THE HIGH COURT

[2023] IEHC 212

Record No. 2000/3398P

BETWEEN/

GERALD KELLEHER and ANN KELLEHER

Plaintiffs

-and-

TALLIS & COMPANY LIMITED, JOHN M. HAYES & COMPANY LIMITED, JOHN M. HAYES T/A JOHN M. HAYES & COMPANY, HAYES CONSULTING ENGINEERS and HAYES HIGGINS

Defendants

Judgment of Mr Justice Cian Ferriter delivered this 26th of April 2023

Introduction

1. This judgment addresses applications brought by the first defendant (*"the builder defendant"*) and the second to fifth defendants (*"the engineering defendants"*) to have the plaintiffs' proceedings against them struck out for want of prosecution. The plaintiffs had separately issued their own motion seeking directions for case management of these proceedings. For the reasons outlined in this judgment, I have concluded that the plaintiffs have been guilty of inordinate and inexcusable delay in the prosecution of these proceedings and that the balance of justice favours their dismissal. It follows that the plaintiffs' application for case management falls away.

Background

2. These proceedings concern claims by the plaintiffs against the defendants for damages (including damages for personal injuries) for breach of contract and negligence arising out of the allegedly defective construction of a house in rural Kilkenny which was to be their family home. The plaintiffs entered a written agreement dated 29 April 1996 with the engineering defendants, pursuant to which those defendants were to prepare building drawings and plans with structural specifications and to supervise the construction of the house and related works to completion. By a separate agreement, dated 7 June 1966, the plaintiffs engaged the builder defendant to construct the house in accordance with the plans and specifications to be produced by the engineering defendants. The plaintiffs moved into the house in October 1997 but say that it quickly became clear that the building was fundamentally defective. They claim, in broad terms, that the building was inadequately designed and built in breach of the Building Regulations and that its construction was not properly supervised. They plead a myriad of defects, including to the foundations, the plasterwork and walls, the electrical installations, the insulation, the pipework, the roof and chimneys. As against the builder defendant, it is alleged that the construction work was defective and in substantial breach of the plans, the requirements of the Building Regulations and the principles of good practice in the industry. The plaintiffs plead that they had been advised that, given the level of defects, the only effective way to remedy the breaches is to demolish the building and reconstruct it in its entirety.

3. In addition to a claim for damages for the building defects, the plaintiffs also make a claim for damages for inconvenience and personal injury, particularly stemming from the fact that they were forced to live with their young family in the property for some three years with all its defects, including the absence of a functioning heating system. They say they have been living in rented accommodation since September 2000 when they were forced to move out of the building by reason of its many defects.

4. The defendants mount a full defence to the claims, as set out in defences delivered by them in January 2006. Each of the defences raised a plea in respect of the Statute of Limitations as regards the claim for damages for personal injuries. As we shall come to, this aspect of matters became a source of controversy between the plaintiffs and their lawyers at various points. The builder defendant, in addition to mounting a full defence, has maintained a counterclaim as against the plaintiffs for its unpaid fees.

The defendants' strike out applications

5. The defendants invite the court to strike out the proceedings both pursuant to the provisions of o.122, r.11 Rules of the Superior Courts and, in the alternative, pursuant to the court's inherent jurisdiction.

Order 122, rule 11

6. Order 122, rule 11 provides, in material part, that:-

> *"In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just."*

7. On the face of it, the provisions of o. 122, r. 11 cannot be invoked by the defendants as their strike out motions were issued shortly after a "proceeding" in the action being the issue by the plaintiffs of their motion for case management. While there is some dispute as to when that motion was properly served, there is no doubt that the defendants were aware of the case management motion and appeared in court in answer to that motion in December 2019 before issuing their strike out motions in January 2020.

8. The defendants remained entitled to issue and pursue their motions to have the plaintiffs' proceedings struck out for want of prosecution pursuant to the court's inherent jurisdiction and I will proceed now to deal with those applications.

Legal principles governing court's inherent jurisdiction to strike out for want of prosecution

9. The principles governing the court's inherent jurisdiction to strike out proceedings for want of prosecution are well settled and have been the subject of extensive discussion in case

law. Indeed, it is difficult to think of a procedural area that has received more judicial consideration in recent years.

10. The *locus classicus* in this area is *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459 ("*Primor*" or "*Primor v SKC*"). As put by Costello J. in her recent judgment in *Doyle v Foley* [2022] IECA 193 ("*Doyle v Foley*") (at para. 53), there are three limbs to the *Primor* test:

(1) The defendant must establish that the delay on the part of the plaintiff in prosecuting the claim has been inordinate.
(2) If that is established, then he must establish that the delay has been inexcusable.
(3) If it is established or agreed that 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 proceedings of the case". (Primor p. 475, para. (c))*

11. Again, as has been repeatedly emphasised in the authorities (see, for example, *Doyle v. Foley*, at para. 54) the matters listed by Hamilton C.J. in *Primor* as matters which the court is entitled to take into consideration when considering where the balance of justice lies (such as delay on the part of the defendant, any acquiescence in the plaintiff's delay and prejudice to the defendant) are not an exhaustive list or set of cumulative tests but, rather, operate as a guide to the court in determining where the balance of justice lies as between the parties in any given case. Each case will very much turn on its own facts.

12. As is clear from the jurisprudence subsequent to *Primor v. SKC*, and as I shall come to later, the constitutional and Convention requirements that litigation is determined within a reasonable time are also material factors when assessing the balance of justice. A factor which has loomed large in the jurisprudence is that of the question of any prejudice to the defendant stemming from periods of inexcusable delay, and I will discuss recent *dicta* on that issue later in this judgment when considering the balance of justice in this case. The question of any acquiescence on the part of the defendant in otherwise inexcusable periods of delay is also a potentially relevant factor on the facts of this case which I will look at more closely in the context of weighing the balance of justice.

***O'Domhnaill v Merrick* strike out jurisdiction**

13. In addition to the *Primor v. SKC* line of jurisprudence, the defendants also rely, in the alternative, on the *O'Domhnaill v. Merrick* [1984] IR 151 line of jurisprudence which addresses the court's inherent jurisdiction to strike out proceedings, even where there has not been inexcusable delay, where the lapse of time between the accrual of the cause of action and the trial of the proceedings would be such that there would be a real and serious risk of an unfair trial or, as it has sometimes been put, a clear and patent unfairness in asking the defendants to defend the action at such a remove in time. The defendants contend that the lapse of time here is such that they simply could not now get a fair trial in respect of the allegations against them.

Chronology

14. In order to put the arguments on the strike out applications in their appropriate context, I set out below a chronology of the material steps and events in the proceedings. This chronology has been drawn from chronologies contained in the affidavits and submissions of the parties.

Date	**Event**
29 April 96	Engagement of engineering defendants
28 May 96	Engagement of builder defendant
7 June 96	Standard Law Society / CIF Building Contract with builder defendant
14 June 96	Commencement of works
19 Sept 96	Final account
14 Oct 97	Plaintiffs took up residence
18 Dec 98	Second Named Defendant company dissolved
16 Mar 00	Plenary Summons issued
2 May 00	Appearance of builder defendant
18 May 00	Appearance of engineering defendants
4 Aug 00	Plaintiffs dispense with Hughes Murphy & Co solicitors and retain

	Malcomson Law solicitors
31 Jan 02	Termination of retainer of Malcomson Law
31 Mar 03	Notice of Change of Solicitor (Dillon Mullins)
3 Oct 03	Plaintiffs' Notice of Intention to Proceed
11 Nov 03	Notice of Motion by engineering defendants seeking an Order striking out plaintiffs' claim for failure to deliver statement of claim
27 Feb 04	Order of the Master of the High Court extending time for filing of Statement of Claim
16 Mar 04	Delivery of Statement of Claim
26 Mar 04	Notice of Particulars – engineering defendants
25 Sept 04	Inspection of property by defendants' experts
30 Mar 05	Motion to amend Plenary Summons to include claim for personal injuries
16 June 05	Notice of Change of Solicitor – Rollestons Solicitors for First Named Defendant
27 June 05	Order permitting Plaintiffs to amend Plenary Summons
25 July 05	Motion of builder defendant to stay case to Arbitration struck out
1 Sept 05	Notice for Further and Better Particulars – engineering defendants
16 Sept 05	Replies to Notice for Particulars
5 Dec 05	Builder defendant issues Notice of Indemnity & Contribution against engineering defendants
3 Jan 06	Defence and Counterclaim of builder defendant
10 Jan 06	Defence of engineering defendants
13 Jan 06	Notice for Particulars issued by Plaintiffs
20 Jan 06	Notice of Discharge of Solicitors by Plaintiffs
22 Mar 06	Notice of Trial issued by engineering defendants
27 Mar 06	Plaintiffs issue motion to set aside Notice of Trial
26 April 06	Replies to Notice of Particulars
26 April 06	Plaintiffs' Reply to builder defendant's Defence and Counterclaim
28 May 2006	Order setting aside engineering defendants' notice of trial
29 June 2006	Plaintiffs' Reply to engineering defendants' Defence
29 Aug 06	Plaintiffs set case set down for trial
13 Nov 07	Plaintiffs' Motion seeking issue of Statue of Limitations be tried as preliminary issue

14 Dec 07	Notice of Motion seeking discovery by engineering defendants
14 Jan 08	Order refusing application to hear preliminary issue pursuant to Order 25
6 Feb 08	Notice of Appeal to Supreme Court against preliminary issue order refusal
23 April 08	Order for Plaintiffs to make Discovery
10 June 08	Plaintiffs' affidavit of Discovery
23 Nov 11	Notice of Appointment of Solicitor – James Cody & Sons for Plaintiffs
13 Dec 11	Plaintiffs' Notice of Intention to Proceed
14 Apr 14	James Cody & Sons file motion to come off record for plaintiffs
15 Sept 14	Order striking out the Plaintiffs' Supreme Court appeal re prelim issue
28 Jan 15	High Court refuses to allow James Cody & Sons to come off record
16 June 15	Notice of intention to proceed
28 Oct 16	James Cody & Sons file further motion to come off record
07 Feb 17	Order for James Cody & Sons to come off record
22 Oct 19	Notice of Intention to Proceed
12 Nov 19	Plaintiffs issue Motion seeking Case Management
16 Jan 20	Builder defendant issues Motion to Strike Out
17 Jan 20	Engineering defendants issue Motion to Strike Out

Inordinate Delay

15. There is no question but that the delay between the institution of these proceedings in March 2000 and the issue of the strike out motions in January 2020, some 20 years later, is inordinate. I will accordingly turn to the question of whether that delay can be regarded as excusable within the meaning of the authorities.

Inordinate delay excusable?

The plaintiffs' main point on excusability: their involvement in related litigation

16. Before addressing the various periods of allegedly inexcusable delay, it is necessary to set in context the plaintiffs' "big picture" answer to the overall delay in prosecution of these proceedings.

17. The plaintiffs filed a lengthy replying affidavit to the strike out applications which set out, in considerable detail, what was going on in the 20 years in question and why they contend that any delay in that period is excusable. In short, the plaintiffs attribute the various tranches of time where little was progressed in the proceedings to difficulties with advice from their legal advisers in relation to the potential application of the statute of limitations to their claims (in particular to the personal injuries claims in the proceedings) and to a whole suite of litigation (much of which has been ongoing until very recently and was certainly ongoing at the time the strike out motions were issued) in which the plaintiffs became embroiled, both as plaintiffs and as defendants and which related to the defective building or these proceedings. As Mrs. Kelleher put it in her replying affidavit:

> *"Since 1998 when we sought legal redress in respect of our defective home ten* [sic – I count seven] *legal actions had been instituted arising from the construction and the various legal retainers we've had in pursuit of the legal claims thereto. Most of these actions have been an enormous burden on our time as well as mentally, physically, financially."* (Ann Kelleher affidavit, 7 February 2020 ("Mrs. Kelleher's affidavit") , para. 103)

18. The plaintiffs aver (at para. 104 of Mrs. Kelleher's affidavit) that:

> *"The facts of the protracted history of the case on the defective construction of our home show conclusively that the Statute issue arising on the claim to breach and negligence against the defendants explains the delay. On account of this issue four legal firms retained by us failed to progress the case to hearing. The Statute issue gave rise to a professional negligence action commenced in 2006, the relevance of which was emphasised to us by the Supreme Court in 2011."*

19. In broad summary, those proceedings include the following:-

(i) Proceedings issued in March 1999 by the electrical subcontractor who worked on the house, seeking recovery of his fees. It appears that these proceedings were ultimately struck out before the District Court in 2002, in the Kellehers' favour, with that strike out being upheld in the Circuit Court in 2005.

(ii) High Court professional negligence proceedings issued by the plaintiffs against Malcolmson Law solicitors in September 2003. It appears that, while the summons was issued, it was not served within twelve months and an order for renewal of the summons was the subject of a successful set aside application by the defendants in December 2006, an order upheld by the Supreme Court on appeal in April 2011 (at which time the Supreme Court made comments to the effect that the plaintiffs had not been well served by certain of their legal advisors to that point).

(iii) Malcolmson Law solicitors issued Circuit Court proceedings against the plaintiffs in September 2005 seeking professional fees for their services on this case. These proceedings were, according to Mrs. Kelleher's affidavit, transferred to the High Court in December 2011 where "there being an existing action between the parties in that Court" i.e. the professional negligence proceedings referred to at (ii) above. I was told at the hearing of the strike out motions before me that Malcolmson Law had successfully obtained judgment against the plaintiffs in these proceedings during the course of 2022.

(iv) High Court professional negligence proceedings issued in 2006 by the plaintiffs against Dillon Mullen solicitors.

(v) Circuit Court proceedings issued in May 2009 by AIB against the plaintiffs which the plaintiffs say related to the recovery of a €25,000 loan provided by AIB to them to fund these defective building proceedings (the plaintiffs say this was a loan advance by AIB on the undertaking of their then solicitor that it would be repaid out of the damages from this defective building case). Judgment was awarded to AIB on appeal to the High Court in February 2012.

(vi) High Court proceedings issued by AIB in 2016 against the plaintiffs seeking a well charging order, a possession order and an order for sale in respect of the earlier loan judgment. I was told at the hearing of the strike out motions before me that a compromise was reached between the plaintiffs and AIB and that ultimately no order was made in favour of AIB in respect of their property.

(vii) Circuit Court proceedings issued in June 2009 by Mullins Lynch Byrne solicitors (formerly Dillon Mullins) against the plaintiffs in relation to a claim for professional fees for work done by that firm for the plaintiffs in respect of these defective building proceedings. There is another very lengthy history in respect of these proceedings which appears to have culminated in these proceedings being struck out, by agreement following case management, in July 2019. Indeed, as we shall see, the plaintiffs regarded determination of those proceedings as clearing the way for seeking case management of these defective building proceedings.

20. The authorities suggest that periods of delay attributable to delay by a plaintiff's solicitors will not be regarded as providing the plaintiff with an excuse for such delay when met with a strike out application. *Delany & McGrath on Civil Procedure* (4th edn, 2018) summarise the case law to date on this issue as follows:

> *"There is also evidence of a reluctance to excuse delay on the basis that it is attributable to a plaintiff's legal or other professional advisors, although differing views have been expressed on this issue. In Gilroy v. Flynn Hardiman J commented that* "the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the Plaintiff personally, but of a professional advisor, may prove an unreliable one" *similarly, in Rogers v. Michelin Tyre plc, Clarke J stated that as a result of Gilroy less weight should be attached to the fact that the delay was accepted as being attributable to the plaintiff's solicitors. These statements were referred to by McMenamin J in McBrearty v. Northwestern Health Board who stated that as a result of the inordinate delay which had occurred in the case before him, there was a particular duty on the plaintiff's solicitor to ensure that the proceedings moved* "with very great expedition". *He added that because of the very extensive amount of time which had elapsed in the matter before him, he considered that even in the circumstances of an absence of culpability on the part of the plaintiff culpability might nonetheless be imputed to the plaintiff by virtue of delay on the part of the solicitors in determining whether the delay was inexcusable. This statement was referred to by Ni Raifeartaigh J in McAndrew v. Egan Daughter & Co., who expressed the opinion that it was also relevant to situations where the*

> *plaintiff's difficulty was in retaining legal representation in the first place. In her view* "if there is an onus on the plaintiff to advance their proceedings even where he or she is legally represented, there must be a similar onus to do so where he or she is not, provided a reasonable period of time to find a new legal team has been allowed to pass."

21. I adopted the *dicta* of Ní Raifeartaigh J. in *McAndrew v. Egan* in my decision in *Scannell v. Kennedy* [2022] IEHC 169. In my view, on the facts before me, the fact that the plaintiffs may have become embroiled in disputes with their solicitors, leading to delay in prosecution of the underlying proceedings, should not be regarded as excusing that delay when applying the *Primor* principles. The onus remained on the plaintiffs to advance their proceedings. Equally, the fact that the plaintiffs became involved in a series of other litigation related to the defective building and its litigation does not in principle excuse their delay in prosecuting these proceedings. The material point in these contexts is that it is not the defendant who has caused or contributed to the delay, nor is the delay caused by awaiting some reasonable step in the prosecution of the proceedings (such as obtaining an expert report or counsel's advices). Notwithstanding difficulties with solicitors and other litigation, of the type that arose here, the obligation remains on a plaintiff to prosecute his or her proceedings and the courts remain under an obligation to ensure expeditious determination of proceedings, in light of a defendant's rights to trial with reasonable expedition and the public interest in the efficient administration of justice. However, depending on the precise nature of the cause of such delay, the court might well have regard to the cause of the delay when assessing the balance of justice.

22. There is no doubt that the plaintiffs became drawn into a vortex of other litigation after the commencement of these defective building proceedings. The other litigation can, at least at a broad level, all be said to relate in some shape or form to the defective building litigation. The litigation against two of their former sets of solicitors appears to have stemmed from the raising of a Statute defence against the plaintiffs' personal injuries pleas and a failure by the later firm of solicitors to serve the first set of professional negligence proceedings in time. The AIB litigation related to a loan to fund the litigation. The actions taken by the two formers sets of solicitors were for recovery of fees relating to the building litigation. The electrical subcontractor's case directly related to the building project itself. However, importantly, the defendants to the defective building proceedings were not parties to any of this other litigation.

In so far as the plaintiffs contend otherwise, it must be said that the defendants were perfectly entitled to raise the Statute defences pleaded in these proceedings and rows between the plaintiffs and their solicitors as to how best to deal with those defences are not the fault of the defendants and do not reasonably excuse the plaintiffs not progressing their case.

23. The plaintiffs contended in their submissions that "*the facts deposed attest that we are victims of a deliberate wrong by our legal representatives in advising and handling of the case. They attest to what the Supreme Court was referring to when it said in its judgment in 2011 in related proceedings that we have not been well treated by certain other legal advisors and have a ground of complaint. That deliberate wrong is the reason for the protracted history of our case.*" However, it is important to note that the plaintiffs were not successful in their professional negligence proceedings and there is no court finding that they were the victims of negligent advice or, more particularly in this context, that any such that advice prevented them from continuing to prosecute these proceedings. Even on their own case, they had dispensed with solicitors by June 2006 and did not engage new solicitors for over 5 years. Accordingly, I cannot accept the general contention advanced on behalf of the plaintiffs that the entire period of delay in the prosecution of these proceedings can be excused as resulting from difficulties with their former legal advisers and/or by the suite of other litigation in which they became embroiled during the 20 year period.

Analysis of periods of delay and whether excusable

24. In broad terms, four periods of delay, have been identified by either or both sets of the defendants as involving inexcusable delay on the part of the plaintiffs. I will analyse each of these four periods of allegedly inexcusable delay in turn below.

(i) pre-proceedings delay between accrual of cause of action in 1997 and issue of proceedings in March 2000

25. As we have seen, the relevant building and design/supervision agreements in respect of which the plaintiffs sue were entered in April and June 1996. The building (and the supervision of its construction) were completed in 1997. The plaintiffs moved into the house in October 1997. The plaintiffs say that difficulties with the building thereafter became manifest. The plaintiffs engaged experts and sought legal advice during 1998. Preliminary reports were

furnished by experts in the latter part of 1998. The proceedings were issued, at least in respect of the breach of contract and negligence aspects of the case, well within the six-year limitation period applying to those claims. It all the circumstances, I do not believe that there has been inexcusable pre-proceedings delay.

(ii) post-proceedings delay between entry of appearances in May 2000 and delivery of statement of claim in March 2004

26. In my view, there is inexcusable delay in the period from when the defendants entered appearances in May 2000 and the issue by the engineering defendants in November 2003 of a motion to strike out the plaintiffs' claims for failure to deliver a statement of claim. (This motion was struck out with directions to deliver a statement of claim, which was delivered in March 2004). The plaintiffs say that this period of delay is excusable as resulting from difficulties resulting from a number of changes of solicitor; they dispensed with their first set of solicitors in August 2000; they terminated their retainer with their second set of solicitors in January 2002 and thereafter engaged a third set of solicitors but those latter set of solicitors did not file a notice of change of solicitor until March 2003. A notice of intention to proceed was served on behalf of the plaintiffs in October 2003 and the engineering defendants then issued their motion to strike out the plaintiffs' claim for failure to deliver a statement of claim. While, as noted by Collins J. in *Cave Projects v. Gilhooly* [2022) IECA 245 ("*Cave Projects*"), at para. 41, identifying precise periods of delay can be more art than science, and allowing for a reasonable period to dispense with solicitors and engage new solicitors, it seems to be reasonable to attribute a period of inexcusable delay of 3 years to this tranche of time.

(iii) delay in period from the filing of the Supreme Court appeal in February 2008 to the strike out of that appeal in September 2014

27. The next period of delay which, in my view, it is not fully excused is the period between the delivery by the plaintiffs of their discovery in June 2008 (some four months after they lodged their appeal to the Supreme Court against the High Court's failure to order the trial of a preliminary issue) and the striking out of their Supreme Court appeal in September 2014.

28. The relevant events in this period are as follows. The plaintiffs brought an application to have determined as a preliminary issue the question of the application of the Statute of

Limitations defence to their personal injuries claims. (At this time they were acting for themselves as they had discharged Dillon Mullins solicitors in January 2006). This application came before the High Court on 14 January 2008. Somewhat oddly, the High Court order records "no order" as the order made on the application. At all events, it is clear that the plaintiffs' application was not acceded to by the High Court. The plaintiffs then lodged an appeal against the High Court order to the Supreme Court on 6 February 2008. The next step taken by the plaintiffs in these proceedings, and the last step for some considerable time, was the delivery of their affidavit of discovery on 10 June 2008. Nothing was done to advance the appeal for the next number of years, although it was not disputed by the defendants that there were lengthy delays in having appeals heard and determined by the Supreme Court around this time.

29. It is clear from the plaintiffs' own evidence that they took a view by 2011 that they did not want to prosecute this appeal. Mrs. Kelleher, in her replying affidavit, avers that in July 2011 James Cody & Co. Solicitors accepted instructions in the building case and that the plaintiffs, thereafter, "instructed our new solicitors to withdraw the Supreme Court appeal and the Statute pleas so that our building case might be proceeded with immediately." A letter of 25 July 2011 from James Cody & Co. appears to acknowledge this instruction. However, it appears that the notice of change of solicitors was not filed until 23 November 2011 and that James Cody & Co. did not receive papers from the plaintiffs until 14 February 2012. Correspondence exhibited in the affidavits before me includes a letter from James Cody & Co. to the plaintiffs of 3 July 2012 which noted the plaintiffs' instructions *"to have the Supreme Court appeal on the limitation question withdrawn to facilitate setting down of the main action"*.

30. Mrs. Kelleher avers that the plaintiffs were informed on 9 May 2013 by James Cody & Co. that the withdrawal of the Supreme Court appeal so as to allow the building case proceed was being held up by the defendants over the issue of costs (Mrs. Kelleher's affidavit, para. 94). It appears that the plaintiffs then objected to any withdrawal of the appeal on the basis they would have to pay costs of the defendants and communicated that position to their solicitors by letter of 28 May 2013. I was not furnished with correspondence between James Cody & Co. and the defendants' solicitors in relation to the proposed withdrawal of the Supreme Court appeal. It is difficult to see what material costs would have been incurred by the defendants in relation to the appeal given that it had not by that point come before the Supreme Court or been

called on for hearing. In any event, if the plaintiffs did wish to withdraw the appeal, they had to bear any costs consequences of that step.

31. Ultimately, the appeal was struck out in September 2014, it appears in the context of a *"clear out"* call over by the Supreme Court in respect of dormant appeals

32. It does not seem to me that the plaintiffs can excuse all of the period up to the strike out of the Supreme Court appeal on 15 September 2014. Given that Supreme Court appeals were, in many cases, taking up to 3 years or more to come on in this period, I think the plaintiffs may have had reasonable excuse for the lapse of time between lodging the appeal in February 2008, the delivery of their discovery in June 2008, and the decision communicated to their new solicitors in July 2011 to withdraw the appeal. This is to give the plaintiffs the benefit of the doubt as to whether all of that period is excusable.

33. I also have regard to the fact that there appears to have been some discussion with (at least) the engineering defendants' solicitors about a potential joint inspection of experts in November 2012 (as I shall come to in more detail later) albeit that this engagement does not appear to have led to any such inspection occurring at that time.

34. I accordingly take the view that there is a minimum period of inexcusable delay of 3 years in this tranche of time.

(iv) September 2014 to August 2019

35. The next period of inexcusable delay in the plaintiffs' prosecution of these proceedings occurred between September 2014 when the Supreme Court appeal was struck out and the start of August 2019 when the plaintiff wrote to the defendants indicating their intention to bring a case management motion in these proceedings and inviting the defendants' consent to same. While the plaintiffs seek to excuse this period as being a period when they were preoccupied with the various other pieces of litigation and, in particular, the professional negligence proceedings against Dillon Mullins (which involved various outings in the High Court and Court of Appeal), as already explained, the defendants were not involved with that other litigation and that other litigation does not provide the plaintiffs with an excuse for the failure to take any material step in these proceedings in this period. Again, as I shall come to later in the context of the question of any acquiescence on the part of the defendants in the plaintiffs'

delay, I have regard to the fact that there was sporadic communication between the engineering defendants' solicitors and the plaintiffs' solicitors in the period May 2015 to March 2016 on the question of a potential joint expert inspection. Even allowing some part of this period as offering an excuse for lapse of time, in my view there is at least 4 years of inexcusable delay in this period.

A further general excuse offered for the delay

36. Before concluding on the question of the overall periods of inexcusable delay, it is necessary to briefly address a contention on the part of the defendants as to another general reason to excuse the overall delay. That contention was found in a supplemental affidavit of the plaintiffs sworn by Mrs. Kelleher on 27 February 2023 in the context of the strike out motions in which it was asserted that fundamental to the protracted history of the legal proceedings was the planning application which led to the grant of permission by Kilkenny County Council for construction of their home.

37. Mrs. Kelleher averred that the grant issued on foot of plans and a building specification furnished by an engineer then in the employment of the County Council. Mrs. Kelleher says that this engineer was Finbarr Coughlan, now unfortunately deceased. Mrs. Kelleher averred that the plaintiffs *"had no idea that the engineer was prohibited from carrying out such work"*. The plaintiffs exhibited a copy of the planning application form as sent to Kilkenny County Council in respect of their proposed home and alleged that this form cited a different engineer to Mr. Coughlan as the person who prepared the drawings. The plaintiffs aver that the engineer named on the form as having prepared the drawings was a stranger to them *"and to the plans and building specification prepared and submitted in 1995 seeking grant of planning permission"*. The plaintiffs allege that they believe the form was altered after its completion and signing and allege that both defendants were aware that planning permission had been granted on foot of plans and building specification furnished by an engineer of the Council when they entered into their contracts with the plaintiffs. The plaintiffs allege a form of malfeasance arising from these matters and seek to contend that this malfeasance was the reason for the inordinate delay in the issuance and prosecution of the proceedings.

38. I do not see any link between this alleged malfeasance and the delay in the proceedings. Insofar as the plaintiffs now wish to make an issue in respect of the occupation of the individual

who originally prepared the drawings for their home, that issue has not been pleaded and that person was not joined as a defendant to the proceedings. Insofar as the plaintiffs now say that an issue arises as to any deviation between the plans as originally prepared by Mr. Coughlan and the detailed construction drawings prepared by the engineering defendants, the plaintiffs' pleaded case relies on negligence by the engineering defendants in the construction drawings prepared by them and their subsequent supervision of the construction. Whatever its potential relevance as an issue in the proceedings (and that relevance is not at all clear), this matter simply cannot excuse the various periods of delay which I have identified as inexcusable in the preceding section of this judgment.

39. In conclusion on the question of inexcusable delay, for the reasons set out above, in my view there is the total period of some 10 years inexcusable delay in this matter. This is a very significant period of inexcusable delay on any view.

40. It is accordingly necessary to turn to the question of the balance of justice.

Balance of Justice

41. As the authorities make clear, the question of the factors to be weighed in the balance of justice will inevitably be fact sensitive. I approach my analysis of the question of the balance of justice in this case by looking at the factors weighing in the plaintiffs' favour against strike out (including the nature of the plaintiffs' claims; the plaintiffs' difficulties with their legal advisors and the other, related, litigation which the plaintiffs had to deal with over the 20 years); the defendants' alleged culpable delay or acquiescence in the plaintiffs' delay; the length of the inexcusable delay; the court's obligation to ensure expeditious determination of proceedings and the prejudice faced by the defendants if the proceedings were allowed to continue at this remove from the events they are concerned with.

Balance of Justice – factors weighing in plaintiffs' favour

42. There are a series of matters which should properly be weighed in the balance of justice in favour of the plaintiffs when considering whether or not it would just to strike out the plaintiffs' proceedings for want of prosecution.

43. In weighing the matters in the plaintiffs' favour when considering the balance of justice, I have had regard to their personal circumstances as the plaintiffs have urged upon me and in particular to the following:-

(i) the nature of the plaintiffs' claims;
(ii) the plaintiffs' difficulties with their legal advisors;
(iii) the other, related, litigation which the plaintiffs had to deal with over the 20 year period.

44. I discuss each of these matters in turn below.

(i) Nature of claims

45. Firstly, there is the nature of the plaintiffs' claims in these proceedings. The proceedings concerned a claim for damages for fundamental defects to their family home, which defects have resulted in them not having their own home and being forced to live in rented accommodation for over 20 years now. The plaintiffs say that the upshot of the defendants' breach of contract and negligence is that they were left with a home that was dangerous, uninsurable and uninhabitable. They have been unable to occupy the house since 2000. They allege that the level of defects are such that the house will have to be demolished and rebuilt. They allege they have suffered personal injuries in the form of huge stress and inconvenience to their personal and family lives. The claim is for a substantial level of damages (including special damages of €775,000 claimed in the statement of claim for proper reconstruction of the house). The plaintiffs aver that:

> *"Instead of enjoying the beautiful home we sought to build for our family in the country we have had to live in a substandard house half the size in a housing estate at rent we could ill afford on a single income with five children and for many years on a single pension income. Instead of having the pleasure and security of our own home we have lived with the insecurity of a tenancy from month to month."*

46. The plaintiffs have put before the court a copy of their expert reports which, on the face of them, contain very critical findings as to the state of the building as built. The plaintiffs' principal expert in his report dated June 2000 states that his *"investigation indicated a*

significant number of problems with the premises. These problems result from the combination of poor quality of workmanship and lack of design information." The report expresses the view that *"the construction is in substantial breach of the building regulation requirements"*. Among the findings were the following:

(i) the foundations were generally narrower and shallower than specified
(ii) the construction of the ground floor was in significant breach of the drawings
(iii) the walls have a significant amount of structural cracking caused by the combination of movement of foundations at construction joints, thermal shrinkage and outward movement of the roof at eaves level
(iv) the chimneys are too slender with severe cracking at eaves level and are presently unsafe and may collapse
(v) the first floor ceilings have extensive cracking
(vi) the roof structure has many significant structural problems including that the joists are close to failure and inadequate to carry the design loads and that the outward thrust of the roof could cause wall failure.

47. The plaintiffs' electrical expert's report (dated November 1999) expressed the view that the electrical installation "*in its present state will not allow a reputable electrical contractor to supply an electrical installation completion certificate to the ESB*" and that the survey showed that "*many bad workmanship practices were adopted throughout the installation*" and recommended that ETCI (Electro Technical Council of Ireland) and workmanship issues should be addressed "as quickly as possible". The electrical issues identified included overloading of circuits, non-earthing and unprotected neutral cables which *"could contribute to a hazardous situation"*.

48. While, of course, the court has not seen any expert evidence on behalf of the defendants, and full defences have been filed, I have regard to the fact that on the basis of the (untested) intended expert evidence of the plaintiffs, the plaintiffs clearly have a stateable case.

49. The plaintiffs' place particular reliance on the case of *Cavanagh v. Springhome Developments Ltd & Martin Curran* [2019] IEHC 496 where Noonan J., in refusing to strike out a claim for damages for a defectively-built home (in the context of some 6 years' inexcusable delay), placed emphasis on the fact that the proceedings concerned the plaintiff's

family home where expert and documentary evidence would likely be more important than oral evidence as to fact. I accept that these are factors that would weigh in principle in a plaintiff's favour on such a strike out application, and I give all appropriate weight to the fact that a house intended as the plaintiffs' family home is in issue in these proceedings. That said one has to be cautious in seeking to "cut and paste" findings in one strike out application to another as underlying facts inevitably differ; in the *Cavanagh* case, for example, the defendant could not point to any specific prejudice if the case proceeded. Furthermore, as I shall come to, the case before me is not one which could be regarded as a pure "expert and documents" case.

(ii) Difficulties with their solicitors

50. I think it is appropriate to also weigh in the plaintiffs' favour in assessing the balance of justice the fact that both the High Court and Supreme Court, in the context of an application to renew a plenary summons in the plaintiffs' first set of professional negligence proceedings, commented to the effect that the plaintiffs had not been well served by certain of their legal advisors to that point. Hardiman J., on the plaintiffs' appeal against the refusal of the High Court to extend the period for renewal of a summons in the professional negligence proceedings against Malcolmson Law Solicitors, said in his judgment on 1 April 2011 that *"There is no doubt on the papers before the court that Mr. and Mrs. Kelleher have not been well treated by certain of their legal advisors"*. Hardiman J. stated that *"The Kellehers have a ground of complaint which appears from what we know to be a significant one"*. It should be emphasised that no finding of professional negligence has been made by any court in either of the plaintiffs' two sets of professional negligence proceedings. I nonetheless have regard in weighing the balance of justice to the fact that the plaintiffs had difficulties with their solicitors and that this appears to have led the plaintiffs to decide to act for themselves from June 2006 to mid-2011.

51. I also have some regard to the difficulties which the plaintiffs had with their fourth set of solicitors, which included a successfully opposed motion to come off record issued in April 2014 and determined in the plaintiffs' favour in January 2015 .

(iii) other litigation

52. As noted earlier, while not providing an excuse for their delay, I believe it is appropriate to weigh in the balance of justice the considerable toll on the plaintiffs in terms of time, money and mental and emotional resources resulting from the large number of other pieces of litigation which they had to contend with during the 20 year period of these defective building proceedings. As already noted, all of the litigation related in some shape or form to the original building and its litigation.

53. The plaintiffs aver that the protracted litigation related to their home had taken over their lives for 22 years and that it has overshadowed all major family life milestones in that period. The plaintiffs aver that Noonan J. acknowledged on 9 May 2019 that they had *"been through the most awful ordeal"* for over 20 years in trying to progress their case, an ordeal which he surmised had *"taken a huge toll"*. The plaintiffs also record Noonan J. in the context of case management of the professional negligence proceedings, commenting that the saga the plaintiffs had been through was *"extraordinary"* in his experience.

54. Accordingly, I place weight in assessing the balance of justice on the ordeal which the plaintiffs endured arising from other litigation linked to their defective home and this litigation during the course of the 20 year period.

Defendants' alleged culpable delay and/or acquiescence in plaintiffs' delay

Alleged culpable delay on part of defendants

55. The plaintiffs claim that the defendants were culpable in the delay and/or acquiesced in the delay by being content to let sleeping dogs lie and reference *dicta* by O'Dalaigh C.J. in *Dowd v Kerry County Council* [1970] IR 27 to the effect that litigation is a two party operation and the conduct of both sides should be looked at. The plaintiffs give the example of the fact that neither defendant communicated with the plaintiffs at any stage in the period 2008 to 2011 in relation to the plaintiffs' Supreme Court appeal or the case more generally. In my view, there has been no material culpable delay by the defendants in terms of their obligations within the litigation; there was no onus on the defendants to try to get the plaintiffs to expedite their Supreme Court appeal and the defendants did not delay unduly in respect of steps required to be taken by them in the proceedings. I will address more specific acquiescence allegations below.

Alleged acquiescence by defendants in plaintiffs' delay

56. The authorities suggest that where a defendant has engaged in conduct which might induce a plaintiff to incur further expense in pursuing their litigation, notwithstanding delay, that this is a factor relevant to weighing the balance of justice (see eg. Fennelly J. in *Anglo Irish Beef Processing v. Montgomery* [2012] 3 IR 510 at 519). The plaintiffs allege that the defendants have acquiesced in the delay here such as to disentitle them to the strike out relief they seek. The first alleged acquiescence related to proposals for expert inspection of the property, particularly in 2015/16. The second relates to alleged acquiescence following issue by the plaintiffs of their case management motion. I will address these contentions in turn below.

Joint inspection suggestions

57. While, as we shall see there were approaches from the engineering defendants' solicitor briefly in late 2012, and on a number of occasions between May 2015 and March 2016 suggesting a joint engineering inspection, these suggestions were not followed through with on the plaintiffs side and I do not believe can be said to amount to some form of acquiescence or estoppel in the circumstances. The relevant facts are summarised below.

2012 expert inspection suggestion

58. It appears from the exhibited material before me that James Cody & Co. emailed the plaintiffs on 9 November 2012 asking for confirmation that the engineering defendants could reinspect the dwelling at a mutually convenient appointment, suggesting that the engineering defendants had been in touch in that regard. The plaintiffs replied to their solicitor on 12 November 2012 confirming that the engineering defendants *"may reinspect the dwelling anytime. If they proceed to nominate a time we will confirm the suitability."* I have no further evidence before me as to what happened at that time although it is clear that no inspection was in fact conducted. A communication between the plaintiffs' solicitor and the plaintiffs suggested that contact had been made with the first defendant's solicitors in relation to an inspection at that time also. The first defendant maintains that it received no contact in relation to any inspection and there is no evidence of any contact from the first defendant at that time on the material before me.

59. I do not believe that the foregoing evidences any material acquiescence by the engineering defendants in delay to that point and or of any acquiescence at all by the builder defendant in delay to that point.

2015/16 joint inspection requests

60. Mrs. Kelleher averred in her replying affidavit that *".. in the period 2015/16 we were informed that both defendants communicated with our solicitors about an inspection of the dwelling for purposes of hearing of the case"* and pointed to a series of correspondence as follows.

61. The plaintiffs' solicitors wrote to the plaintiffs by letter of 19 May 2015 asking them to confirm that *"arrangements can be put in place for representatives of.* [the builder defendant] *to attend to inspect the dwelling in Paulstown, the subject matter of the proceedings"*. The plaintiffs replied by letter to their solicitor of 22 May 2015 confirming there was no problem facilitating the representatives of the builder defendant with carrying out an inspection. This correspondence suggests that there was some contact between the plaintiffs' solicitors and solicitors for the first defendant about a potential inspection and that the plaintiffs were agreeable to this course of action. No inspection was carried out. The first defendant maintains that, as its expert had died, no joint inspection was ever sought by it at this time or indeed at any time since its expert's death in 2008. Insofar as internal communications between the plaintiffs' solicitors and the plaintiffs suggested to the contrary, it submitted that those communications must have been in error.

62. The relevant communications relating to proposed inspection on behalf of the engineering defendants' expert are as follows. On 3 July 2015, the plaintiffs say that their solicitor informed them that representatives of the insurers of the engineering defendants were seeking to inspect the dwelling. On 8 September 2015, the plaintiffs' solicitors wrote to the plaintiffs asking them to identify the engineer in Ove Arup who was retained in the case so that the name could be passed on to the engineering defendants' solicitor in order to progress matters. This letter noted *"I understand that* [the engineering defendants' solicitors] *wish to set up a joint engineers inspection of the property with a view to preparing the case for hearing"*. The engineering defendants' solicitors wrote to the plaintiffs' solicitors on 2 September 2015 referencing a letter from the plaintiffs' solicitors of 9 July 2015 confirming

the identity of plaintiffs' engineer. This letter stated that the name provided appeared to be wrong ("*our engineer has made contact with both offices of Ove Arup and are informed that no one by that name works for them*") and sought confirmation of the correct name. There was then a follow up letter from the engineering defendants' solicitor to the plaintiffs' solicitor on 16 September 2015. There again appears to have been no response to that letter and the engineering defendants' solicitor wrote again on 23 March 2016 stating:- *"We would be obliged if you could kindly confirm if the plaintiffs are yet in a position to advance this case. We are keen to arrange a joint inspection with a view to advancing matters."*

63. The plaintiffs' solicitor (James Cody & Co.) then wrote to the plaintiffs on 1 April 2016 following that letter of 23 March 2016 suggesting:- *"that a joint engineering inspection occur with all parties to the action attending with their respective engineers. You will note that this will include* [the builder defendant] *who are represented by Rolleston Solicitors in Portlaoise."* The letter went on to state:-

> *"Obviously whilst this is a welcome development and one which would be encouraged by any judge having seisin of the case, we have a difficulty in that you have not retained an engineer other than Arup Consulting Engineers in relation to the context of your case. You might please refer to confirm the identity of your chosen engineer in relation to the matter. In the event that you intend to call upon Arup Consulting Engineers to remain involved on your behalf you might please indicate the position by return."*

64. It should be noted that the first defendant contends that it made no approach to the plaintiffs' solicitors in 2016 in relation to an expert inspection (for the reason summarised earlier i.e. that it had no expert still alive at that point).

65. At all events, it is clear that no such inspection took place, whether by an engineer on behalf of the engineering defendants, the builder defendant or any other form of joint inspection involving the plaintiffs' engineer. Indeed, it is not at all clear as to the extent to which the plaintiffs' originally retained engineers (Ove Arup) remained actively involved in the case by 2015/16 at all. There is no evidence that the plaintiffs incurred further expense in the litigation based on the approaches suggesting further inspections.

66. In the circumstances, I do not believe the foregoing sequence of events evidences any material acquiescence on the part of the defendants. If I am wrong in that conclusion, in any event, the last act constituting such acquiescence (being the engineering defendants' suggestion of a joint inspection in March 2016) occurred some 4 years before the issue of the strike out motions. Accordingly, this is not a factor to which I attach significant weight in assessing the balance of justice.

Alleged acquiescence in issue of case management motion

67. The plaintiffs separately contend that there was acquiescence to the delay preceding the issue of the case management motion in the response of the defendants to that motion. The relevant factual basis for this contention is as follows. The plaintiffs aver that, on 31 July 2019, they informed Noonan J. that they wished for the building case to be bought into case management (the professional negligence proceedings against Dillon Mullins having been struck out on that date). Noonan J. understandably directed the plaintiffs to seek the consent of the defendants to this step and, in the absence of such consent, gave the plaintiffs leave to bring a motion for case management. The plaintiffs wrote to the defendants on 2 August 2019 seeking their consent to case management. No response was received from the defendants. It appears that the first defendant may have been written to at an old address for its solicitors, that firm of solicitors having changed address as far back as 2012. The plaintiffs followed up by filing a notice of intention to proceed on 22 October 2019. A motion for case management (being the motion for case management before me at this hearing) was issued on 21 November 2019, returnable for 9 December 2019.

68. It appears that the plaintiffs' correspondence of 2 August 2019 and the notice of intention to proceed of 20 October 2019 were correctly served by hand delivery to the correct address for the solicitors for the first defendant on 22 November 2019. The solicitors for the first defendant replied on 29 November 2019 seeking an adjournment to take instructions and to file a responding affidavit and/or documents as the case may be. Solicitors for the engineering defendants replied on 5 December 2019 setting out their view that the case management motion should be adjourned into a Thursday "long motions" list to fix a date. On 9 December 2019 the case management motion was adjourned for hearing before Noonan J. (by then appointed to the Court of Appeal) coming before him on 16 December 2019.

69. The plaintiffs contend that the defendants, in essence, acquiesced in the bringing of the case management motion as they had been on notice from 2 August 2019 of the fact that the plaintiffs intended to bring such an application, did not object to that course of action at the time and sought time when the matter first came before the court on 9 December 2019 and never, at that point, indicated that they intended to bring applications to strike out for want of prosecution. It seems clear that the defendants were served both with the notice of intention to proceed dated 22 October 2019 (albeit that, in the case of the first defendant, its solicitors may not have got this document until 21 November 2019) and the case management motion issued on 21 November 2019.

70. I do not believe that the defendants' actions in the period between the plaintiffs' letter of 2 August 2019 proposing case management and the issue by the defendants of their strike out motions in January 2020 constituted an acquiescence in the delay which had preceded it. Given the very lengthy lapse of time since any prior positive step by the plaintiffs in these proceedings, it was understandable that some time was going to be needed for the defendants and their lawyers to bring themselves back up to speed. It appears that new junior counsel were engaged by both sets of defendants when the case management motion was issued and inevitably some time was going to be required for these counsel to be properly briefed and for advices to be provided in relation to the bringing of any strike out applications. The strike out applications were brought with all appropriate expedition in the circumstances and no acquiescence was involved.

Length of delay – interference with defendants' right to trial with reasonable expedition

71. Next, I must have regard to the length of the delay. I have found the level of inordinate and inexcusable delay to be some 10 years out of a 20 year period. This is a very significant level of delay. It is a level of delay which significantly interferes with the entitlements of the defendants to have a trial of the claims against them determined with reasonable expedition.

Balance of justice: courts' obligation to determine litigation expeditiously

72. As the authorities make clear, for some 20 years now, as Hardiman J. put it in *Gilroy v. Flynn* [2005] 1 ILRM 290, at 293/294, *"the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities… are determined*

within a reasonable time", citing specifically in that regard the European Court of Human Rights decision in *McMullin v. Ireland* (July 2004) and the European Convention on Human Rights Act 2003. This constitutional onus on the courts to ensure that litigation coming before them is conducted in a timely fashion is reflected in numerous *dicta* since then such as that of Irvine J. in *Millerick v. The Minister for Finance* [2016] IECA 206 (at para. 40) and, very recently, by Costello J. in *Doyle v. Foley* [2022] IECA 193 (at para. 55)**.** As Collins J. noted in *Cave Projects* (at para. 37) *"It is entirely appropriate that the culture of "endless indulgence" of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context."*

73. The lapse of time in these proceedings represents the antithesis of expeditious determination of civil litigation.

Balance of Justice – prejudice to defendants

Introduction

74. As I shall come to shortly, the defendants contend that they will be significantly prejudiced if a trial were to take place at this remove and cite a series of difficulties in that regard including missing factual and expert witnesses and, in the case of the first defendant, missing documentation. The plaintiffs seek to answer this complaint by saying that this is a trial which can be conducted by reference to expert evidence, based on inspection of the property, and on documents, and that missing experts can be replaced by new experts who can now inspect the property sufficiently to meet the plaintiffs' claims. As such, it is said the defendants' claims of likely prejudice are overblown and that there would be no true prejudice to the defendants in the event that the proceedings were to continue at this point.

75. As Barniville J. (as he then was) recently made clear in *Gibbons v. N6 (Construction) Ltd* [2022] IECA 112, it is not helpful to seek to pigeonhole cases as being expert or documents cases for the purposes of the application of the strike out principles. It seems to me that, both in terms of resolving the matters in issue on the pleadings as between the plaintiffs and the defendants, and as between the defendants as regards claims in indemnity and contribution, there are a series of factual matters in dispute as to precisely what work the defendants did, the

quality of that work and the liability of the defendants for any defects in same. This is so across a range of disciplines – electrical, masonry, roofing, flooring, foundations and finishes. Accordingly, it does not seem to me that the trial of this case can realistically proceed as some form of inspection of a sterile object, unaffected by the passage of time, together with the study of contemporaneous documents. Witness evidence as to fact, coupled with expert evidence as to the state of the building reasonably proximate to its construction, will be required to fairly determine the issues in the case.

76. In the circumstances, it is necessary to closely examine the prejudice which the defendants allege they will suffer if a trial proceeds at this remove.

Applicable legal principles

77. Before doing so, it is appropriate to consider the principles in the case law as to the degree of prejudice which the defendants must typically demonstrate to succeed in tipping the balance of justice in favour of striking out the proceedings.

78. This issue was the subject of consideration by Collins J. very recently in his judgment in *Cave Projects*. In order to put his discussion of the principles in their appropriate context, it is necessary to look briefly at the facts relevant to the balance of justice there. The facts of the case were unusual in the general run of strike out cases found in the jurisprudence, in that the level of inexcusable delay was low (at least in relative terms) at 18 months (para. 41, p.39). Furthermore, no concrete prejudice at all had been made out arising from the 18 month delay; there was no evidence that any relevant witness was unavailable; no potential witness, no longer in the employment of relevant entities, had been identified; the applicant had been entirely silent as to the steps, if any, which he had taken to identify and secure the attendance of witnesses at trial; there was no evidence that the delay in issue had resulted in the loss of documentary evidence that would otherwise have been available to the defendant (p. 40). There was no evidence that any material prejudice could arise in any general sense (p. 41). The defendant applicant had contributed to and acquiesced in the overall delay in the case, including in the period of inexcusable delay (p. 42).

79. Collins J. engaged in a helpful analysis of the question of prejudice to the applicant defendant and how that it is to be properly weighed in the balance of justice. He described the issue of prejudice as *"a complex and evolving one"* (para. 35, bullet point 3, p. 29), noting that

there are many statements in the authorities to the effect that, in the exercise of the *Primor* jurisdiction, the question of prejudice is central (*ibid.*). He confirmed that prejudice is not confined to *"fair trial"* prejudice (p. 31).

80. Importantly, Collins J. references the fact that *"in many (if not most) applications to dismiss based on the Primor principles, the defendant will assert that some specific prejudice has arisen from the delay of the plaintiff*" (at p. 33). He then noted that "*The absence of any specific prejudice (or, as it is often referred to in the caselaw, "concrete prejudice") may be a material factor in the court's assessment. However, it is clear from the authorities that absence of evidence of specific/concrete prejudice does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice."*

81. Collins J. went on to note that the case law suggests that the form of general prejudice most commonly relied on in this context is the difficulty that witnesses may have in giving evidence – and the difficulty that courts may have in resolving conflicts of evidence – relating to events that may have taken place many years before an action gets to trial. He then stated: *"That such difficulties may arise cannot be gainsaid. But it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis. As a matter of first principle, only such prejudice as is properly attributable to the period of inordinate and inexcusable delay for which the plaintiff is responsible ought to be taken into account in this context"* (at p. 33).

82. I take it from the foregoing passage that Collins J. is laying emphasis on the need to ground any general allegation of prejudice (resulting from the fallibility of memory and/or the difficulty of resolving conflicts of evidence at many years remove) in the actual issues in the case and further that such prejudice needs to be attributable to the period of inordinate and inexcusable delay. As Collins J. goes on to make clear, his caution is against *"an immediate presumption of prejudice arising whenever there is any material default on the part of a plaintiff in prosecuting a claim"* (p. 34).

83. In analysing what Irvine J. said on the question of the degree of prejudice required to be made out by an applicant defendant seeking to strike out for delay (Irvine J. having referred in *Cassidy v. The Provincialate* [2015] IECA 754 to "moderate prejudice" being required while referring in *Millerick v. Minister for Finance* [2016] IECA 206 to the fact that "even marginal

prejudice may suffice") Collins J. expressed the view that it *"it would seem wiser to continue to refer to " moderate prejudice" in this context"* (p. 36). Collins J. then had the following to say (at para. 37):

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

84. I do not take it from this passage that Collins J. is seeking to set out a new, and, from an applicant's perspective, more burdensome test in relation to the *Primor* strike out jurisdiction. The reference to the court needing to be astute to ensure that proceedings are not dismissed unless it is clear that permitting the plaintiff to proceed would result in *"some real and tangible injustice to the defendant"* seems to me, when read in context of the extensive analysis that precedes it, to say no more than that a defendant must typically establish some prejudice, whether specific/concrete or general (once properly grounded in the issues to be addressed at trial) and that such prejudice must be more than marginal (in the sense of not being insignificant). It seems to me that the comments of Collins J. in that passage also have to be viewed in the context of the very specific facts of that case (where there was a comparatively short period of inordinate and inexcusable delay, no prejudice of any sort demonstrated on the part of the defendant applicant and where the defendant applicant was guilty of acquiescence in that delay) and also in light of his earlier observation (at p. 27) that "*an order dismissing a claim is on any view a far-reaching one".*

85. Accordingly, I approach the question of assessing the balance of justice in the case before me on the basis that the defendants have an onus of demonstrating to the court that there is some likely prejudice to them which is moderate (in the sense of not insignificant), which arises from the nature of the matters which will have to be addressed at any trial and which is attributable to periods of the plaintiffs' inexcusable delay. Such prejudice will then be weighed in the balance of justice along with other relevant factors such as the nature of the plaintiffs' claims, the constitutional and Convention imperatives to ensure cases are progressed and determined expeditiously, and any material acquiescence by the defendants in the delay.

Prejudice to the first defendant

86. I will turn first to the prejudice which the builder defendant avers it will suffer in the event that these proceedings are allowed to proceed to trial at this juncture. Pat Tallis, a director of the builder defendant, and a person involved in the construction of the building, swore two affidavits in support of the builder defendant's strike out application. I will address his relevant averments as to prejudice below.

Missing witnesses – fact

87. The builder defendant alleged the following specific items of prejudice.

Stephen Tallis

88. Firstly, it says that Stephen Tallis, who was a director of the first defendant, died on 24 February 2002. It is said that he had an integral role in the running of the first defendant company and was directly involved in the site management and construction of the house the subject of the plaintiffs' claim. It is averred by Pat Tallis that *"of all the personnel engaged on the site for the first named defendant* [Stephen Tallis] *is the person who would have been on site more than any other person or party"*.

89. The plaintiffs say in reply that the role of Stephen Tallis is greatly overstated by the defendants. Mrs. Kelleher avers that he suffered from a serious health condition and was deployed by Pat Tallis *"in an ad hoc fashion to carry out odd jobs. His main involvement was*

at the snagging stage in late 1997/98 and in that limited role late stage defects or problems would have been brought to his attention."

90. This averment is not refuted by the first defendant. The plaintiffs also say that the CRO records do not show that Stephen Tallis was ever a director of the first defendant company.

91. The authorities make clear (most recently *Cave Projects*, as noted above) that any prejudice relevant to the balance of justice has to be linked to the period of inordinate and inexcusable delay. I cannot hold that, if these proceedings had been progressed efficiently, the trial would have taken place before February 2002 (when Stephen Tallis died). I think that is an unrealistic view given the nature of allegations, the fact there were two sets of defendants, the need for expert evidence and the need for extensive discovery. Accordingly, while this is undoubtedly an item of prejudice to the first defendant in defending the claims, it is not prejudice flowing from the culpable delay of the plaintiffs such as to be reckoned in the balance of justice when exercising the *Primor* jurisdiction.

Michael Walsh

92. The first defendant also avers specific prejudice arising from the death in August 2016 of the cabinet maker (Michael Walsh) engaged by the first defendant to carry out the woodwork and kitchen installation and bedroom wardrobes, meaning it cannot meet the allegations in the proceedings related to those aspects of the alleged defective building. The plaintiffs say Mr. Walsh was not a subcontractor of the builder defendant but was, rather, engaged directly under contract to the plaintiffs to manufacture, at his own workshop, and install the kitchen and wardrobe units and that he had no other involvement in the construction of the house. In my view, the question of the quality of kitchen installation and bedroom wardrobes does not materially arise on the pleadings and Mr. Walsh's unavailability does not cause any meaningful prejudice to the first defendant in the circumstances.

Joseph Butler

93. Mr. Tallis avers that Joseph Butler was a director of the company and an industrial engineer who was the company's quality manager. He was responsible for quality standard ratings. He left the firm in 2010. Mr. Tallis avers that he not believe that Mr. Butler would be

available to him at this remove. The plaintiffs say that Mr. Butler was not deployed at the house until January 1997 at second fix stage *"long after the defective foundation, ground floor, chimneys, roof etc. were constructed. The builder did not deploy a foreman on the construction. We complained to the builder in December 1996 that the construction was way behind schedule and under a contract with him the completion date was January 1997. We complained that often we came on site to find the gate locked and nobody working there. After Christmas, therefore, Pat Tallis deployed Joseph Butler on site for the purposes of ensuring that the builders workmen/subcontractors were on site daily so the construction would progress speedily thereafter."* While this averment was not the subject of refutation by the first defendant, given that Mr. Butler was in fact involved with the construction project, I accept that his unavailability is a likely source of some prejudice to the first defendant.

Finbarr Coughlan

94. The first defendant also relies on the death of the engineer (Finbarr Coughlan) engaged by the plaintiffs to design the house (that engineer died in December 2018). The plaintiffs say that the building contract with the first defendant dated 7 June 1996 was not made on foot of the plans provided by Mr. Coughlan to the plaintiffs (which plans were used to obtain planning permission). The building contract was made on foot of the working plans and structural drawings and amended specification furnished by the engineering defendants. Accordingly, Mr. Coughlan's absence, they say, is irrelevant to the building case, save for the issue as to the irregularity they allege in relation to the planning application having a different name from that of Mr. Coughlan in relation to the person who prepared the drawings on foot of which the planning application was made. However, given that the plaintiffs now seek to contend that Mr. Coughlan is a relevant witness to the background events the subject of the proceedings, his absence to death must be regarded as causing some degree of prejudice to the first defendant.

Staff no longer with first defendant

95. The first defendant also relies on the fact that none of the staff in the company who were employed by it at the time of this job are still employed by it, save for Pat Tallis and one block layer and one digger-excavator operator. It is averred on behalf of the first defendant:

> *"that some of the employees were made redundant in the recession, some simply retired. They would all now be long removed from the company and very unfamiliar*

with its processes and records for the purpose of giving evidence at trial, if they were to be available at all."

96. The plaintiffs complain that this allegation does not reveal any specific prejudice. While this allegation of prejudice may be said to be at a quite generalised level, the court needs to take a common sense approach to evaluating this head of alleged prejudice. It is very difficult to see how individual workers who worked on the construction aspects of the project would be in a position to give meaningful evidence as to precisely what they were instructed to do or what they did well over 25 years (at this point) from the time the work was done. I accordingly accept that likely prejudice to the first defendant is made out under this heading.

Missing witnesses – expert

97. The first defendant next says that it instructed Mr. Michael Molloy, an engineer, to carry out inspections of the building and that he completed a report in 2006. Those inspections took place in 2004, and possibly on one occasion thereafter. Mr. Molloy died in October 2008. The first defendant understandably says that it is prejudiced by the death of Mr. Molloy, as it will not be able to rely on the findings in his report or evidence from him at trial. In my view, this is a prejudice that can be linked to the culpable delay of the plaintiffs. If the matter had been advanced expeditiously, a trial would have been well capable of being had within eight and a half years of the launch of the proceedings. The loss of the key expert witness who inspected the property and prepared an export report for the first defendant is a very significant and material prejudice to the first defendant and clearly imperils its ability to fairly meet the allegations against it.

98. The first defendant says that, given the length of time that has elapsed, it is not feasible to suggest that this evidential deficit can be rectified by instructing a new engineer.

99. The plaintiffs say there was only one site inspection by experts for the defendants, being a joint inspection by Mr. Molloy, for the first defendant, and Mr. O'Keeffe, for the second defendant, on 16 September 2004 (they say that there was a brief visual inspection by Pat Tallis with his solicitor on 17 May 2006).

100. The plaintiffs say that the property had been vacant for four years when the September 2004 expert inspection took place. They aver that:

> *"The dwelling has not been interfered with in any way whatsoever since. It is open to the builder to have a follow up inspection carried out by reference to Mr. Molloy's report if necessary so that he can stand over Mr. Molloy's report. It is also for the expert engineer to determine either categorically or on the balance of probability whether deterioration, if any, is due to the alleged defects in the foundation, chimneys, roof etc. or is due to some other factor or combination of factors. No expert engineer could be compromised in making such a determination just because the dwelling has been vacant."* (Mrs. Kelleher principal affidavit, para. 16)

101. I do not believe that these contentions of the plaintiffs are well founded. I do not see that it can tenably be contended that another expect could be engaged to stand over the contents of a report prepared by Mr. Molloy some 18 years ago. As the property has been unoccupied and vacant since September 2000, its condition is very likely to have deteriorated since then making meaningful inspection, at this remove, an unrealistic exercise. It would not be fair to the defendants to assume that experts will be able to readily identify what failings in the building are attributable to negligence on the part of either of the defendants arising from actions some 25 years ago and what may be attributable to deterioration over that period. Mr. Malloy's absence through death is a significant prejudice to the first defendant on any view.

Missing evidence - documentary

102. Mr. Tallis in his grounding affidavit of 15 January 2020 avers that, while he has retained a file of correspondence between himself and his solicitors exchanged over the years:

> *"the substantive company records relating to the company's general work in these years including documents related to the Agreement have long since been destroyed and I am positive in saying that some of these will include dockets and billing records and other records in relation to the work on this site. I say and believe that a lot of these have been cleared out in or about 2010 on the assumption that this matter was at an end."*

103. I would not have been sympathetic to the contention that this head of prejudice could be linked to the plaintiffs' inexcusable delay in circumstances where in 2010, the plaintiffs had delivered their discovery not very long previously in June 2008, and where the plaintiffs' Supreme Court appeal against the High Court's refusal to direct the trial of a preliminary issue of the statute of limitations point was still live, particularly where delays in Supreme Court appeals at the time were such that any appeal was most unlikely to have come one before the end of 2010.

104. However, matters do not rest there as the builder defendant delivered a further affidavit of Mr. Tallis shortly before the hearing of the strike out motions. There was no objection by the plaintiffs to this affidavit being before the court. In this affidavit, Pat Tallis averred that the original file relating to the plaintiffs was *"largely destroyed in a flood which occurred in October 2022 at Freshford Village and caused flooding to the first named defendant's premises"*. Mr. Tallis appended to his affidavit a list of the documents contained in that original file which were destroyed in the flood. These included *"original drawings and specification notes by the late Finbarr Coughlan, engineer"*; original contract documentation; home bond documentation; *"material lists, orders and delivery documents"*; correspondence with the engineering defendants; correspondence with the clients and with Frank Dunne, engineer, and John Moore, electrical contractor; *"plumbing and heating details of plans"*; snag lists and reports by Shafry Architecture; paperwork relating to electrical supply, water supply and telephone; details of final accounts and details of payments. Mr. Tallis' affidavit also referred to reports from Ove Arup Engineers which were presumably the plaintiffs' engineering reports which had been furnished in the context of the reply to the strike out motions. The affidavit confirmed, through the appended list, that correspondence from 2020 onwards had survived. Mr. Tallis avers that, due to the loss of these documents, the first named defendant is seriously prejudiced in its defence of the proceedings.

105. While it would presumably be possible to furnish the first defendant with potentially relevant documents held by the plaintiff and the engineering defendants, the loss of virtually the entire of the first defendant's documentary records relating to the construction of the property is undoubtedly a significant prejudice both in relation to its defence of the plaintiffs' claims against it and in relation to its prosecution of the claims in indemnity and contribution made by it against the engineering defendants.

Conclusion on prejudice to first defendant

106. In conclusion, in my view the first defendant would undoubtedly be significantly prejudiced in attempting to defend the action at this remove as a result of the loss or unavailability of relevant factual and expert witnesses and documentary evidence.

Prejudice to the engineering defendants

107. Mr. John M. Hayes, the third defendant and the principal of the second, fourth and fifth defendants, swore an affidavit in support of the engineering defendants' strike out application. He avers that a significant element of the plaintiffs' case and a matter in dispute between the plaintiffs and the defendants (and between the defendants) is the nature and quality of the works carried out by the first defendant.

108. Mr. Hayes avers as to the following prejudice to the engineering defendants were the proceedings not struck out at this point.

Missing witnesses – fact

109. Firstly, the engineering defendants say that Alan Guildea who ran the project is no longer employed by the fifth defendant. I do not have evidence of any attempts by the engineering defendants to track down Mr. Guildea. However, even assuming he can be located within the jurisdiction at this point, I believe that in general terms these defendants are likely to be prejudiced by the difficulty of Mr. Guildea being asked to address the detail of matters which happened over 25 years ago.

110. Mr. Hayes averred that his former colleague, Philip Funcheon, who was also involved in the project, is now deceased. The precise level of Mr. Funcheon's involvement in the project is not specified but it does seem to me that, where it has been averred that he would have been a relevant witness and was involved in the project, his death does stand to concretely prejudice the engineering defendants in their defence of the action.

Missing witnesses – expert

111. The engineering defendants rely, as further evidence of specific prejudice, on the fact that an electrical engineer (Richard Murphy) engaged to carry out an inspection on the

plaintiffs' property and complete a report (the inspection occurred in September 2004 and the report was completed in December 2005) retired in 2012. Mr. Hayes avers that he believes that Mr. Murphy's file in respect of this matter is no longer in existence. The plaintiffs contend that Mr. Hayes' affidavit does not aver a specific prejudice to the engineering defendants in their defence of the action at this point. The plaintiffs make the point (as set out in Mrs. Kelleher's replying affidavit) that *"notably, it is not averred that Mr. Murphy, albeit retired, and his report are not available"*. They also point out that his inspection of the electrical installation in September 2004 was conducted without electricity being supplied to the dwelling (which was disconnected in 1999). In those circumstances, they allege that "*Mr. Murphy's inspection/evaluation of the installation did not conduct any testing and was at best partial and superficial*."

112. The plaintiffs make the point that the breach of contract and negligence alleged against the engineering defendants on foot of the contract primarily pertains to the adequacy of the drawings and structural specification provided, supervision of construction, and the serious underlying structural defects in the dwelling in respect of the foundation, chimneys, roof and in respect of non-compliance with the planning permission. They say that this can be addressed by fresh inspection at this point. They also assert that the engineering defendants' other expert witness in this regard, Mr. O'Keeffe, who inspected the property also on 16 September 2004 and furnished a report at the time is available to give evidence on the principal allegations of breach and negligence.

113. The plaintiffs say that the real prejudice asserted by the defendants is one of deterioration of the dwelling. The plaintiffs say that it is for the engineering experts to determine whether there has been any deterioration and, if so, what if any impact such deterioration has had on the structural defects they rely upon. They assert (in their affidavit) that *"just as the experts engineering witnesses used our expertise to evaluate the construction originally they will use the same expertise to evaluate deterioration"*.

114. The engineering defendants for their part say that it will not be possible to meaningfully instruct a new expert engineer to inspect the property at this remove and to distinguish between damage resulting from deterioration of the property in the intervening 20 plus years and damage resulting from the alleged defective design, workmanship or supervision.

115. It seems to that the engineering defendants are materially prejudiced by the absence of Mr. Murphy (through long retirement) as an expert witness. It is neither fair nor realistic to expect an expert who has been retired for over 10 years to come out of retirement at such a long remove to deal with matters in a report prepared by him almost 20 years ago.

116. While I take the point that certain of the more fundamental alleged structural defects (such as overly shallow foundations) may be capable of objective verification even at this remove, the plaintiffs' claims are not confined to structural matters and any inspection now is not going to be any kind of adequate substitute for inspections conducted almost 20 years ago.

117. Given the lapse of time of over 20 years since the work the subject of the action occurred and in light of what has been averred to on their behalf, common sense dictates that the engineering defendants will suffer at least moderate prejudice (and likely more serious prejudice) in seeking to defend the action at this remove, both in relation to the plaintiffs' claims and in defending the claims in indemnity and contribution as between themselves and the builder defendant.

Other prejudice to defendants

118. The defendants seek to have weighed in the balance of justice in favour of dismissing the proceedings, the fact that have had allegations of gross breach of their professional duties as builders and engineers hanging over them for a period of in excess of 20 years. I do not place much weight on this matter. There is no evidence that, for example, that the defendants have had to pay higher insurance as a result of the existence of this action or that their reputations in the marketplace have been impacted by this litigation and its continued existence.

Conclusion on prejudice to the defendants

119. In my view, a significant degree of likely prejudice will be occasioned to the defendants in the event that the trial were to proceed at this remove. In this regard, particular weight has to be attached to the fact that both sets of defendants are missing important witnesses, both expert and as to fact. It is clear that not all of the matters in issue will be capable of being dealt with simply on the basis of structural inspection of the property as it now stands. The defendants had the property inspected in 2004. The house has been abandoned and unoccupied since September 2000, over 22 years ago. While issues such as the depth of the foundations

might still be objectively verified by inspection of this remove, the reality is that many other issues (such as cracking, quality of electrical installations, pipework, the quality of the workmanship, the level of supervision and so on) are likely to be rendered more difficult (if not impossible) of assessment some 18 years on from those inspections. Furthermore, there would be inevitable difficulties in determination of the issues as between the defendants as to who may have been responsible for what aspects of the building and the defects said to be present in it.

Conclusion on balance of justice

120. As discussed above, factors such as the nature of the claims in these proceedings, the difficulties the plaintiffs have had with certain of their legal advisors, and the other litigation they have been engaged in during the 20 year period and the difficult life circumstances created by these matters weigh in the plaintiffs' favour when considering the balance of justice. However, as against that, I must have appropriate regard to the very significant periods of inexcusable delay and the constitutional and Convention imperatives requiring expeditious disposal of litigation. When these matters are weighed along with the significant prejudice to the defendants if the trial were to proceed at this remove, in my view the balance of justice comes down in favour of dismissal of the proceedings.

***O'Domhnaill v Merrick* applications**

121. In light of the conclusions which I have reached on the defendants' applications to have the plaintiffs' proceedings against them struck out on the application of the *Primor v. SKC* jurisprudence, it is not necessary to consider the defendants' arguments based on the *O'Domhnaill v. Merrick* line of jurisprudence.

Conclusion

122. In conclusion, I am satisfied that the plaintiffs have been guilty of inordinate and inexcusable delay and that the balance of justice favours the dismissal of the plaintiffs' proceedings against all defendants.