her costs on the basis that she had been entirely successful. The appellant sought alternative orders. Firstly, the appellant submitted that costs should be borne by the respondent's solicitor on the basis that she had caused an inordinate and an inexcusable delay in the prosecution of the proceedings. Alternatively, it was submitted that, in the circumstances of the case, it would be appropriate for the court to make no order as to costs, having regard to the criticisms made by the judge

of the solicitor for the respondent, because to award the respondent her costs would be to compensate her solicitor for her own misconduct.

34. The trial judge delivered a written ruling on the costs issue on 4th April 2022. He considered that the court had to look at the interlocutory application on a stand-alone basis, and that the respondent, having been entirely successful on the application, was entitled to an order for her costs. The judge was satisfied that there was no reason to depart from the normal rule that applies in circumstances where a person has been entirely successful on an interlocutory application.

Notice of appeal

35. The grounds of appeal may be summarised as follows:

(1) The trial judge erred in concluding that liability in a medical negligence action will turn almost exclusively on contemporaneous records, and that oral evidence would have a minor role to play. There was no evidence before the judge to support such a conclusion.

(2) While the trial judge correctly identified the principles outlined in *Primor,* he applied those principles incorrectly to the facts of the case. The judge accepted that the appellant would suffer some prejudice at the trial of the action by a reason of the delay and the fact that oral evidence would be required, but he erred in also finding that, by reason of the availability of his own notes, the appellant would not suffer prejudice to the extent that he would have an unfair trial. In so finding, the trial judge inadvertently applied the complementary jurisdiction of *O'Domhnaill v Merrick* [1984] IR 151.

(3) The judge erred in relying on *Mangan* because, in that case (unlike in this case) the Supreme Court did not find the plaintiff guilty of inordinate and inexcusable delay.

(4) In reaching his conclusions on the balance of justice, the judge failed to have regard to matters other than prejudice, including:

(i) the reputational damage caused to the appellant;

(ii) the length of time the appellant has had the proceedings hanging over him;

(iii) the fact that the appellant will have to instruct an expert so long after the matters complained of, and the expert will have to apply the relevant medical practice as in place in 2011.

(iv) the attempts of the solicitor for the respondent to excuse the delay were found by the judge to lack credibility.

(5) The judge failed to have regard to the appellant's rights under the European Convention on Human Rights to have the litigation against him dealt with within a reasonable period.

(6) The judge erred in failing to give adequate consideration to the fact that the appellant would have an alternative remedy against her solicitor if the proceedings were dismissed.

(7) The judge erred in awarding the respondent her costs against the appellant, in circumstances where he found the respondent to have been guilty of inordinate and inexcusable delay, and there was no fault on the part of the appellant.

36. While other grounds of appeal were set forth in the Notice of Appeal they were not pursued at the hearing of this appeal.

Respondent's notice

37. In general terms, the respondent says that the judge was correct to conclude that the balance of justice lay with allowing the proceedings to continue, notwithstanding his finding that the respondent had been guilty of inordinate and inexcusable delay. The respondent claims that the trial judge was correct to conclude that the determination of the proceedings will turn almost exclusively on contemporaneous records, and that oral evidence would have a minor role to play. Further, the judge was entitled to rely on the fact that no relevant witnesses were stated by the appellant to have died or to be otherwise unavailable.

38. The respondent does not accept that the judge inadvertently misapplied the complementary jurisdiction of *O'Domhnaill v Merrick*.

39. The respondent states that the judge was correct in relying on the dicta of McKechnie J. in *Mangan*, and correctly applied the principles set out in that decision.

40. The respondent denies that the judge failed to have due regard to other matters referred to in the Notice of Appeal.

41. In a section headed "*Additional grounds on which a decision should be affirmed"* the respondent says that the central allegation in these proceedings is that the respondent lost her leg owing to the negligence of the defendants. So far as the appellant is concerned, the central allegation is that he failed to refer the respondent for a vascular review. There is no suggestion that the appellant has not retained his notes and records in this case and, as with most medical negligence claims, doctors and medical staff are more likely to rely on medical notes and records than on their own memories of events, regardless of the lapse of time between the incident complained of and the trial of the action. Furthermore, the appellant has been on notice of the claim since March 2013. Since the appellant would have access to all of his own notes and records, this is not a case where the passage of time has eliminated a defendant's opportunity to defend a claim, and as such, the appellant has not suffered any specific serious prejudice by virtue of the delay.

42. It is said that the question of liability/causation will be determined on the basis of expert medical evidence, which, in turn, will be assessed by reference to the appellant's notes and records. Any prejudice which the appellant claims to have suffered by reason of the delay (which is denied) must be balanced against the potential loss of access to the court of the respondent (if her proceedings are dismissed) in circumstances where she has suffered the catastrophic loss of a leg.

Submissions of the parties

43. The appellant's central submission is that in deciding where the balance of justice lay, the judge placed too much emphasis on the availability of medical records. In doing so, it is said, the judge placed too much reliance on *Mangan*. Moreover, the appellant contends that the judge determined the balance of justice solely on the basis that whatever prejudice may be suffered by the appellant if the case proceeds to trial, will not be such as to lead to an unfair trial. It is submitted that having identified the correct test to be applied, the judge inadvertently applied the *O'Domhnaill v Merrick* test, which is not applicable in cases where there has been culpable delay on the part of the plaintiff.

44. Having succeeded in establishing inordinate and inexcusable delay on the part of the respondent, all the appellant was required to demonstrate to succeed with his application was that he would suffer moderate prejudice if the matter proceeds to trial. While this does not require the appellant to satisfy the court that he has suffered fair trial prejudice, it is the appellant's contention that he has suffered fair trial prejudice because, notwithstanding the availability of the appellant's notes, he will still be required to give evidence regarding how he believed the plaintiff presented when she attended, and also give his views on what he believed to be the general and approved practice at the time the respondent attended with

him in 2011, and also give evidence on what was his usual practice at that time. It is submitted that this will be far more difficult now given the passage of time.

45. Furthermore, it is said, the respondent has declined to make available the expert report procured on her behalf available, and the appellant does not know the extent to which that expert is reliant on specific instructions regarding how the respondent says she presented to the appellant, or the expert's opinion of the usual practice at the time, or whether the report is solely reliant on medical notes made available to the expert.

46. In any case, as has already been said, the appellant submits that it is unnecessary under this jurisdiction for the appellant to satisfy the Court that he cannot now get a fair trial – it is only necessary for the appellant to satisfy the Court that he has suffered moderate prejudice by reason of the delay, and under *Primor* that may not engage the issue of the fairness of the trial at all, depending on the circumstances of the case.

47. The appellant submits that in considering where the balance of justice lies, the judge failed to have sufficient regard to the likelihood that the respondent will have an alternative remedy in damages against her solicitor in the event of the dismissal of proceedings. While the judge did allude to this argument, he said no more than that it is not the function of the Court to punish errant solicitors, which in the submission of the appellant is an inadequate response to the point, not least because the availability to the respondent of a remedy against her solicitor goes a long way, in the context of weighing the balance of justice, to addressing the prejudice that would be suffered by the respondent in event of the dismissal of her claim

48. The appellant also relies upon other matters, such as that a paramedic upon whose evidence the respondent herself places importance may not be available at the trial. This concerns a paramedic who attended the respondent in the ambulance in which she was brought to hospital. He also relies upon an averment of Ms. O'Donnell that suggests that the respondent was receiving relevant care and treatments as far back as 2004, long before

she attended the appellant. There may therefore be a need for evidence from doctors who previously treated the respondent, and it is not known if they will be available to give evidence. Furthermore, the appellant submits, it is unclear from the further particulars of additional negligence which of those particulars relate to the first named defendant and which relate to the appellant.

49. The appellant submits that the trial judge erred in considering that all of these issues were overcome by the availability of medical records, and relies upon the recent decision of Simons J. in the High Court in *Rooney v HSE* [2022] IEHC 132 in which Simons J. stated, at para. 50:

> *"It would be inaccurate to characterise all such actions as 'documents cases'. The direct evidence of witnesses of fact will still have a bearing on the outcome of the proceedings. Not everything will have been recorded in the medical notes."*

50. So far as *Mangan* is concerned, the appellant submits that that case may be distinguished on a number of grounds. Firstly, the substantive issue in *Mangan* was whether or not the case against the applicant defendant should be dismissed pursuant to O. 19, r. 28 of the Rules of the Superior Courts on the grounds that the plaintiff did not have a cause of action against him. The plaintiff did not have an expert report which supported an action against the applicant defendant, although one of the other defendants did have such a report. While there had been a considerable delay with the proceedings in that case, the Supreme Court concluded that it was neither inordinate nor inexcusable given the nature of the case. Accordingly, the issue of prejudice was considered by reference to the test in *O'Domhnaill v Merrick*, and so the Supreme Court was addressing a higher threshold in that case. Furthermore, the Supreme Court was satisfied that there were countervailing circumstances favouring the plaintiff in *Mangan*, who was severely disabled, a factor which gave rise to

what the Supreme Court referred to as the *"crucial importance for the plaintiff in continuing with the action."*

51. The appellant also places reliance upon the decision of Barniville J. (as he then was) sitting in this court in *Gibbons v N6 (Construction) Limited and Galway County Council* [2022] IECA 112 in which Barniville J. gave consideration to the submission of the plaintiff in that case that there are certain categories in cases in which the risk of prejudice, including moderate prejudice, will be considerably lower than in other cases on the basis of the evidence likely to be adduced at the trial. One such category, it was submitted, are expert evidence cases. At para. 105, Barniville J. stated:

> *"While it is unnecessary to decide for the purposes of this appeal whether the plaintiff is correct in his contention that there are certain categories of cases such as expert evidence cases and documents cases which should be treated differently to other cases, I do not find it particularly helpful to draw such a distinction in principle. It is undoubtedly the case that there are certain cases in which it may be more difficult for a defendant to establish prejudice, even moderate or marginal prejudice, where the issues in the case largely turn on expert evidence or on documents and not on witnesses whose evidence may have become impaired over the passage of time. However, it is difficult to distinguish those cases from others as a matter of principle for at least two reasons. The first is that each case has to be decided on the basis of its own particular facts. The second reason is that the suggested categorisation of these types of cases as being different to other cases is based solely on one form or type of prejudice, namely, 'fair trial' prejudice. As we have seen, there are of course many other forms of prejudice apart from 'fair trial' prejudice which are potentially relevant in the assessment of where the balance of justice lies in a particular case."*

52. The appellant also submits that the trial judge erred in failing to have sufficient regard to the appellant's constitutional and Convention entitlements to have the proceedings determined within a reasonable time frame. Moreover, the appellant is concerned that the respondent's solicitor's dilatory conduct has continued even after the issue of the motion to dismiss, and in the context of this appeal, the respondent's submissions were filed two months late. The appellant relies upon the decision of this Court (Costello J.) in *Doyle v Foley* [2022] IECA 193, in which Costello J. stated, at para. 55:

> *"It is important for the court to bear in mind the constitutional context. While litigants have a constitutional right of access to the courts, all parties have a constitutional right to fair procedures and to a timely resolution of their litigation. Furthermore, the public have an interest in ensuring the timely and effective administration of justice. (Donnellan v Westport textiles and ors [2011] IEHC 11, Cassidy and Millerick). In more recent times a stricter approach has been taken by courts dealing with the delays in the conduct of litigation than in the past. In Comcast International Holdings Incorporated and ors v the Minister for Public Enterprise [2012] IESC 50, Clarke J held that applications to [dismiss] proceedings on grounds of delay would be approached on a significantly less indulgent basis than heretofore*."

Submissions of the Respondent

53. The respondent on the other hand argues that the trial judge correctly identified the distinction between the *Primor* and *O'Domhnaill* tests. In applying the *Primor* test, the judge was correct to conduct an assessment of fair trial prejudice, it being one of the factors to be taken into account when considering whether or not a defendant has suffered moderate prejudice as a result of an inordinate and inexcusable delay. The respondent submits that if

this court is satisfied that the judge did not inadvertently apply the *O'Domhnaill* test, then his conclusions on the balance of justice must stand.

54. The respondent relies upon the decision of Collins J., speaking for this Court, in *Cave Projects Limited v Kelly* [2022] IECA 245, in which, following a detailed analysis of the authorities and principles at play in such applications, Collins J. stated, at para 37:

> *"…. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all of 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".*

55. In submitting that the judge came to his conclusions based on a correct application of the *Primor* test principles, the respondent refers to para. 63 of the judgment under appeal:

> *"The key issue in considering the balance of justice is whether there is a sufficient prejudice to tilt the scales in favour of striking out the proceedings. In this regard as the second named defendant has established inordinate and inexcusable delay on the part of the plaintiff, it is only necessary for there to be moderate prejudice to him for the court to strike out the proceedings. It was not necessary for the second named defendant to establish that he cannot get a fair trial. That threshold only has to be met when there has not been inordinate or inexcusable delay, but a delay of such length and consequence that a defendant can no longer get a fair trial. That threshold does not apply in this case."*

56. This passage, the respondent submits, demonstrates that the judge consciously decided the application on the basis of the *Primor* test, and did not simply consider the application by reference to the issue of fair trial prejudice. So too does the following extract from para. 71 of the judgment:

> *"What the court must do, is look at the particular circumstances of this medical negligence action and ask whether the second named defendant has really suffered even moderate prejudice as a result of the delay that has occurred to date and will occur pending the hearing of the action"*.

57. In submitting that fair trial prejudice is one of the factors that may be taken into account in assessing whether or not there has been moderate prejudice, the respondent relies upon both the decision of Irvine J. (as she then was) in *Cassidy v The Provincialate* [2015] IECA 74 and the decision of McKechnie J. in *Mangan*. In the former case, Irvine J. stated:

> *"It is clear from this decision [i.e. Primor] that the third leg of the Primor test requires the court to carry out a balancing exercise in the course of which it will put the interests of each of the parties and their conduct into different sides of the scales for the purpose of deciding whether the balance of justice favours allowing the case to proceed to trial. In this regard it is to be noted that one of the factors that may go into that scales is whether the delay relied upon gives rise to a real risk that it is not possible to have a fair trial. This question however constitutes the sole consideration for the court when engaged with the alternative line of prejudice to which I will now refer"*.

58. In *Mangan*, McKechnie J. stated that, in considering whether or not an inordinate and inexcusable delay justifies the termination of proceedings 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."*

59. As to arguments made by the appellant that *"documents"* cases and *"expert"* cases do not fall into some special category and should not be treated differently to other cases, the respondent submits that the authorities do recognise that such categories may be treated differently, but only following a case by case assessment. In this regard the respondent relies

upon *Greenwich Project Holdings Limited v Cronin* [2022] IECA 154, a case in which this Court reversed an order of the High Court dismissing proceedings on grounds, *inter alia*, of inordinate and inexcusable delay, and did so having regard to the fact that *"the case in front of the judge sounded in damages and furthermore was a documents case where the dispute concerned the legal implications meaning and effect of the terms of the contract for sale, the legal effect of steps taken and the import of a notice to rescind served in 2014*.". In effect, the respondent submits that the availability of documents may eliminate or significantly reduce any prejudice suffered by a defendant by reason of delay. The respondent also places reliance upon what was said by Clarke J. (as he then was) in *Comcast International Holdings v Minister for Public Expenditure* [2012] IESC 50 wherein he stated, at para. 6.3:

> *"This case can be regarded as a so called 'documents' case, where there are contemporary records of much of the matters which will require to be addressed in evidence. It is of course the case that it is not a pure 'documents' case where the issues turn on the construction of documents and where oral testimony is likely to be of only marginal relevance. In such cases prejudice caused by delay will be non-existent or extremely remote. However, the availability of contemporary records will in my view at least so far as a lot of the issues likely to arise are concerned, minimise any risk of prejudice."*

60. The respondent submits that in this case, the judge considered the availability and relevance of both documents and expert evidence, but he did so in addition to other factors referred to by him, including reputational damage, the fact that the respondent would still have her action against the first defendant if the proceedings against the appellant were dismissed and the likely availability of a cause of action against her solicitor for loss of her cause of action against the appellant, if the application were granted and the proceedings dismissed. Furthermore, the judge also considered that some oral evidence would be

required during the hearing of the case, but gave reasons for concluding that such evidence would have a minor role in this case. The respondent submits that the judge was correct in his conclusion that *"liability will turn on the reasonableness of his [the appellant's] diagnosis, given the history and presentation of the plaintiff on the occasions that he saw her, all of which will be based on his notes."*

61. In the appellant's submission, the judge was correct to conclude that the balance of justice does not favour of the dismissal of the proceedings, in circumstances where the respondent has suffered severe personal injuries through the loss of her leg below the knee and the appellant has not suffered even moderate prejudice arising from the delays that have occurred. That conclusion, it is submitted, was one arrived at within the proper exercise of the judge's discretion, having weighed up all relevant factors, and was one with which this Court should not interfere.

Discussion and Conclusion

62. It is clear from para. 63 of the judgment under appeal (set out at para. 55 above) that the motion judge was very much aware that, in order for the appellant to succeed with his application to dismiss the proceedings, it is only necessary that the delay of the respondent has caused the appellant moderate prejudice, and that it is not necessary for the appellant to establish that he will not get a fair trial as a result of the delay. The judge expressly stated that the latter threshold "*only has to be met when there has not been inordinate and inexcusable delay, but a delay of such length and consequence that the defendant can no longer get a fair trial. That threshold does not apply in this case*."

63. However, in the appellant's submission, having correctly identified the relevant principles, the judge then proceeded to determine the balance of convenience by reference *only* to the question of whether the prejudice suffered by the appellant by reason of the

respondent's delay would lead to an unfair trial. This submission is based upon the fact that the greater part of the analysis of the motion judge focuses on the issue of a fair trial, while saying comparatively little about other issues raised by the appellant in the context of modest prejudice. I will come back to that point later, but first I must address the arguments of the appellant that the trial judge also erred in his assessment of the issue of fair trial prejudice.

Did the Judge err in his assessment of fair trial prejudice?

64. The appellant maintains the judge erred in his assessment of fair trial prejudice in that, while he acknowledged that some oral evidence would be necessary, he did not accord sufficient weight to the prejudice flowing from the need for oral testimony in respect of a number of matters including: how the appellant believed the respondent presented at her consultations with him, the general practice regarding such symptomology at the time (i.e. in 2011) and the appellant's own practice at the time in such matters. The appellant submits that his recall of these matters will inevitably be impaired by the passage of time. Moreover, the appellant contends that he is further prejudiced by the fact that the respondent has declined to share her expert's report and he therefore does not know how the expert has recorded the respondent's instructions as to how she presented to the appellant. The appellant says that the judge should have weighed all of these matters in the balance, but instead gave too much weight to the decision in *Mangan*.

65. In the course of his consideration of this issue (of fair trial prejudice) the motion judge observed that even without there being any delay, the action could not realistically have been brought on for hearing any earlier than four years from the date of the events giving rise to the complaint. He held that at that remove, the appellant was going to be entirely reliant on

his notes, and therefore the fact that the action will now probably come to trial a further eight years later [the judge's estimate at the time of the hearing of the motion] should not prejudice the appellant in the conduct of his defence.

66. I have already quoted at para. 30 above the conclusion reached by the motion judge at para. 75 of his judgment, but it is useful at this point to set it in full out again:

> "*In essence, the case will boil down to whether, having regard to the matters pleaded in the further particulars of negligence, the [appellant] ought to have considered an alternative possible cause for the plaintiff's leg pain and directed that a vascular investigation be carried out by an appropriate expert. I am satisfied that resolution of that issue will turn on the expert evidence given in relation to the notes and records and the actions taken thereon by the treating doctors, including the [appellant].*"

67. Put another way, the trial judge concluded that, so far as the trial of the action is concerned, the appellant was in no worse a position by reason of the respondent's delay than had the litigation been conducted in a timely manner. At the hearing of this appeal, in the course of exchanges with the Court, counsel for the appellant accepted the general proposition that, for the most part in medical negligence actions, doctors do not recall all their patients and specific interactions with them and the proceedings are determined by reference to medical notes and records. Nor did counsel for the appellant take issue with the view expressed by the motion judge that in the event of any conflict between the oral testimony of the respondent and the contemporaneous notes of the appellant, it would take very convincing evidence to persuade the court that the appellant's note was inaccurate or incomplete.

68. While the motion judge reached these conclusions independently of *Mangan*, he found support for them in that judgment, and in particular two factors relied upon by McKechnie J. in refusing to dismiss those proceedings on grounds of delay, being:

> *"The availability of what appears to be full and complete records of the events at and surrounding the birth and thereafter during the plaintiff's stay in Mount Carmel Hospital… [and]….the likelihood that irrespective of the passage of time, the evidence of both the second and third defendants and any experts called on their behalf, would be heavily if not almost entirely reliant on those medical records*."

69. I do not believe that in finding support for his own conclusions in *Mangan*, it can be said that the motion judge *"over-relied"* on *Mangan* as claimed by the appellant. In my view, the motion judge's analysis of this issue accurately reflects the conduct of medical negligence actions and there was no evidence before the court to give rise to any concern that these proceedings will be any different. The motion judge correctly took into account the fact that oral evidence would be required at the trial of the action, but he concluded that that evidence would play only a very minor role in the case. However, as already mentioned, the appellant submits that oral evidence will be required in respect of important matters, such as how the respondent presented to the appellant at her consultations with him and what the practice in respect of such complaints was at the time.

70. As regards how the respondent presented to the appellant, this is quintessentially a matter of doctors' notes and records. The description of a patient's complaints as related by the patient and how the patient presents to the doctor are of fundamental importance to everything that else that follows. The observation of the motion judge that doctors are aware of the importance of such records and are trained to keep accurate records cannot be gainsaid, and nor can his observation that insofar as any evidence of the respondent might contradict the contemporaneous notes of the appellant, it would take very convincing evidence from

the respondent to persuade the court that the appellant's contemporaneous note was inaccurate or incomplete.

71. As to the argument that the appellant may suffer prejudice because medical practice may have changed over the course of the intervening years, and that evidence would have to be provided of what was the appellant's practice at the time, and what was accepted practice at the time, it is unclear to me whether or not this argument was advanced in the court below, but whether it was or not, it is certainly not the subject of any evidence. If there was likely to be any difficulty under this heading, I would have expected that these are matters about which the appellant could have provided an affidavit for the purposes of this application, because they are not dependent upon any evidence that will be given by or on behalf of the respondent at the trial. The appellant has reasonably detailed particulars of the allegation against him, and it would have been possible for him to address specifically any evidential difficulties under this heading now. In the absence of any evidence on the issue, I do not think it was necessary for the motion judge to address it, even if it was raised in argument before him.

72. For the foregoing reasons, I see no error in the conclusion of the motion judge as expressed in para. 75 of his judgment (see. para. 66 above). The passage from the judgment of Clarke J. in *Comcast* relied upon by the respondent is indeed apposite: "*However, the availability of contemporary records will in my view at least so far as a lot of the issues likely to arise are concerned, minimise any risk of prejudice.*" So too are the conclusions of McKechnie J. in *Mangan.* I would therefore dismiss all grounds of appeal that are grounded on an assertion that the appellant has suffered fair trial prejudice by reason of the respondent's delay.

Did the trial judge fail to take account of other prejudicial matters?

73. I turn then to address the question as to whether or not the motion judge in his consideration of the balance of justice fell into error by not considering other issues raised by the appellant and whether or not the appellant has suffered moderate prejudice by reason of the delay. Two other areas of potential prejudice were identified by the appellant; the first being alleged damage to the professional reputation of the appellant by reason of the issue of these proceedings against him, and the second being the burden of having proceedings hanging over him for years longer than is necessary. Apart from prejudicial issues however, the appellant also argues that the motion judge should have taken into account other issues, including the fact that in this case the respondent would have an alternative remedy against her solicitor if the proceedings against the appellant were dismissed, as well as the constitutional and Convention rights of the appellant to have the proceedings against him determined within a reasonable period.

Reputational damage

74. At para. 62 of his judgment, the judge states that the appellant has suffered reputational damage by reason of the proceedings. He does not explain why he came to this conclusion, and there was no evidence of it before him, a point made by counsel for the respondent at the hearing of this appeal. While there is no cross appeal from that finding, counsel for the respondent explained that no cross appeal has been filed because the appellant's notice of appeal is from all of the decision of the motion judge and therefore there was no necessity to file a cross appeal. While the court was not invited by the respondent to set aside this finding of the motion judge, the point being made by counsel for the respondent (as I understand it) was that the judge did not need to address the issue any more than he did in the absence of any evidence of damage to the appellant's reputation.

75. The appellant is correct in his submissions that the motion judge, having found that the appellant has suffered reputational damage, does not explain how he is taking this into account in his assessment of *"moderate prejudice"*. One can only infer that since the appellant did not himself swear an affidavit at all for the purposes of this application, and has not therefore deposed to or provided any evidence at all as to the damage to his reputation, that the motion judge did not consider whatever damage the appellant may have suffered to his reputation by reason only of the issue proceedings to be sufficient, whether by itself or taken together with other factors, to tilt the balance in favour of the appellant and to justify the dismissal of the proceedings.

76. In any case, and whether or not that is a correct inference to draw, in my view where an applicant wishes to rely heavily upon reputational damage in support of an application to dismiss proceedings on grounds of delay, it is necessary for the applicant to provide at least some evidence of damage to his or her reputation, and not simply assert it by way of submission. While the authorities do indeed refer to the potential for damage to a person's reputation by reason of the issue of proceedings (in the case of professional defendants in particular, although Collins J. in *Cave* makes it clear that defendants who are professionals do not enjoy any privileged status) there is no presumption that a person's reputation is damaged by the mere issue of proceedings. Very often nobody other than the parties and their legal representatives and others associated with or involved in the proceedings will even be aware of proceedings. But even where others are so aware, damage to the reputation of the defendant does not follow inexorably just by reason of the issue of proceedings. No doubt there are instances where this is so, but where a defendant relies on reputational damage when seeking the draconian remedy of dismissal of proceedings without trial, some evidence of damage to reputation must be provided for consideration by the court. In this instance, it has not even been suggested that anybody else at all was aware of these

proceedings. In these circumstances, if there was an error on the part of the judge it was in finding that the appellant's reputation was damaged without any evidence at all upon which to base such a finding, but it cannot be said that he fell in to error by failing to consider the issue when weighing the balance of justice. There was nothing of substance for him to consider.

77. Finally, on this point, even if the appellant has suffered reputational damage, it does not follow that this would give rise to a dismissal of the proceedings . As Noonan J. observed in *Gerard McCarthy v The Commissioner of an Garda Síochána* [2023] IECA 224 (in a judgment handed down after the hearing of this appeal), at para.4 :

> *"Although reputational damage is referred to as a prejudice to be considered in an assessment of the balance of justice in several cases, particularly where professional defendants are concerned, it has rarely, if ever, sufficed on its own to warrant dismissal"* .

Burden of proceedings over a long period

78. The same may be said of the argument that the proceedings are more burdensome because of their lengthy prolongation. While it was submitted that there is no need to provide evidence of the obvious, as the authorities make clear, these applications all fall to be determined on the facts of each individual case. What is burdensome to one person is not at all to another, and it is far from clear what burden fell upon the appellant after the initial report of a claim to his insurers – which must arise in every case where there are insurers – until the trial of the action. In this case there was no evidence that the appellant's insurance premium had increased by reason of the fact of the claim or the prolongation of the action.

To the extent that the trial itself may be more burdensome by reason of the delay, that is dealt with above in the context of the fair trial argument.

79. It is unclear precisely what argument was advanced to the trial judge under this heading, but it seems to me that in the absence of any evidence that the duration of the proceedings has been causing an additional burden to the appellant, the motion judge can hardly be said to be in error by not having addressed it, although it might have been preferable if he had done so.

Alternative remedy

80. The appellant acknowledges that the motion judge referred to the possibility of the respondent having a remedy against her solicitor, but submits that his treatment of the issue is erroneous, in that he did not engage with the point in stating only that it is no function of the court to punish errant solicitors. The point that the appellant was making was that such concerns as the court might have in dismissing the respondent's claim against the appellant were more than adequately addressed by the fact that the respondent would have a remedy against her solicitor, should her action against the appellant be dismissed. In other words, the argument has nothing to do with punishing the respondent's solicitor, and everything to do with considering where the balance of justice lies.

81. As authority for this proposition, the appellant relies on the decision of Simons J. in *Rooney,* in which he stated, at para 14:

> *"In a case where the entire responsibility for delay rests upon a professional adviser retained by the plaintiff, then the court can and should take into account the fact that a plaintiff may have an alternative means of enforcing his or her rights, i.e., by way of an action in negligence against that professional adviser (Rogers v Michelin Tyres plc [IEHC] 294 (at pages 10 and 11) and Sullivan v Health Service Executive [2021] IECA 287 (at paragraph 560*)".

82. It must be acknowledged that there is a great deal of force in this submission. However it seems to me that it is not enough, by itself, to sway where the balance of justice lies in this case. I say this for the following reasons.

83. Firstly, while I agree that the availability of an alternative remedy is a factor that should be taken into account when considering the balance of justice, there is no authority for the proposition that an alternative remedy is sufficient, in and of itself, to justify an application to dismiss proceedings. Simons J. did not suggest this to be so in *Rooney*, and in that case the proceedings were dismissed mainly because of the failure of the plaintiff to deliver adequate particulars of his claim .

84. To be fair to the appellant, this argument was not advanced as a standalone argument, but was made in conjunction with other arguments as to prejudice, but, as is apparent, those arguments have been rejected above. Nonetheless it is necessary to say that while the availability of an alternative remedy may bolster or augment an argument in favour of dismissal, in the absence of other factors it is unlikely in and of itself to sway the balance of justice in favour of dismissal.

85. Secondly, it must be open to some doubt whether an action against her solicitor would be an adequate alternative remedy for the respondent for the loss of her action against the appellant. In essence, an action against her solicitor would be one for the loss of the opportunity to pursue the appellant. The assessment of damages in an action against a solicitor for the loss of the opportunity to pursue an action against the original wrongdoer will necessarily entail an assessment of the prospects of success of the original action had it come to trial. This may mean that the value of the action against the errant solicitor will not equate to what is loosely referred to as the *"full value"* of the case against the original defendant. So therefore, while the action against her solicitor might offer some solace – even considerable solace – to the respondent, it seems unlikely that it would result in an award of

damages equivalent to the award which she could expect to achieve by successfully prosecuting her action against the appellant.

86. Thirdly, in considering the balance of justice, it is not at all clear that the decisive factor should be the availability of an alternative remedy against another party for a different negligent act *quoad* the plaintiff, thereby – as Collins J. put in in *Cave* (at para. 37) – potentially allowing a negligent party to *"escape liability that is properly theirs"*. Absent any moderate prejudice to the appellant in the conduct of the proceedings, this would have the appearance of something of a windfall gain to the appellant, and could not be just, and certainly not insofar as the respondent may not recover a fully indemnity from her solicitor, as discussed above

87. Finally, on this point, even though the respondent would still have her action against the first named defendant, the dismissal of the action against the appellant would deny the respondent the opportunity of having a determination as to whether or not the appellant had any responsibility for what befell her in 2011, although it must be said that the respondent did not, at the hearing of this appeal, give any indication that this was of any particular importance to her.

Constitutional and Convention Arguments

88. The appellant's submission that the motion judge did not address the constitutional and Convention arguments in his conclusions is correct, although the judge did make reference to the fact that these arguments were raised. However, many judgments of appellate courts place emphasis on the fact that because a particular point is not mentioned, it is not to be assumed that it was overlooked. The onus remains on an appellant to demonstrate error in the trial court's conclusion and a failure to mention something, without

more, is not sufficient. But that must be seen in the context of the conclusion of the motion judge that the appellant had not suffered even moderate prejudice by reason of the delay. I am not aware of any case in which proceedings have been dismissed solely on the basis of the defendant's constitutional or Convention rights, and without the moving defendant having demonstrated at least moderate prejudice to the satisfaction of the court. The exercise being undertaken by the court in weighing where the balance of justice lies implicitly involves a contest between competing rights; being the right of access to the courts of the plaintiff on the one hand and the defendant's right to determination of proceedings within a reasonable period on the other. This contest is resolved, in the words of McKechnie J. in *Mangan* through an assessment of *"... whether it is unfair to allow the action to proceed or is unjust to strike the action out."*

89. The motion judge conducted such an assessment and, having done so, concluded at para. 76 that *"there was not sufficient prejudice to tip the balance in favour of striking out the action against the second defendant".* That conclusion also has the effect of resolving any contest between the competing constitutional and Convention right of the parties. For the reasons given I am of the view that that conclusion was one arrived at within the reasonable parameters of the judge's discretion and having due regard to the principles applicable to such applications that have evolved in recent years. Accordingly, the appeal from the motion judge's refusal to dismiss the proceedings must be dismissed.

Appeal from the Motion Judge's order as to Costs.

90. The appellant also appeals from the judge's decision to award the respondent her costs, on the basis that the respondent lost the argument on inexcusable delay, and that the trial judge was clearly unimpressed by the arguments raised by the respondent's solicitor by way

of excuse for the delay. The appellant submits that the respondent's solicitor should not be allowed to profit from her own culpable delay. On behalf of the respondent, it was submitted that the motion judge was correct to award the respondent her costs, on the basis that she successfully resisted the appellant's application to dismiss, and that costs follow the event.

91. It is clear that a significant portion of the time taken by this application in the court below was spent on the question of whether or not the acknowledged inordinate delay was also inexcusable. The respondent lost this argument, and it is apparent from his judgment that the judge was unimpressed by the excuses offered by the respondent's solicitor for her delays in progressing the proceedings.

92. Sections 169 (1) (a) and (b) of the Legal Services Regulation Act 2015 *(the "2015 Act")* provide :

> *"169(1) a party who is entirely successful in civil proceedings is entitled to an award of costs against the party was not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstance of the case, and the conduct of the proceedings by the parties including-*
>
> *(a) conduct before and during the proceedings,*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings."*

93. The conduct on the part of the respondent's solicitor was found, after a fully contested hearing, to have caused inordinate and inexcusable delay in the progression of these proceedings. The judge was wholly unconvinced by any of the excuses tendered by the respondent's solicitor by way of excuse for the delay. Any fair reading of the affidavits of the respondent's solicitor and the excuses she offered could lead to no other conclusion. That being the case, it must surely also be the case that it was reasonable for the appellant to have issued a motion seeking the dismissal of the proceedings on the grounds of inordinate and

inexcusable delay, by which I mean it was reasonable for the purposes of s.169(1)(b) of the 2015 Act.

94. I find myself in complete agreement with the submission made on behalf of the appellant that the respondent's solicitor should not be allowed to profit from her own inaction and her failure to progress these proceedings in any timely way. I consider that the motion judge, in awarding the costs of the motion to the respondent solely on the basis that he dismissed the application, and without any regard to the conduct of the respondent's solicitor in the proceedings as a whole, or whether or not it was reasonable for the appellant to issue the motion, fell into error. Regard should have been had both to the conduct of the respondent's solicitor in causing inordinate delay and the fact that the appellant had succeeded in satisfying the court that the delay was inexcusable. I would therefore set aside the order of the motion judge so far as costs are concerned and make no order as to costs in the Court below.

95. So far as the costs of this appeal are concerned, my provisional view is that since each party has enjoyed some measure of success, there should be no order as to costs. I have reached this preliminary conclusion because, while the respondent has clearly succeeded on the substantive issue, she did not abandon the issue as to whether or not the delay was excusable until the opening of this appeal, and the appellant has succeeded in persuading the court to set aside the costs order made in the court below. If either of the parties wishes to contend for a different order, they may, within 14 days from the date of the delivery of this decision, deliver written submissions not exceeding 1,000 words within 14 days of this judgment the opposing party will likewise have 14 days to respond.

96. Since this judgment is being delivered remotely, Noonan J. and Allen J. have authorised me to confirm their agreement with it.