THE HIGH COURT

[2021] IEHC 138

[2012 No. 2691 P.]

BETWEEN

EDDIE GIBBONS

PLAINTIFF

AND

N6 (CONSTRUCTION) LIMITED AND GALWAY COUNTY COUNCIL

DEFENDANTS

JUDGMENT of Ms. Justice Nuala Butler delivered on the 1st day of March, 2021

Application

1. This is the first defendant's application to strike out the plaintiff's proceedings for delay. The application is moved on the alternate basis of a failure to prosecute the proceedings under O. 122, r. 11 of the Rules of the Superior Courts and/or on the basis of inordinate and inexcusable delay under the court's inherent jurisdiction. The plaintiff accepts that he is responsible for the delay which occurred between either March 2012 or February, 2014 and October, 2017 but disputes responsibility for any delay occurring after October, 2017. The court has had difficulty pinpointing the exact length of the delay which the plaintiff accepts was inordinate and inexcusable, the plaintiff having taken nearly two years from the date of the plenary summons to serve the statement of claim. The first defendant contends that as the plaintiff has accepted he was guilty of inordinate and inexcusable delay, the only issue for the court is to determine where the balance of justice lies.

Factual and Procedural History

2. The plaintiff's proceedings arise out of the flooding of his property at Athenry, County Galway, allegedly caused by road construction works carried out by the defendants between 2006 and 2009. The first defendant is a joint venture incorporated as a special purpose vehicle solely for the purposes of constructing the M6 motorway. Those construction works were completed in 2009 and, shortly thereafter, the first named defendant ceased trading. However, the first defendant has been unable to windup its affairs because of the plaintiff's outstanding litigation against it. The second named defendant is the local authority and roads authority for the area.

3. The flooding of which the plaintiff complains first occurred in November, 2009. The claim is pleaded on the basis that the flooding results from the works carried out by the defendants which altered the pre-existing groundwater and surface water regime in the locality. The plaintiff claims that flooding has re-occurred on an intermittent and ongoing basis since 2009. The plaintiff moved out of the property for a period between October, 2011 and October, 2012. It is not entirely clear whether the plaintiff carried out remedial works during this period or what works were carried out because, although a claim is made for the cost of works carried out, the most recent replies to the second defendant's particulars in July, 2020 suggest both that the flooding is ongoing and that further works are contemplated.

4. Proceedings were instituted by way of plenary summons dated 14th March, 2012 and a statement of claim was served on 7th February, 2014. The first defendant immediately sought particulars of the claim against it by way of notice for particulars dated 14th

February, 2014. Despite follow-up correspondence, no reply was received to those particulars until the first defendant brought a motion and an order was made by the High Court on 14th July, 2014. The first defendant then sought to organise a joint inspection of the plaintiff's premises. No response was received to this request and a further motion was brought by the first defendant. Inspection facilities were granted by the Master of the High Court on 15th July, 2015 and an inspection was carried out by the first defendant's engineer on 14th September, 2015. Interestingly, it does not appear from the orders made on 14th July, 2014 and 15th July, 2015 that counsel for the plaintiff attended court or opposed the relief being sought by the first defendant. In other words, there was no principled objection to replying to the particulars raised nor granting the inspection facilities requested. Instead, the solicitors for the plaintiff seem simply not to have bothered engaging with the relatively straightforward requests being made or even replying to the first defendant's solicitor's correspondence until compelled to do so by court order.

5. The matter then lay dormant, save for exchanges with the second defendant to which I shall return, until the plaintiff served a notice of intention to proceed on 8th June, 2017. The first defendant delivered its defence on the 15th February, 2019 and this motion seeking to strike out the proceedings was issued on 13th July, 2020.

6. The course of the proceedings as between the plaintiff and the second defendant is not strictly speaking relevant to where the balance of justice might lie as between the plaintiff and the first defendant. However, it is not unreasonable that the plaintiff, who is a private individual and not a commercial entity, would wish to pursue his claim against both defendants in the one set of proceedings and at the same time. The plaintiff has relied on alleged delay on the part of the second defendant since October, 2017 as part of the overall context within which the court has to assess the balance of justice. Mindful that the second defendant is not a party to this application and, consequently, has not had an opportunity to respond to the allegations of delay against it, I nonetheless accept that the question of whether the plaintiff has been frustrated in the more expeditious prosecution of his claim because of delay by the second defendant is relevant in this general sense.

7. The plaintiff also relies on delay on the part of the first defendant as its defence was not filed until February, 2019. No specific reference is made to the reason for this delay in the first defendant's solicitor's affidavit grounding this application but the written legal submissions suggest that this was due to an oversight in circumstances where it was believed that the defence had already been delivered. Although it would have been preferable to have had this explanation disposed to on affidavit, it is in fact consistent with the exhibited correspondence. In an exchange of solicitors' correspondence starting in October, 2016, the first defendant's solicitor is anxious to progress the litigation and requests the plaintiff's solicitor to provide it with a copy of the second defendant's defence and to serve a notice of trial. On 3rd April, 2017, the plaintiff's solicitor responded saying that he had not received a defence from the second defendant. By letter dated 18th April, 2017, the first named defendant's solicitor replied stating:-

"We delivered our defence years ago. Can you explain why the second named defendant has been given such extraordinary latitude?"

It was of course incorrect to state that the first defendant's defence had been delivered years earlier, but clearly the solicitor believed that this had occurred. Surprisingly, the plaintiff's solicitor did not revert to advise him of his error. It was not until 12th October, 2017 that the matter was mentioned by the plaintiff's solicitor in a letter which did not refer to the first defendant's solicitor's error but simply asked him to revert immediately with a copy of the first defendant's defence. It is not possible to ascertain from the material before the court when the first named defendant's solicitor became aware that his belief that his client's defence had been delivered was erroneous nor whether there was any delay between that realisation and the delivery of the defence on 15th February, 2019.

8. The plaintiff's case against the second defendant progressed at an even slower pace. On 6th May, 2014, the second defendant looked for inspection facilities in respect of the plaintiff's property. The second defendant then raised particulars on 21st July, 2014 which were not replied to until 10th October, 2017. Intermittently, the plaintiff's solicitor wrote to the second defendant seeking its defence (perhaps prompted by the first defendant's solicitor's correspondence looking for a notice of trial to be served). The second named defendant repeatedly replied to this correspondence by saying that it was awaiting replies to particulars and inspection facilities before it would be in a position to finalise its defence, neither of which were forthcoming from the plaintiff. After some delay, the plaintiff agreed in principle to a joint inspection on the basis that the plaintiff's engineer would contact the second defendant's engineer to make the necessary arrangements. Despite follow-up correspondence from the second defendant, the plaintiff's engineer did not make contact, even though it seems a new engineer was instructed in 2016. A joint inspection between the plaintiff's and second defendant's engineers was not arranged until October, 2019, some five years after it had first been requested. In fact, that inspection was postponed and did not take place until 17th December, 2020, the more recent delays being due to a combination of public health restrictions in light of Covid-19 and staff availability issues for the second defendant. The second defendant also raised supplemental particulars on 7th February, 2018 which were not replied to by the plaintiff until 6th July, 2020. The plaintiff has now served a notice of intention to proceed on the second defendant with a view to issuing a motion for judgment in default of defence.

Applicable Legal Principles

9. The current application is made in light of this factual and procedural history. Both parties agree that the decision to be made by the court is one governed by the principles set out by Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459 as follows:-

"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant – because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

10. Although the factors set out at para. (d) above are intended to guide a court in determining where the balance of justice lies as between the parties, they are not intended as an exhaustive list of all of the factors that a court is permitted to consider. Equally, some of the factors may not be relevant in the particular circumstances of a given case. Each case will vary depending on its individual facts and the matters to which the court should have regard will likewise vary in tandem with those facts. However, the fundamental principle remains that the court is trying to ascertain where the balance of justice lies as between the parties and that procedural justice and the possibility of ultimately having a fair trial are central in this regard.

11. Further, as Hardiman J. has observed in *Gilroy v. Flynn* [2005] 1 ILRM 290, these principles now have to be applied in light of the obligation on the State under Article 6 of the European Convention on Human Rights to ensure that civil rights and liabilities are determined within a reasonable time. This has led to a somewhat stricter approach being taken by courts to delay by the parties in more recent times, one element of which – the extent of which the defendant must establish prejudice – is relevant to the argument made by the first defendant. The general consensus appears to be that while the fundamental principles to be applied have not themselves changed since *Primor*, the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court's obligation to ensure that litigation is progressed to a conclusion with reasonable expedition. This obligation has been characterised (by Hogan J. in *Donnellan v. Western Textiles Ltd* [2011] IEHC 11 and by Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206) as a constitutional imperative, and, presumably, also a Convention imperative, to protect the public interest by ensuring the timely and effective administration of justice.

Arguments of the Parties

12. The first defendant's argument focused on the extent to which it was obliged to establish specific prejudice resulting from the delay and whether it had in fact done so. The first defendant pointed to a number of cases, the older of which suggests that once inordinate and inexcusable delay has been established, prejudice follows inexorably (O'Flaherty J. in *Primor;* Quirke J*. in O'Connor v. John Player & Sons* [2004] 2 ILRM 321). However, the first defendant's case did not rest on this proposition alone and its solicitor's affidavit included an averment as to the specific prejudice caused. This included the difficulties which necessarily arise in defending a claim regarding events occurring twelve years earlier. Although the first defendant did not point to the absence of any specific witness, it pointed to the non-availability as witnesses of those employed by it at the time, the majority of whom are no longer within the jurisdiction and many of whom are untraceable. The solicitor also averred to the first named defendant's desire to wind-up its affairs and its inability to do so because of the plaintiff's outstanding litigation. Maintaining the first defendant's corporate existence requires compliance with regulatory requirements which constitute both an ongoing administrative burden and a cost.

13. The first defendant also contends, relying on the decisions of Kearns J. in *Stephens v. Flynn* [2008] 4 IR 31 and Irvine J. in *McNamee v. Boyce* [2016] IECA 19 that in cases where inordinate and inexcusable delay has been established, only a very modest level of prejudice need be shown by a defendant seeking to have the proceedings struck out. This is to be contrasted with the high level of prejudice and the requirement to show a real risk of an unfair trial that arises where a plaintiff has not been shown guilty of culpable delay but the delay is of such a length that the defendant nonetheless contends that it is prejudicial. Irvine put it thus, in McNamee v. Boyce, citing firstly her own decision in Cassidy v. The Provincialate [2015] IECA 74:-

> *"Clearly a defendant, such as the defendant in the present case, can seek to invoke both the Primor and the O'Domhnaill jurisprudence. If they fail the*

Primor test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the Primor Test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceedings if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend the claim?"

Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the Primor test."

14. The plaintiff resists this application on two main grounds. Firstly, whilst apparently admitting a five-and-a-half-year period of inordinate and inexcusable delay between March, 2012 and October, 2017, the plaintiff does not accept that he is solely responsible for the delay which has occurred since then. The plaintiff points to the fact that the first defendant did not file its defence until February, 2019. The plaintiff also seeks to ascribe general culpability for this delay to the second defendant which has not yet filed a defence pointing, in particular, to the postponement of the inspection of the plaintiff's premises between October, 2019 and December, 2020. Finally, in this regard, the plaintiff informs the court that there were without prejudice negotiations between the parties in 2017 and although these discussions did not result in a resolution of the proceedings, they showed that the plaintiff continued to maintain and progress them.

15. Secondly, the plaintiff contends that in weighing the balance of justice, the court must have regard to the fact that this is a case which will likely be decided on the basis of expert and technical evidence regarding the impact the engineering works had on the pre-existing ground and surface water flows in the area adjacent to his property. The plaintiff emphasises the averments of the first defendant's solicitor in an affidavit sworn to ground the motion seeking inspection facilities to the effect that, in light of the unusual nature of the claim, it was *"necessary to appoint an engineer to survey and inspect the plaintiff's property, make technical findings and advise generally on the matter".* The plaintiff relies on two authorities to the effect that where a case will turn on expert

evidence rather than the credibility or recollection of what he characterises as "*ordinary*" witnesses, the balance of justice should favour allowing the trial proceed (see Laffoy J. in *Manning v. National House Building Guarantee Company Ltd* [2011] IEHC 98 and Keane J. in *Nolan v. Chadwicks Ltd* [2014] IEHC 542).

Decision

16. The first matter for the court to address is the length of the delay and who has been responsible for that delay since 2017. This case is unusual in that for the purposes of minimising the significance of the five-and-a-half-years' delay up to October, 2017 for which the plaintiff accepts responsibility, the plaintiff attributes blame to all parties for the three-and-a-half-years' delay which has occurred since then. I am unconvinced by the plaintiff's arguments in this regard.

17. Firstly, I do not think that any blame can be attributed to the first defendant for the delay which has occurred. Whilst it is true that the first defendant did not file a defence until February, 2019, I accept that its solicitor genuinely but erroneously thought that a defence had been filed some years before April, 2017. Prior to October, 2017 the plaintiff did not actively seek a defence from the first defendant and, strikingly, even then the plaintiff's solicitor did not advise the first defendant's solicitor of the obvious error which was evident from his correspondence. Further, given that during most of this period the plaintiff had not replied to the second defendant's request for particulars or taken steps to facilitate the second defendant carrying out an inspection, the delay in filing the first defendant's defence did not impact in any way on the plaintiff's ability to progress his litigation. During the period of admitted delay, the first defendant had to motion the plaintiff twice in order to achieve progress on basic procedural steps. In reality, until faced with this motion to strike out, the plaintiff's solicitors had been singularly unresponsive to almost all correspondence emanating from the defendants' solicitors and there is no evidence before the court from which I could conclude that the plaintiff would have actually progressed the litigation had the first named defendant's defence been filed any earlier.

18. I should also say that I reject the argument that as the orders made against the plaintiff on foot of the first defendant's motions included the costs of those motions that the plaintiff has somehow already paid the price for the delay involved and that it should now be disregarded. The orders for costs made on foot of those undefended motions represent the actual cost to the first defendant of being forced to go to court to achieve a response to its perfectly reasonable procedural requests. I might be more impressed with the argument if there had been a real dispute between the parties as to the first defendant's entitlements and those motions had been opposed on a principled basis. Even then, whilst that might go towards explaining the delay involved (an argument the plaintiff does not seek to make), the fact that costs follow the event and were awarded against the plaintiff is irrelevant both as to the delay and as to the balance of justice as between the parties now.

19. It is more difficult for the court to deal with the allegations of delay against the second defendant, especially since the second defendant is not a party to this application.

Nonetheless, even taking the facts as presented by the plaintiff at their height, it is far from clear that the second defendant is guilty of any culpable delay. For example, the plaintiff took three years and three months to reply to the second defendant's notice for particulars and a further two years and five months to reply to the supplemental request for particulars. There is no suggestion that these particulars were improperly raised, yet it took the plaintiff a combined period of nearly six years to reply to them. Similarly, leaving aside the question of whether the second defendant is responsible for delays arising out of the postponement of the joint inspection since October, 2019, it still took the plaintiff nearly five years from the time inspection facilities were first requested to get to a point where the plaintiff's engineer contacted the second defendant for the purposes of organising that inspection. In light of these facts, I find it impossible to conclude that any delay on the part of the second defendant has frustrated the plaintiff in the expeditious prosecution of his claim against the first defendant. Needless to say, conscious of the fact that it may yet be a live issue in a different application, I make no finding as to whether the second defendant is actually responsible for any delay.

20. The *Primor* principles acknowledge that in exercising its discretion regarding the balance of justice, the court must also look to any delay on the part of the defendant. I am satisfied that the only delay the plaintiff has identified in respect of the first defendant is not material in the overall context of this case. Further, nothing in the first defendant's conduct could be said to amount to acquiescence in the plaintiff's delay, on the contrary, there appears to have been a persistent effort on the first defendant's solicitor's part to get the plaintiff to progress the proceedings. It follows that there is also no conduct on the part of the first defendant that has caused the plaintiff to incur further or unnecessary expense.

21. Thus, the only remaining issue is whether the delay will cause the first defendant prejudice in the defence of the proceedings or more generally. The onus lies on the moving party in an application of this nature to establish that the delay complained of is both inordinate and inexcusable. Once that has been done, the onus then shifts to the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice favours allowing the claim to proceed. Further, that is a weighty obligation (see Irvine J. in *Flynn v. Minister for Justice* [2017] IECA 178, followed by McGrath J. in M*yrmidon CMBS (Propco) Ltd v. Joy Clothing Ltd* [2020] IEHC 246).

22. The plaintiff approaches this issue from the high point of the *Primor* jurisprudence, arguing that the nature of the case is such that there is not a substantial risk that the trial will be unfair and that the first defendant has not shown serious prejudice. On the other hand, the first defendant looks to more recent jurisprudence to contend that once inordinate and inexcusable delay is established and absent any conduct on the part of the defendant such as that discussed in the preceding paragraph, it is only required to show moderate prejudice and not that the trial, whenever it occurs, will necessarily be unfair.

23. In reality, the true position lies somewhere between these two extremes. The court must look to the extent of the delay in the context of a spectrum of time which might be taken

for litigation of this type and also look to the extent of the potential prejudice, again on a spectrum, ranging from a complete inability to defend the proceedings in any meaningful way whatsoever through the difficulties arising from having to marshal witnesses and documents at some remove from the events to which they relate to the general inconvenience of being subjected to protracted litigation. There is clearly a direct relationship between the time taken and the likely extent of the prejudice although the degree to which the latter necessarily follows the former will vary from case to case. I certainly accept that a defendant is not required to show categorically that the trial risks being unfair in order for the proceedings to be struck out after a lengthy delay. I also accept that the overall length of the delay is a factor even if not all of that delay constitutes inordinate and inexcusable delay for which the plaintiff is culpable. Where a plaintiff has been guilty of delay, whether prior to the institution of proceedings or in the prosecution of them, there is then a heightened obligation on that plaintiff to prosecute the balance of the case expeditiously. However, justice would not necessarily be done between the parties by striking out proceedings in cases where the delay is of a lesser magnitude and the defendant has not sustained some actual prejudice rather than merely inferred prejudice, however moderate. Prejudice in this context is not limited to prejudice in the defence of the proceedings.

24. How do these considerations apply to the facts of this case? It is now nearly twelve years since the events giving rise to these proceedings. In fact, as the first flooding occurred at the very end of the three-year period during which the works were being carried out, much of the information potentially relevant to the defence of the proceedings and relating to the design and execution of the works is likely to predate that by some three to five years. The plaintiff accepts responsibility for a delay of five-and-a-half-years but on the court's reckoning, the culpable delay for which the plaintiff is responsible is probably longer and is more in the order of seven or eight years (for example, the plaintiff has taken no action to advance his case against the first defendant since its defence was filed in February 2019). No explanation has been offered for the extraordinarily languid approach taken by the plaintiff and his legal advisors, even allowing for the fact that it is accepted that five-and-a-half-years of this delay is simply inexcusable.

25. Moreover, the proceedings are still at a relatively early stage in that the second defendant has not yet filed a defence. In looking at the effects of delay for the purpose of exercising its discretion, the court is entitled to have regard to the stage the proceedings are currently at and the additional time that will be required if they are to run to a full trial. In this regard, I agree with the comments of McGrath J. in *Myrmidon CMBS (Propco) Ltd v. Joy Clothing Ltd* [2020] IEHC 246 at para. 50:-

> *"Looking at the matter prospectively, which I believe that the court is entitled to do, if this matter is to proceed it is likely to be some time more before the case comes on for hearing. At that stage, a further period will have expired from the time of the events pleaded. I also believe that, in the circumstances, I am also entitled to take into consideration the further general prejudice to the plaintiffs [sic]*

which it is submitted on their behalf arises from the oppressiveness of a claim hanging over them for such a period of time."

26. The plaintiff anticipates that discovery will be required and asks the court to give directions fixing a timetable for the making of requests for discovery, the bringing of motions and the making of discovery itself all within a 10 week period. In my view, the proposals made by the plaintiff in this regard are completely unrealistic even if it were realistic to suppose they would be adhered to. It is evident from the plaintiff's most recent supplemental replies to the second defendant's particulars that the claim now being made is more extensive than that pleaded and particularised to the first defendant. It is likely that discovery will be a complex exercise, especially for the first defendant which exists only as a legal entity with no staff or premises and no contact with the workforce which was responsible for carrying out the works on its behalf some twelve or fifteen years ago. In normal circumstances, in my view, it would be unrealistic to expect this case to reach trial in less than two years from the date the pleadings are closed. Because of the global pandemic we are not operating in normal circumstances, but that is a factor which is obviously outside the control of the parties to the proceedings. However, the best-case scenario is that these proceedings would come to trial in early 2023, that is seventeen years after the works began and nearly fifteen years after the flooding first occurred. By any standards, that is a very long delay and one which is likely to create problems for the court, not just for the parties.

27. The plaintiff argues that much of the prejudice averred to by the first defendant's solicitor is not relevant to the question of whether there can be a fair trial. That is correct insofar as it goes but fails to appreciate that the first defendant is not obliged to establish that it will be unable to receive a fair trial. This is a case of inordinate and inexcusable or culpable delay on the plaintiff's part such that moderate prejudice to the defendant may justify the striking out of the proceedings. Clearly if a defendant cannot receive a fair trial then the court must strike the proceedings out. However, that is not a threshold which the first defendant must reach in order to succeed in this application. Further the prejudice on which a defendant may rely is not limited to prejudice in the defence of the proceedings. Reputational damage, stress and inconvenience caused by being subject to on-going litigation over an extended period are all adverse factors to which a court can have regard in an application of this type. In this case the first defendant, as a special purpose vehicle that is no longer trading, cannot realistically complain of reputational damage and as a corporate entity it does not complain of stress. Nonetheless the matters identified by its solicitor arising from its *de facto* non-existence create real difficulties for it. There is also a particular prejudice caused to such an entity (which has no on-going involvement in the operation or management of the road, no facilities, premises or staff) by being required to defend proceedings 12 to 15 years after the relevant events. Although these matters would not necessarily result in an unfair trial, they are weighty concerns which must be considered as part of the balancing exercise to be conducted by the court.

28. The plaintiff also contends that because this case is likely to depend on expert evidence, it falls into a sub-category of cases in which the balance of justice will almost invariably favour allowing the trial to proceed. This is because the most significant problem created by a lengthy delay is the effect the lapse of time has on the recollection of witnesses. Thus, the quality of evidence that can be presented to a court will necessarily be poorer than if the trial were taking place at a time more proximate to the events themselves. Where a trial is going to be based primarily on documentary evidence or on technical evidence to be given by expert witnesses, it is contended that the effects of the delay are significantly reduced. I accept that this is so, but only up to a point. The two cases on which the plaintiff relies, *Manning v. National House Building Guarantee Company* and *Nolan v. Chadwick* both held that in the absence of significant prejudice being caused to the defendant, the balance of justice favoured allowing the plaintiff to proceed. Whilst the timelines in *Nolan v. Chadwick* are similar to those involved in this case, the facts in *Manning v. National House Building Guarantee Company* are quite different and probably *sui generis*. In particular, the scientific testing on which the plaintiff wished to rely had taken place more than 30 years earlier. However, those tests were already 20 years old at the time of the events giving rise to the proceedings and, because of the nature of the tests, they could be replicated by appropriate experts.

29. More significantly, those two High Court cases date from 2011 and 2014 and do not, and, indeed, could not, take account of subsequent developments in the jurisprudence most evident in a series of judgments from the Court of Appeal, including *Cassidy v. The Provincialate* [2015] and *McNamee v. Boyce* [2016]. Those judgments apply *Primor* in it's recalibrated form which is less indulgent of culpable delay and more cognisant of the court's obligation to ensure the efficient conduct of litigation. They emphasise that once inordinate and inexcusable delay has been established, the onus lies on the plaintiff to establish countervailing factors which justify allowing the litigation to proceed rather than on the defendant to establish sufficient prejudice to require it to be halted. This is not to say that either case would necessarily be decided differently were it to be decided today, rather the starting point for analysis of the issues would likely be different and would not presume a type or category of case in which prejudice would be unlikely to be caused to a defendant.

30. In any event, I do not think it has been established that this is a case which will necessarily proceed solely on the basis of expert evidence. Given that the proceedings have advanced so little since they were instituted, it is difficult for the court to reach any definitive conclusions as to what witnesses the parties might require. The plaintiff presumes that the evidence will relate largely, if not solely, to the inspections which have been carried out, albeit after much difficulty, by the defendants. The fact that such evidence will be important does not mean that it is the only evidence which the defendants might wish to call. There may well be issues relating to the design of the works and the processes involved or the conditions on the ground both before and during the works which are not strictly "he said, she said" issues, but nonetheless may depend on witnesses' recollection and understanding of work on which they were professionally engaged some fifteen years earlier. In circumstances where the onus lies on the plaintiff

to establish countervailing circumstances such that the balance of justice favours permitting the case to proceed, I am not satisfied that the plaintiff has established that this is a case which can or will proceed only on the basis of technical evidence to be called from witnesses instructed subsequent to the institution of the proceedings.

31. Finally, it might be noted that during the course of this hearing, I asked the parties to address me on the significance of the fact that there are two defendants to these proceedings and that this application is made on behalf of only one of them. Somewhat to my surprise, this is a point which does not appear to have been discussed much in any of the decided case law. Obviously, if this application is allowed, the plaintiff is not totally deprived of his opportunity to litigate as his claim against the second defendant remains extant (although subject to the possibility that a similar application may be brought). Both parties agreed that in circumstances where the claim were to proceed against the second defendant only, it would be open to the second defendant to invoke the provisions of the Civil Liability Act to limit its liability by reference to the potential liability of the first defendant to the plaintiff. The plaintiff contended that this, of itself, would result in a prejudice to the plaintiff who might not then receive full compensation for the injury done to his property. Of course, if the plaintiff suffers such a loss by reason of being unable to pursue his claim against the first defendant or recover the full value of the claim against the second defendant, then he may still have an alternative remedy available to him outside of these proceedings. These are all factors which must be taken into account in the exercise of the court's discretion and which, in the circumstances of this case tend on balance to reduce the potential prejudice to the plaintiff.

32. In conclusion, for the reasons set out above, I will grant the first defendant an order striking out the plaintiff's proceedings on the grounds of inordinate and inexcusable delay. Insofar as the application is brought on an alternate basis, I note that the plaintiff has made a procedural objection regarding whether the first defendant was required to serve a notice of intention to proceed before bringing this motion. The court was referred, in passing, to authority which indicates that a notice of intention to proceed is not required to be served where the step being taken by a party is to secure the striking out of rather than the progression of the proceedings. As this authority was not opened to the court and in circumstances where I am satisfied that the application should be allowed under the court's inherent jurisdiction, I do not propose to determine whether it should also be allowed under O. 122, r. 11.