APPROVED

THE HIGH COURT

2024 [IEHC] 120

Record No. 2009/4198S

BETWEEN:

DWYER NOLAN DEVELOPMENTS LIMITED

Plaintiff

-AND-

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

Defendant

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 16th day of February 2024

INTRODUCTION

Preliminary

1. This is an application brought by Wicklow County Council ("the Council") seeking to dismiss the Plaintiff's Claim pursuant to O. 122, r. 11 of the Rules of the Superior Courts, 1986 (as amended) ("RSC 1986") and/or striking out the Plaintiff's Claim for delay and want of prosecution.

2. Mr. Padraic Hogan SC appeared for the Council and Mr. Hugh McDowell BL appeared for the Plaintiff, Dwyer Nolan Developments Limited.

3. The background to this application concerns a planning permission (Register Reference No. 00/3625) granted, subject to conditions, by the Council to the Plaintiff on 15th August 2001 for the development of a golf clubhouse, carpark and alterations to an access road at Ballynamuddagh, Bray, County Wicklow.

4. The following conditions of the planning permission are particularly relevant to the to the underlying dispute between the parties:

> "***A. General***
>
> *Condition 3: <u>PRIOR TO THE COMMENCEMENT OF ANY DEVELOPMENT</u>, the applicant shall lodge security with the Council for the satisfactory compliance with the conditions of this permission. This security is required by the Council for application at its absolute discretion if such conditions are not duly complied with to its*

satisfaction. The security shall be given by a lodgement with the Council of the sum of £50,000.00 (EUR €63,486.00).

REASON: To ensure satisfactory compliance with the conditions of this permission.

…

G. Services

Condition 3(d): Detailed drawings of the foul and storm water drainage systems shall be submitted and agreed by the Planning Authority before development commences. Drawings shall include layout and longitudinal sections, together with gradients, pipe diameters and class invert levels and location of all manholes and interceptor traps.

REASON: In the interests of proper planning and development and clarification, in order to ensure satisfactory foul and storm water drainage."

5. In brief, the parties disagree on whether Condition G3(d) has been met. The Plaintiff says the condition was satisfied and therefore Condition A3 means that the security of €63,486.00 should be returned to it and hence it issued summary proceedings for that amount on 5th October 2009. The Council's position is that the Plaintiff has not complied with that condition and once that is done, it has indicated that, subject to certain terms and conditions, it will return the security to the Plaintiff.

6. In her Affidavit of 1st September 2020, Ms. Clare-Ann Temple Solicitor, a solicitor in the firm of Benville Robinson Solicitors who represent the Council, described the background and context to this application for a dismissal/strike out in paragraphs 9 and 10 as follows:

> "*9. … the nub of this case is actually very simple. The Plaintiff built a golf course and clubhouse on lands in Bray pursuant to planning permissions granted. As a condition to one of those permissions, cash security was paid to the Council. The purpose of this cash security is to ensure compliance with the conditions attaching to the planning permission. The Council require confirmation from the Plaintiff that the surface water system installed by the Plaintiff is in compliance with what was approved under planning permission register reference number 00/3625. If not, the Council want to know what has in fact been installed so as the Council can evaluate this.*
>
> *10. Several letters and notices have issued to the Plaintiff and/or its legal representatives requesting this confirmation and information. For whatever reason, this has not been forthcoming. The Council have concerns as flooding has occurred in the area over the years (the Council do not say that such flooding has been caused by the golf club). If the Plaintiff simply clarifies the point, the position can be evaluated and if in order, the cash security returned. Again, very simple.*"

7. At the hearing of this application, Mr. Hogan SC (for the Council) again re-stated the point averred to by Ms. Temple that the Council were not saying that the flooding had been caused by the golf club. Mr. McDowell BL (for the Plaintiff) says that the above paragraphs illustrate that the Council are in fact saying that this is a straightforward issue which can be dealt with at trial. He says that no prejudice and no risk of an unfair trial is alleged. Far from pointing to any prejudice, these passages, he submits, do not ground the subsequent assertion made in paragraph 11 of Ms. Temple's Affidavit where she states: "*11. I say that the Plaintiff has taken no further steps in these proceedings. I say that the delay has been both inordinate and inexcusable. I say that the passage of time has prejudiced the Defendant in defending these proceedings.*"

CHRONOLOGY

8. The following is the relevant chronology in this application:

5th October 2009	Summary Summons
10th December 2009	Appearance
19th February 2010	Notice of Motion seeking final judgment
20th July 2010	Order of the Master of the High Court adjourning the within action to plenary hearing and granting the Plaintiff until the 21st September 2010 to deliver a Statement of Claim
6th January 2011	Defendant issued a Notice of Motion seeking an Order directing the dismissal of the Plaintiff's proceedings by reason of its failure to furnish a Statement of Claim on or before the 21st September 2010 contrary to the Order of the Master made by consent on the 20th July 2010

13th January 2011	Statement of Claim delivered
7th February 2011	Defendant's Motion dated the 6th January 2011 to dismiss the Plaintiff's claim was struck out with an Order for costs. (Order of Ryan J.)
5th/6th April 2011	Plaintiff issued a Motion for Judgment in Default of Defence
25th July 2011	Order of O'Neill J. extending the time for the delivery of the Defendant's Defence by four weeks
16th November 2011	Defence delivered
16th November 2011	Defendant's Notice for Particulars
17th November 2011	Notice of Change of Solicitor
20th January 2012	Notice of Change of Solicitor
23rd January 2012	Plaintiff's Replies to Notice for Particulars
21st June 2012	Plaintiff's Notice for Particulars of Plaintiff
26th June 2012	Notice of Trial
26th June 2012	Plaintiff's Notice to Produce
11th July 2012	Defendant's Notice to Produce
11th July 2012	Replies to Notice for Particulars of Plaintiff
12th July 2012	Notice of Motion for Discovery
5th November 2012	Consent Order of Mr. Justice Cross for Discovery against the Plaintiff granting the Plaintiff four weeks within which to discover two categories of documents
14th March 2013	Defendant's Notice of Motion for failure to comply with Order for Discovery

21st October 2013	Consent Order of Mr. Justice Cross striking out the Defendant's Motion dated the 14th March 2013 seeking to strike out the Plaintiff's claim for failure to comply with an Order for Discovery
16th December 2013	Notice for Particulars
4th February 2014	Notice of Motion seeking Replies to Particulars
4th February 2014	Notice of Motion for failure to comply with Order for Discovery
7th July 2014	Consent Order of Mr. Justice Cross that the Plaintiff do deliver within two weeks to the Defendant the particulars in writing requested in the Notice for Particulars dated the 16th December 2013
3rd October 2014	Defendant's Motion dated the 4th February 2014 seeking an Order directing the dismissal of the Plaintiff's proceedings for failure to comply with Consent Order of Mr. Justice Cross of the 5th November directing the Plaintiff to make discovery – struck out.
22nd December 2015	Plaintiff's Notice of Intention to Proceed
22nd December 2017	Plaintiff's Notice of Intention to Proceed
9th September 2020	Notice of Motion seeking to strike out proceedings for delay and want of prosecution

9. The Council issued a motion dated 4th February 2014 seeking an order compelling the Plaintiff to reply to its Notice for Particulars dated 16th December 2013. This was the subject of a consent order from this court (Cross J.) on 7th July 2014 directing that the Plaintiff deliver the replies within two weeks. The Council's Notice for Particulars dated 16th December 2013 raised two matters: the first states that "*[t]he central issue in this matter is what surface water system the Plaintiff has installed at Bray Golf Club in compliance with planning permission register reference number 00/3625. Please*

provide detailed particulars of the said surface water system as installed by the Plaintiff"; the second particular states that "*[i]f it is alleged and maintained that the Plaintiff installed the surface water drainage system in accordance with drawing number 98357-308, please so confirm.*" (Also on 4th February 2014, the Council issued a motion seeking the dismissal of the Plaintiff's proceedings for failure to comply with the consent order of Cross J. dated 5th November 2012 directing the Plaintiff to make discovery. On 3rd October 2014 this motion was struck out).

10. Mr. Hogan SC states that these replies remain outstanding and that the only active step taken by the Plaintiff was the Plaintiff's affidavit of Discovery dated 19th October 2013, but even that, he says, is not in compliance with the Order of the court (Cross J.) dated 5th November 2013.

11. On 16th February 2022, the Plaintiff's solicitors wrote to the Council's solicitors *inter alia* enclosing the following: (1) Drawing No. 98350/308 setting out details of the foul surface, water mains and surface water treatment on the site of Bray Golf Club and (2) Copy Certificate of Compliance dated 27th August 2003 from DBFL Consulting Engineers in relation to conditions G1, G2 and G3 of planning permission register reference 3625/00 concerning Bray Golf Club. This was acknowledged on 23rd February 2022 by the solicitors for the Council, wherein it was indicated that instructions would be sought from the Council (and the summary summons proceedings were adjourned). On 30th March 2022, the Solicitors on behalf of the Council wrote to the Solicitors for the Plaintiff, and having taken the Council's instructions, stated *inter alia* that the relevant conditions were G1, G2 and G3; that "*[n]o letter of compliance issued in relation to this submission from the Council. The Council were (and still are)*

of the opinion that what has been constructed does not comply with the permission as granted. The Council have for years sought details of what has actually been constructed on site. The surface water system on site is not constructed in accordance with this drawing 98350/308", (paragraph numbered 5); that "*[f]or the avoidance of doubt, Liam Burke has reiterated and confirmed that he did not agree any drainage details [with] [sic.] DBFL or with Bray Golf Club. He would not have had the authority to do so in any event*."

12. Further, in this correspondence dated 30th March 2022, it is stated that:

> "*(1) [t]he Council do not accept the Certificate of Compliance of Paul M. Forde previously submitted. This does not certify what is there and compliance with the planning permission.*
>
> *(2) Insofar as the Certificate refers to "requirements of the local Authority" the Council understand this to relate to the Local Authority's requirements under the permission granted. If this is purporting to refer to any purported agreement with Liam Burke, there was no such agreement. Mr. Burke has confirmed this and again, he would not have had any authority to agree anything outside of the planning process.*
>
> *(3) To conclude matters without the necessity of proceeding with application to Court, the Council require the following:*
>
> *(a) A Certificate stating [that] [sic.] there is compliance with the planning permission other than any modifications which should then be set out and listed.*

(b) The Certificate should go on to state that these modifications are design enhancements.

(c) This certificate should also be accompanied by "as constructed" drawings and detailed calculations for the surface water system constructed.

(d) If reference is being made to the requirements of the local authority, this should refer to the requirements of the planning permission.

(e) Any Certificate should be accompanied with evidence of appropriate professional indemnity insurance.

Upon receipt of the foregoing, matters can then be considered by the Council with a view to realising the security held in this matter, subject to the issue of costs being dealt with. Alternatively, we have instructions to seek a date for our Motion and bring matters to a conclusion …".

13. Mr. McDowell BL submits this correspondence illustrates that the Council have a concluded view that there was non-compliance. In response to Mr. Hogan SC's arguments in relation to delay and fading memory, Mr. McDowell BL submits that this letter confirms that there could be no argument about fading memory in so far as Mr. Burke is concerned and that Council cannot have it both ways in terms of their argument regarding the hypothetical memory fade factor.

SUMMARY OF THE PLAINTIFFS' POSITION

14. On or about 17th December 2001 DBFL Consulting Engineers, on behalf of the Plaintiff, wrote to the Council's Planning Department in relation to the planning permission stating *inter alia* that it, "*… in compliance with conditions G1, G2 and G3 now enclose 4 copies of our drawing no. 98357-308 "Layout of Foul Drainage, Lay out of Watermains and Layout & Treatment of Surface water*. *This drawing details the layout and proposed works to comply with the requirements of these Conditions. The details shown in respect of the surface water proposals have been discussed with your Area Engineer, Mr. Liam Burke [sic.]. We trust that you will find these proposals acceptable and would be grateful to receive your confirmation of their compliance with the above Condition*s..."

15. The letter and copy of the drawing was circulated to the following persons: Mr. Liam Burke, Executive Engineer, Greystones Area Engineer's Office; Mr. Sean Canavan, Executive Engineer, Greystones Area Engineer's Office; Mr. E. O'Dwyer, Dwyer Nolan Dev. Ltd, Mr. Raymond F. McDonnell, Architect.

16. At the bottom of that exhibited letter a manuscript note is endorsed and signed by Sean Canavan, Executive Engineer, Greystones Area Engineer's Office dated '20/12/01' which states: "*[t]he proposals are in order*."

17. However, an internal review – but not the actual compliance determination from the Council – reviewed the documents submitted and found that they were not in fact in compliance notwithstanding that (i) they had been certified initially on behalf of the Plaintiff, and (ii) the above note recited that the proposals were in order.

18. Mr. Hogan SC for the Council argues that if the Plaintiff had not brought this application, the Council would have considered bringing an enforcement action pursuant to section 160 of the Planning and Development Act 2000 (as amended) in relation to what they say is non-compliance with the conditions of the planning permission. He also states that in the broader context, the Council's concerns are that it has been separately sued in respect of flooding.

19. Mr. Hogan SC in this case claims that because of the Plaintiff's inordinate and inexcusable delay, the Council will suffer general prejudice (rather than specific or concrete prejudice), and that the net issue in the case is the court's interpretation of the balance of justice.

20. In this regard he points to the averments, in particular, in paragraphs 7 and 8 of the Affidavit of Conor Page, Executive Engineer in the Council, dated 31st May 2010. Mr. Page's Affidavit address the gravamen of the dispute in the substantive proceedings – including *inter alia* whether or not the works carried out were in conformity with the planning permission and the drawings submitted as part of the application for planning permission and whether any alleged differences were agreed with Mr. Burke and DBFL representatives after a site visit (noting that Mr. Page states that Mr. Burke stated to him that, while he did meet with DBFL to discuss their proposal, he did not deal with their actual submission)– but for the purposes of this application Mr. Hogan SC submits that the general prejudice the Council suffers arises from the *elapse of time* when these matters were alleged to have occurred including that there was an alleged specific agreement that what was done was to the satisfaction of the Council *i.e.*, there is a

dispute which will require oral evidence and the elapse of time causes general prejudice to the Council.

21. Mr. Hogan SC submits that this litigation has been 'dragging on' for some time which amounts to an inordinate and lengthy time. He further submits that as the case may not be listed for hearing for a further 12 to 18 months, the Council are also prejudiced. The Council's application to strike out the Plaintiff's proceedings was issued on the 9th September 2020 and a replying Affidavit to this application was received from the Solicitors for the Plaintiff on 14th December 2022 – a delay of 2 years and 2 months, although it is accepted on behalf of the Council that during this time the parties were involved in correspondence, and it is only when this did not result in a resolution, that an Affidavit was furnished.

22. Mr. Hogan SC's central point is around delay and the fallibility of memory recall which results in general prejudice by reference in particular to those matters including *inter alia* paragraphs 7 and 8 of the Affidavit of Conor Page sworn on 31st May 2010, which addresses what occurred in or around late 2001 and early 2002 and whether or not the works carried out were in conformity with the planning permission and submitted drawings, and whether any alleged differences were agreed with Mr. Burke and DBFL representatives after a site visit (again pointing out that Mr. Page states that Mr. Bourke said to him that while he did meet with DBFL to discuss their proposal he did not deal with their submission). Mr. Hogan SC submits that general prejudice arises in this regard because there is a dispute of fact over which evidence will be required and the delay and therefore general prejudice arises because the "… *caselaw 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",[1] *i.e.*, he states that the fallibility of witnesses arises because of the elapse of time, and generally the period of time here is approximately 22 years from the time of the initial dispute.

23. Mr. Hogan SC further submits that in considering general prejudice, the court can take judicial notice of the likely costs of the proceedings and the expenditure of public moneys and in consideration of the balance of justice, the court can have regard to the fact that replies to particulars (as referred to earlier) remain outstanding and that the only active step that has been taken by the Plaintiffs was the Plaintiff's affidavit of Discovery dated 19th October 2013.

24. Mr. Hogan SC relies on general (rather than specific) prejudice and submits that the elapse of time can affect memory which he says is prejudicial, in and of itself. He explains that this application to dismiss was brought to avoid the costs of setting the case down for trial.

SUMMARY OF THE DEFENDANTS' POSITION

25. In summary, the submissions of Mr. McDowell BL elaborate on the following points: the case law – reviewed extensively in the judgment of Collins J. in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 – suggests that prejudice, in the most part, will be specific. He submits that the review of the case law carried out by Collins J. in *Cave*

[1] *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 per Collins J. at page 33 (first bullet point).

Projects Ltd (commencing at paragraph 36, page 27), represents a "*recalibration away from*" applications to dismiss (such as this application brought by the Council) and suggests that the judgment has "*moved the dial back*" towards the position adopted by the Plaintiff in this case; the prejudice claimed must be related to the delay that is relied upon, which is not the case here; the prejudice must cause the impairment of the Defendant's ability to defend the case, which is not applicable here; there must be a risk of an unfair trial, which does not arise in this instance; Mr. McDowell BL says that there is not a presumption of prejudice and that an application such as this one will *not* succeed without the evidence of prejudice and there is no evidence of prejudice here; the litigation costs can be dealt with by an appropriate costs order which is a more appropriate matter for the trial of the action and not a motion to dismiss; further, the alleged *ongoing* default from both sides means that there could be no question of prejudice arising.

26. Mr. McDowell BL contends that there is no evidence that the Council will not have a fair trial and that pursuant to O. 122 RSC 1986, the court can fashion its own order rather than dismissing the action. He submits that the case is ready to be set down for trial and refers to the following extract from the judgment of the High Court (Heslin J.) in *Costello v MacGeehin* [2022] IEHC 442 at paragraph 129 of the judgment:

> "*I am satisfied that, on the facts of the present case, countervailing circumstances have been put forward. These include (i) the pre – commencement delay for which the Defendants are, for the purposes of the present application, exclusively responsible; (ii) the Defendants' post – commencement delay of at least a year; (iii) the nature of the*

case; (iv) what is at stake for the Plaintiff; (v) the absence of any evidential deficit, (vi) the availability of extensive records and reports; (vii) the absence of any prejudice, specific or presumed; and (viii) the fact that the case is ready to be set down for trial."

27. Mr. McDowell BL submits that the Council is not prejudiced and can perfectly meet the case at the substantive hearing and observes that in September 2020 the Council should have set the matter down for trial.

DISCUSSION & DECISION

28. Both Mr. Hogan SC (for the Council) and Mr. McDowell BL (for the Plaintiff) agree that the legal authorities which apply to the Council's application to strike out or dismiss the Plaintiff's action are the Supreme Court decision in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459, as interpreted and applied by the Court of Appeal in the judgment of Collins J. in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 and the exercise of the general inherent jurisdiction of the court.[2]

29. The three elements of the *Primor* test are: first, the Council must establish that the delay on the part of the Plaintiff in prosecuting the claim has been inordinate; second, if that is established, then the Council must establish that the delay has been inexcusable; and third, if it is established that the delay has been both inordinate and inexcusable, the

[2] In this context see also *O'Domhnaill v Merrick* [1984] I.R. 151 which addresses the court's inherent jurisdiction to strike out proceedings where the lapse of time between the cause of action accruing and the trial of the proceedings would be such that there would be a real and serious risk of an unfair trial even in circumstances where there has not been inexcusable delay.

court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the continuing of the case.

30. In addressing *inter alia* the decision of the Court of Appeal in *Millerick v Minister for Finance* [2016] IECA 206 the Court of Appeal in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 (per Collins J. at page 36 of the judgment) makes the point that "*[t]he suggestion that a defendant might succeed in having a claim against them dismissed in the absence of evidence of prejudice is a far-reaching one which raises significant issues that are perhaps best explored in a case where the point is actually pressed in argument. However, it would appear to represent a significant development of (or, perhaps more correctly, departure from) existing jurisprudence, in which, as already discussed, the issue of prejudice has been acknowledged to be central. In addition, any suggestion that proceedings might be dismissed in the absence of prejudice to the defendant would appear difficult to reconcile with the consistent emphasis in the authorities that the jurisdiction is not punitive or disciplinary in character: the "jurisdiction does not exist so that form of punishment can be inflicted upon a dilatory plaintiff as a mark of the Court's displeasure" (per Peart J in Bank of Ireland v Kelly , at para 52).*"

31. While I have set out the chronology of relevant dates earlier in this judgment, Mr. McDowell BL for the Plaintiff accepts that the Council has established the first two elements of the *Primor* test case and that this application is focused on the third element, namely the application of the Court's discretion in assessing the balance of justice.

32. In *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245, for example, Collins J. held that the court's assessment of the balance of justice did not involve a free-floating inquiry divorced from the delay that had been established. The nature and extent of the delay was a critical consideration in the balance of justice. In circumstances where inordinate and inexcusable delay ***was*** demonstrated (which is the case here), there had to be a ***causal connection*** between ***that*** delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim.[3]

33. I am not satisfied, however, that the required causal connection has been established to warrant the dismissal of the proceedings. Rather, for the following reasons, I am of the view that the balance of justice favours the case proceeding to trial and the application to dismiss being refused.

34. The decision in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 establishes that the question of prejudice must be at the centre of the application and no actual prejudice on behalf of the Council has been established here.

35. At the heart of the Council's case are the matters discussed at paragraphs 7 and 8 of the Affidavit of Conor Page, Executive Engineer in the Council, dated 31st May 2010 in relation to whether or not the works carried out were in conformity with the planning permission and submitted drawings and whether any alleged differences arose from discussions with council officials (which the Council denies). Mr. McDowell BL submits, what he characterises as this 'preview of the trial' or the 'merits of the case', is in fact an exercise in 'papering over the cracks' because there is no actual prejudice.

[3] *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 per Collins J. at page 28.

Nowhere in the authorities is it suggested that an application to dismiss should be decided on a view of the merits of the case. The opposite is indeed the case. Further, he submits that the court should be careful in an interlocutory application not to determine the merits of the substantive application.

36. The correspondence dated 30th March 2022 (referred to earlier) suggests that Mr. Liam Burke was able to confirm certain matters to the solicitor for the Council, and in that regard, there does not appear to be a fading memory issue insofar as he is concerned and therefore no basis for claiming that the Council will suffer prejudice if the proceedings were to continue.

37. Mr. McDowell BL submits that while the delay was accepted, it must be contextualised. In this regard, the first unusual feature of this case was that the Plaintiff set the matter down for trial by notice of trial dated 26th June 2012.

38. The second unusual feature is the *ongoing* or *continuing* nature of the dispute, arising as it does, from the conditions in a planning permission and each sides' respective and contested positions as to the *ongoing* entitlement, or otherwise, of returning the security *i.e.*, it does not arise from a specific event on a specific date. Both sides submit that each other are in *continuing* breach of the planning permission and the conditions therein and, therefore, in terms of the question of prejudice, the Council is in no worse position now as it was when the proceedings commenced.

39. While hypothetically canvassed by Mr. Hogan SC, the Council have never in fact taken a formal step alleging that the Plaintiffs are not in compliance with the planning

permission. The Council's position – as evidenced in the letter dated 30th March 2022 – is that upon confirmation of certain matters set out in that correspondence (including the question of costs) the Council was conditionally prepared to realise "*the security held in this matter*". However, it is not appropriate for a court on hearing this interlocutory application to make any findings on the substantive matters which will be the subject of the trial of the action. While the Council place much emphasis on these matters, they are considered in this judgment only through the prism of the Supreme Court decision in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 as interpreted and applied by the Court of Appeal in the judgment of Collins J. in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245.

40. In this regard, and as referred to earlier, the judgment of Collins J. in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245, provides that where inordinate and inexcusable delay is demonstrated, there must be a *causal connection* between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. Therefore, the Council cannot rely on matters which do not result from the Plaintiff's delay. The Council, in my view, have not established that because of the delay, there is something that means it cannot be fairly expected to engage in the trial of the action. In considering the balance of justice from the perspective of the concepts of fairness and prejudice, the Council have not established that any unfairness will be visited upon it at the hearing of the action in this case.[4]

[4] *Keogh v Wyeth Laboratories Incorporated* [2005] IESC 46; [2006] 1 I.R. 345; *O'Riordan v Maher* [2012] IEHC 274 per Birmingham J. (as he then was) at paragraph 32. See the review of these and other cases at pages 29 and 30 of the judgment of Collins J. in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245.

41. In *Bank of Ireland v Kelly* [2017] IECA 288 at paragraph 52, the Court of Appeal[5] (Peart J.) identified the purpose of the jurisdiction to strike out proceedings on grounds of delay as being "… *to prevent injustice in the form of an unfair trial arising from culpable and unexcused delay by the plaintiff, and as a deterrent to culpable delay by a plaintiff leading to injustice to the defendant*." This again appears to place the issue of prejudice – specifically in the form of "*fair trial prejudice*" centre-stage, and there is no evidence that the Council will suffer any injustice.[6]

42. It is, in my view, also important to look at what Collins J. says immediately following the extract emphasised by Mr. Hogan SC in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 at page 33 (underlining added):

> "*[t]he caselaw 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. That such difficulties may arise cannot be gainsaid. <u>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</u>.*"

[5] The Court of Appeal comprised Peart, Irvine and Hedigan JJ.
[6] Extract from *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 per Collins J. at page 31.

43. Ultimately in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245, paragraph 37, page 37, Collins J. makes the points that:

> "*[t]he 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.*"

44. In the circumstances, I refuse the Defendants' application seeking to dismiss the Plaintiff's Claim pursuant to O. 122, r. 11 of the Rules of the Superior Courts, 1986 (as amended) and/or striking out the Plaintiff's Claim for delay and want of prosecution.

PROPOSED ORDERS

45. I will, therefore, make an Order refusing the Defendants' application seeking to dismiss the Plaintiff's Claim pursuant to Order 122, r. 11 of the Rules of the Superior Courts,

1986 (as amended) and/or striking out the Plaintiff's Claim for delay and want of prosecution.

46. I will put the matter in for mention before me at 10:30 on Wednesday 28th February 2024 so the parties can address what further orders should be made pursuant to Order 122, r. 11 of the Rules of the Superior Courts, 1986 (as amended) and to address such ancillary and consequential matters which arise, including the costs of the application.