

**BETWEEN****JOSEPH ARTHUR AND DEIRDRE ARTHUR****PLAINTIFFS****AND****JOSEPH GORMAN AND J.A. GORMAN CONSULTING LIMITED****DEFENDANTS****JUDGMENT of Mr. Justice Eagar delivered on the 28th day of July, 2017**

1. This is a judgment in respect of an application by way of notice of motion on behalf of the first named defendant:

(1) For an order dismissing the plaintiffs claim as against the first defendant for want of prosecution.

(2) Further or in the alternative pursuant to the inherent jurisdiction of this Court, an order dismissing the plaintiffs claim as against the first named defendant on the basis of inordinate and inexcusable delay on behalf of the plaintiffs herein, or in the alternative, orders or directions that this honourable Court deems fit.

2. The plenary summons was issued against the two defendants by the plaintiffs on the 15th of January, 2012 claiming damages in respect of loss, damage and expenses arising from the negligence, breach of contract and/or breach of duty by the defendants.

**Background**

3. The background to the pleadings arose from alleged defects in the design of the plaintiff's family home by the defendants. The defendants filed an appearance on the 2nd of March, 2012 and have not as yet delivered a defence.

4. On the 11th of July, 2014 Kearns P. ordered that the proceedings against the second named defendant be dismissed on the grounds that the action was bound to fail as it had no reasonable prospect of success, given that the second named defendant had not been incorporated until the 14th of June, 2004. This date post-dated the completion of works on the property.

5. The plaintiffs' claim states that they retained the first named defendant from early 1999 to oversee the building of a family home, to ensure it was built correctly. The relied on the defendant's expertise in this regard. Based on this retainer, the first named defendant prepared designs and a percolation test in or around February, 1999 for the local authority in support of the planning application. This was submitted to the local authority on about the 5th of March, 1999. The planning application was approved by the local authority on the 1st of June, 1999. The first named defendant as an expert also signed certificates for stage payments to Bank of Ireland, Mullingar at different stages between June 1999 to December 1999.

6. The construction of the house commenced on the 6th of June, 1999 and it was completed in or around early December, 1999 and the plaintiffs moved in on the 12th December, 1999.

7. The plaintiffs identified some dampness many years later, which they assumed was a result of poor ventilation. The plaintiffs claim they were not aware that there was a fundamental defect in the design of their home at that stage. The dampness became a health issue, and as a result the plaintiffs were forced to move out of the house in September, 2009 at considerable financial loss.

8. As a result of this the plaintiffs commissioned reports, which indicated there was a problem with the foundations of the house. These reports were dated the 23rd February, 2011 from Tom O'Brien Consultant Engineer and on the 20th July, 2011 from Padraig Arthurs & Associates. This was the first notification to the plaintiffs that there was a fundamental defect with the foundations of the home as a result of the negligence of the first named defendant.

9. In the report dated the 23rd February, 2011 Tom O'Brien Consultant Engineer Ltd. points out that the plaintiffs engaged the first named defendant to supervise the construction of their house. They relied on the first named defendant's expertise to ensure the house construction was suitable for the site conditions.

10. However, the report finds, *inter alia*, that the defendant failed to discharge his duties in a suitably competent manner. He designed a raft foundation and a knee wall construction that created a sump (a low space that collects liquids). Without a tanking membrane, this caused moisture to gather. This omission has caused a significant amount of damage to the house, and nuisance and discomfort to the plaintiffs.

11. Padraig Arthurs & Associates Chartered Quantity Associates in their report dated the 20th July, 2009 claims the role of the first named defendant evolved into that of a design engineer, when it was discovered that there were different ground conditions where the property was to be built. This report states that this imposed additional responsibilities on the first named defendant and he recommended a raft foundation for the property.

12. Raft foundations are normally calculated and designed by the defendant in his design office. The first named defendant was under an extreme duty of care to carefully address this issue. The report further states that the first named defendant should have advised the plaintiffs that the services of a specialist tanking company should be employed to integrate a system of tanking.

13. On behalf of the first named defendant, it is alleged that the plaintiffs failed to plead in their plenary summons or statement of claim the date of the alleged retainer between the plaintiffs and the first named defendant. The plaintiffs indicate the retainer between the parties was concluded in early 1999 in their replying affidavit and the property was completed in late 1999 over eighteen years ago and some thirteen years prior to the issue of the plenary summons. They say that besides the issue of the statute of limitations, it is clear the plaintiffs were under an obligation in light of the delay pre-commencement to the proceedings to prosecute their claim in a timely manner. The first named defendant states that since the institution of the proceedings over five years ago on the 15th January, 2012, there has been ongoing failure on the part of the plaintiffs to prosecute their claim.

14. The plaintiffs' statement of claim was delivered on the 26th of July, 2012 but no further steps were taken thereafter by the

plaintiffs. The solicitors on record for the plaintiffs at that time applied successfully to come off record on the 1st July, 2014 on the basis of a failure by the plaintiffs' solicitor to obtain instructions. The defendants issued a motion seeking to dismiss the plaintiffs' claim on the ground that no reasonable cause of action was disclosed and/or that their claim was bound to fail and/or was frivolous and vexatious. This was heard by Kearns P. on the 11th of July, 2014.

15. There was no appearance by the plaintiffs and an order was granted dismissing the plaintiffs' claim as against the second named defendant, on the basis that the second defendant had not been properly incorporated as of the date of retainer and/or construction. It was only after the issuing of this application to dismiss the plaintiffs action for want of prosecution on the 22nd of November, 2016 that steps were taken by the plaintiffs, and solicitors came on record for the first named defendant on the 17th of December, 2016, for the first named plaintiff on the 17th of December, 2016 and for the second named plaintiff on the 13th of February, 2017.

16. The plaintiffs say that they had to deal with difficult problems associated with their home and had to re-house themselves with young children. They have four dependent children now aged nineteen, sixteen, five and three and half. They also claim they had to deal with socio-economic issues due to the burdensome financial catastrophe that occurred following from the defects with their home, in the context of the economic downturn. As a result, they say they were unable to fund a legal team to take on the prosecution of the case. The firm of Brendan Irvin Solicitors, Athlone, Co. Westmeath came off record in 2014 seeking to be given funds. From that time, the plaintiffs did try to engage the services of solicitors, but again the issue of funding their litigation was their sole problem in getting solicitors to come on record. Hannon & Co. solicitors and counsel have recently come on record to deal with the matter on their behalf.

#### **Legal Principals**

17. The jurisprudence on dismissing actions for want of prosecution deals with the concepts of fairness and justice. The Court must balance the interest of both plaintiff and defendant and consider:-

- (a) Whether it is fair to the defendant to allow the action to proceed; and
- (b) whether it just to the plaintiff to strike out the action

18. In *Dowd v. Kerry County Council* [1970] I.R. 27 Ó Dálaigh C.J. said that:-

"In weighing the extent of one party's delay, the court should not leave out of account the inactivity of the other party. Litigation is a two-party operation, and the conduct of both parties should be looked at."

In *O Domhnaill v. Merrick* [1984] I.R. 151 Henchy J. stated:-

"In all cases the problem of the court would seem to be to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend."

19. In *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, having conducted an extensive review of the relevant authorities Hamilton C.J. summarised the principles to be applied as follows:-

"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:-

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
- (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
- (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
- (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
  - (i) the implied constitutional principles of basic fairness of procedures,
  - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
  - (iii) any delay on the part of the defendant - because litigation is a two party operation, the conduct of both parties should be looked at,
  - (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
  - (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
  - (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
  - (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

20. The plaintiffs claim that the affidavits and the submissions of the defendant do not demonstrate that there was inordinate or

inexcusable delay, nor that there is a real and serious risk that the defendant, by reason of any delay by the plaintiff, would not obtain a fair hearing, or that the hearing would be unfair as a consequence of any delay. In striking a balance between the plaintiffs' need to prosecute their claim against the defendant and the defendant's basic right not to be subjected to a claim which it could not reasonably be expected to defend, they submit that there is no possibility of fair procedure being denied to the defendant, nor a real or unfair hearing because of any inordinate and inexcusable delay.

The plaintiffs state that the balance of justice is in favour of permitting this action to proceed. The chances of a major injustice being done to the plaintiff for the action to be dismissed is significantly greater than the chances of a major injustice being done to the defendants by allowing it to proceed.

21. The plaintiffs submit that despite the fact that the first named defendant has not delivered a defence, he has set out in his affidavit of the 21st March, 2014 and 18th of November, 2014 both within the affidavits and exhibits thereto detail matters which clearly show that he is in a position to mount a robust defence in the matter.

22. The first named defendant quoted from the decision of *Allan v. Sir Alfred McAlpine and Sons Ltd.* [1968] 2 Q.B. 229 where Diplock L.J. said:-

"The chances of the courts being able to find out what really happened are progressively reduced as time goes on. This was justice to the hazard."

The defendants submitted that where a defendant proves inordinate and inexcusable delay on the part of his plaintiff, to the satisfaction of the court, such a defendant need only establish moderate prejudice as justification for seeking to have the action dismissed on the grounds of delay. There is not an onus on the defendant to establish prejudice such that there is a significant risk of an unfair trial.

23. The first named defendant submits that there is a constitutional imperative to bring an end to the culture of delay in litigation, so as to ensure the effective administration of justice and basic fairness of procedures. The relevant constitutional provisions are Article 34.1, which requires the court to administer justice and Article 43.2, which guarantees the right of the citizen to protect their good name.

24. In *Quinn v. Faulkner t/a Faulkner Garages and another* [2011] 1 IEHC 103, Hogan J. criticised the courts' prior tolerance to inactivity on the part of litigants. Similar sentiments were expressed by Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98 where he states as follows:-

"The courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued ... following such cases as *McMullen v. Ireland* and the European Convention on Human Rights Act, 2003 the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."

25. The first named defendant submitted that from a chronology of the events and proceedings, the delay must be classified as inordinate. The plaintiffs do not dispute this issue in their replying affidavit. Since delivery of the plaintiffs' statement of claim in 2012, no steps have been taken by the plaintiffs to these proceedings.

### **Inexcusable Delay**

26. The plaintiffs in their replying affidavit alleged that the delay in proceedings is excusable delay, insofar as the plaintiffs had difficulty dealing with the problems associated with the house, and had to rehouse young children. No explanation or justification for the five year delay arising from the rehousing of the family to rental accommodation is provided.

27. The plaintiffs also reference dealing with the "financial catastrophe" associated with the problems on the property, particularly against the backdrop of the financial downturn. Reference is made to the plaintiffs in relocating into rental accommodation having to continue to service the mortgage. There is again no explanation provided to explain how the plaintiffs' financial circumstances referenced led to such inordinate delay or how this is relevant to the delay in the plaintiffs' action.

28. The plaintiffs also refer to an inability to fund a legal team to take on the litigation of the case. No explanation is provided as to the delay of the plaintiffs first firm of solicitors to progress the action from January, 2012 to the 1st July, 2014. No explanation is provided as to how it was possible for the plaintiffs to retain their current solicitors within a month of the first named defendant issuing the within the application to dismiss the proceedings for want of prosecution.

### **Balance of Justice**

29. The primary basis of the plaintiffs' claim is that the defendants failed to adequately design foundations for their property to suit the site conditions. The defendants submit that the accrual of the plaintiffs cause of action was in or about December 1999. The plaintiffs did not commence proceedings until the 15th January, 2012. The defendants state that given this passage of time, it is clear that a fair trial for either the plaintiffs or the first named defendant is no longer possible.

30. The impossibility of the fairness of the trial is demonstrated by reviewing the report exhibited by the plaintiffs in their replying affidavit from Pdraig Arthur and Associates dated the 20th of July, 2011, in which the report said:-

"(a) the defendant's retainer evolved into that of a design engineer;

(b) that the first named defendant recommended a raft foundation for the property; and

(c) that the first defendant allegedly communicated all the details with respect to the foundations for the site verbally."

Therefore, the plaintiffs will be relying on conversations held in 1999 to determine the truth or validity of their claim.

31. The defendants also submitted that the plaintiffs further failed to move with due expedition in the light of the fact that the allegations in the case directly impacted on the first named defendant's professional reputation and good name. This breached his constitutional right to a good name and that the impact on the first named defendant's reputation was compounded by the plaintiffs action, in that the plaintiff's unnecessarily joined the second named defendant company to the proceedings.

## Discussion

The reliefs sought are an order dismissing the plaintiffs' claim as against the first defendant for want of prosecution, or in the alternative, pursuant to the inherent jurisdiction of this Court, an order dismissing the plaintiffs' claim as against the first named defendant on the basis of inordinate and inexcusable delay on behalf of the plaintiffs, or in the alternative, an order or direction that the Court may deem fit.

32. An application was made to the High Court in 2014, seeking an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts 1986 and/or pursuant to the inherent jurisdiction of this Honourable Court dismissing or, in the alternative, striking out or in the alternative staying the within proceedings on the grounds that no reasonable cause of action is disclosed and that the claim is bound to fail or has no reasonable prospect of successful and is frivolous or vexatious.

33. The matter was heard by Kearns P. who made an order directing that the proceedings be dismissed against the second named defendant on the grounds that the action was bound to fail against the second named defendant and had no reasonable grounds of success because the second named defendant had not been incorporated until 14th June, 2004, a date that post dated the completion of works on the property. No other order was made by Kearns P. and the court considers this a relevant factor in its consideration of the claim.

34. The jurisprudence in relation to applications for dismissal for want of prosecution are summarised in the judgment of Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459:-

"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:-

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
- (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
- (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
- (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
  - (i) the implied constitutional principles of basic fairness of procedures,
  - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
  - (iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,
  - (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
  - (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
  - (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
  - (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

35. The task for the Court to decide whether or not the delay was inordinate and inexcusable, and if the Court so finds, then the Court must exercise a judgment on whether, in its discretion, the balance of justice on the facts is in favour or against the proceeding of the case. The timeline as set out by counsel for the defendants is as follows:-

- (i) A retainer was paid by the plaintiffs to the first defendant in February 1999.
- (ii) There was a grant of planning permission dated 29th April, 1999. Based on the retainer, the first named defendant prepared designs and a percolation test in around February, 1999 to the local authority in support of the planning application, which was submitted to the local authority on or about 5th March, 1999.
- (iii) The planning application was approved on 1st June, 1999.
- (iv) The first named defendant signed certificates for stage payments to the Bank of Ireland, Mullingar, at different stages from June 1999 to December 1999.
- (v) The construction of the house commenced on 6th June, 1999. This was completed and the plaintiffs moved in on 12th December, 1999. No defence has been lodged.

The Court notes the affidavit of Joseph Gorman filed on 22nd November, 2016, sworn in support of the notice of motion. In that affidavit the first named defendant stated that he did have certain limited involvement in the project comprising the development of the dwelling house, the subject of these proceedings.

36. He said he was approached by the first named plaintiff in early 1999 and asked to carry out a percolation test and trial hole test in connection with an application for planning permission that the first named plaintiff was making with Westmeath County Council for the construction of a house. He said that the planning application form was completed and signed by the first named plaintiff dated 19th February, 1999. He states that the first named plaintiff prepared all the plans and drawings in relation to the project. He also says that the first named plaintiff built the dwelling house himself using direct labour and that he had no real role in relation to these matters. He says that the first named plaintiff did ask for his advice referring to the foundations of the house, and he stated that he volunteered some general advice in relation to the raft foundation design thickness and general reinforcement requirements. He advised the plaintiffs verbally in 1999 that the raft slab should be booted to provide a better detail for the cavity wall around the edge, but the plaintiff did not want to pay for the form work or incur the additional costs of providing a bootied raft slab.

37. It appears that the defendant has a very clear recollection of the issues which are the subject matter of these proceedings. There are also considerable documents which were exhibited to his affidavit in support of the notice of motion.

38. The plaintiff's say that the problems with dampness in the house posed considerable difficulties for them, and they had to re-house with young children. They had four dependent children at the time, who are now aged 19, 16, 5 and 3½. They say that plenary summons was issued by and on their behalf by Brendan Irwin Solicitor on 15th January, 2012 and appearance was lodged by Joseph Gorman on 2nd March, 2012 and the statement of claim was issued on 26th July, 2012 by Brendan Irwin Solicitors.

39. No defence was lodged by the first named defendant.

40. An application was made to the President of the High Court by notice of motion dated 20th March, 2014. Prior to the hearing before the President on 1st July 2014 the plaintiff solicitor applied to come off record.

41. A warning letter was sent to dismiss the proceedings.

42. The motion to dismiss for want of prosecution by way of notice of motion is now before this Court, dated 22nd November, 2016.

43. On the 17th December, 2016 the first named plaintiff was successful in obtaining the services of a solicitor.

44. The first named plaintiff filed a replying affidavit to the motion dated 29th March, 2017.

45. Counsel on behalf of the plaintiff relies on *Brandley and W.G.B. Developments Ltd. v. Hubert Deane t/a Hubert Deane and Associates and John Lohan t/a John Lohan Ground Works Contractors* [2016] IECA 54 to submit that there was no basis to the defendant's claim that there was delay in prosecuting the matter. The Supreme Court has determined on 1st June, 2016 that the issue raised in the application was one of general public importance and allowed an appeal in that case.

46. In *Brandley and W.G.B. Developments Ltd. v. Hubert Deane t/a Hubert Deane and Associates and John Lohan t/a John Lohan Ground Works Contractors* [2016] IECA 54, the defendants pleaded the statute of limitations arising from the delays in the development of housing. The question before the Court of Appeal was whether the respondent's cause of action accrued when the building was built in July 1999, or when the cracks appeared in the building. The Court of Appeal held:-

"The evidence here is that the foundation of these houses was defective, but it did not cause damage at that time. It caused damage in December 2005. The evidence is not that there was hidden damage which became discoverable at a later point; it is that the damage resulting from the defective foundations happened in December 2005."

47. The President of the Court of Appeal stated:-

"In the circumstances, it seems to me that the situation here is clear and that the defendants have pitched the beginning of the period of limitation at too early a point that does not take account of the requirement that damage be actually suffered by the plaintiff in order to complete the cause of action.

I would, accordingly, allow the appeal and remit the matter to the High Court."

48. In this present case, no defence has been lodged which would indicate that the statute of limitations is being pleaded, but nevertheless the Court notes that the defendants left their home in 2009 and subsequently received reports from Tom O'Brien, Consulting Engineer Limited and Padraig Arthurs and Associates in 2011, and instituted proceedings in 2012. The Court is satisfied that there was no delay in issuing proceedings in relation to this matter.

49. The Court however also considers the period from the issue of the statement of claim, the service of the statement of claim on 26th July, 2012, to the application and subsequent hearing by Kearns P. of the motion dated 11th July, 2014, a period of two years. It is noted that the solicitors on behalf of the plaintiff did not seek to motion the defendant for failure to deliver a defence. The Court notes that the defendant did not deliver a defence, but nevertheless the defendants sought to have the case dismissed before Kearns P. pursuant to the inherent jurisdiction of the court on the grounds that no reasonable cause of action was disclosed and/or that the claim was bound to fail or has no reasonable prospect of success and is frivolous or vexatious. This was not acceded to by the President.

50. The next delay resulted after the decision of the President in July 2014, to the motion in this matter on 22nd November, 2016, a period of more than two years.

51. The Court notes that in relation to the period between the issuing of the service of the statement of claim and the decision of Kearns P constituted a period of inordinate delay. However, the Court also takes into account the principles established by Hamilton C.J. in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, that the Court should take into consideration and have regard to delay on the part of the defendant. The Court notes that the defendant has since failed to issue a defence in this matter.

52. The Court finds that the delay from July, 2014 until November, 2016 is both inordinate and inexcusable. However, counsel on behalf of the plaintiffs has submitted that the defendants having lost their solicitor in July 2014 found it difficult to get funds which would be necessary to employ a solicitor. In this regard, the Court notes the replying affidavit of Joseph Arthur sworn on the 29th of March, 2017 in response to the notice of motion dated the 26th of November, 2016.

53. Therein, he states that he accepts that there has been delay in the case, but he says it is clearly excusable delay. He said they had considerable difficulties in dealing with the problems associated with their home and having to rehouse their young children. He

says the four dependent children are now aged 19, 16, 5 and 3½. They had to move initially into rented accommodation, and continued to service the mortgage on the property, the subject matter of these proceedings. This put an additional financial burden on them and as a result they were unable to put a legal team in funds.. He says that the delay in proceeding with their case was excusable and that the justice of the case requires that they as plaintiffs be allowed to pursue their claim.

54. The Court does find that the delay is understandable, but nevertheless in the words of Hamilton C.J., even where the delay has been both inordinate and inexcusable, the Court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the proceeding of the case. The Court exercises its discretion having regard to the constitutional principles of basic fairness of procedures, this Court will allow the plaintiffs to continue their claim against the first named defendant subject to management by this Court.

55. In summary the court is satisfied that the delay between the service of the statement of claim and the judgment of Kearns P. on the 11th of July, 2014

(1) was inordinate but that the failure of the plaintiff to issue a defence constituted a part of that delay.

(2) The court finds that delay between the judgment of Kearns P. and the issue of this motion on the 22nd of November, 2016 was inordinate and inexcusable but in exercising its discretion having regard to what has been stated on behalf of the plaintiffs, this Court exercises its discretion in allowing the plaintiffs case to proceed against the first named defendant subject to strict management conditions.