

**THE HIGH COURT**

[2021] IEHC 772

**[Record No. 2012/858P]**

**BETWEEN**

**DANIEL BYRNE**

**PLAINTIFF**

**AND**

**PHILOMENA MCGREEVY AND ROSEMARY CONROY (AS LEGAL PERSONAL REPRESENTATIVES OF SÉAMUS MCGREEVY DECEASED) AND NEIL MONAHAN**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Stack delivered on the 6th day of December, 2021.**

**Introduction**

1. This is an application to dismiss the plaintiff's claim for want of prosecution pursuant to both the inherent jurisdiction of the Court and/or Order 122 of the Rules of the Superior Courts ("RSC").
2. The proceedings concern a contract for the purchase of land entered into on 16 February 2006 between the deceased as vendor and the plaintiff and the third defendant as purchasers. The first and second defendants are sued in their capacity as legal personal representatives of the deceased. The third defendant was joined by Order of this Court (Gilligan J.) on 31 July 2014, apparently in response to the first and second defendants' insistence that the proceedings could not be maintained without his participation. However, he was never served with the proceedings and there must be considerable doubt as to whether the summons would be renewed at this stage so as to bring him into the proceedings.
3. The proceedings were instituted on 27 January 2012, almost six years after the signing of the contract, and two years after the death of the deceased on 31 January 2010.

**Issues in the case**

4. The current statement of claim is the second amended statement of claim and was delivered on 3 November 2014, the first amendment simply correcting the date of death of the deceased and the second reflecting the Order of this Court joining the third defendant to the proceedings. There has therefore been no change in the substantive case pleaded since the original statement of claim was delivered on 5 April 2012.
5. The effect of the contract was that the plaintiff and the third defendant agreed to buy the plot of ground marked "B" on the map annexed to the contract and forming part of the land comprised in Folio 11932 Co Meath for the sum of €8,829,000.
6. The contract has not been exhibited but its material terms appear from the pleadings and are not in dispute. Special condition 3 of the contract described it as being conditional on the property the subject of the contract being zoned for residential development in the Fingal County Development Plan to be adopted next after the adoption of the then current draft County Development Plan.
7. Special condition 8 provided that the purchasers should pay a deposit of €500,000 which should be released to the vendor and not held as stakeholder. There was provision for

payment of additional deposit sums of €100,000 on the first, second, third and fourth anniversaries of the execution of the contract, and for the sum of €200,000 on each subsequent anniversary, in the event of the contract not having been rescinded or the purchase not having been completed by specific periods. The first two of these anniversary payments (as I will refer to them) were made, with the result that the plaintiff and the third defendant each paid €350,000 by way of deposit.

8. Special condition 10 stated that in the event of the contract having been rescinded in accordance with the provisions thereof the purchaser should not be entitled to a refund of any deposit paid. It appears to be common case that the contract was not rescinded in accordance with its provisions and that, therefore, the deceased retained the deposit. The pleadings do not disclose the basis on which this could occur but the defendants' solicitor states in the grounding affidavit that either party could rescind the same if the lands had not been zoned for residential development within eight years, i.e., by 16 February 2014. This statement has not been controverted.
9. According to the plaintiff, it subsequently came to light that the lands were in County Meath and not in the functional area of Fingal County Council, and the plaintiff alleges that the contract was void or voidable by reason of common and/or unilateral mistake as special condition 3 was incapable of being fulfilled from the outset. As a result, the plaintiff contends that special condition 10 does not apply and seeks the return of the sum of €350,000, being the share of the deposit and anniversary payments contributed by the plaintiff.
10. The plaintiff also relies on fraudulent and/or negligent misrepresentation by the deceased. In replies to particulars he states that these representations were to the effect that the lands would have a "Dublin postal address" and were within the administrative area of Fingal County Council and were made, according to replies to particulars, during the period "August 2004 to February 2006 and thereafter". The circumstances in which these representations were allegedly made are set out in some detail in replies to particulars dated 12 February 2015, and comprise alleged representations made in August 2004, May 2005, August 2005, late November 2005, January 2006, and February 2006.
11. Of these, the representations allegedly made in May 2005, August 2005, and February 2006, appear to relate, in substance, to the drafting and furnishing of the draft contract, which is said not only to refer to Fingal County Council but also to a copy map with no corresponding folio or county area thereon.
12. The remaining alleged representations made in August 2004, late November 2005, and January 2006, are said to have occurred in conversations between the plaintiff and the deceased in the company on each occasion of one other individual, being a different individual on each occasion and, in late November 2005, being a solicitor who does not appear to have acted for either party in the transaction. It was on this latter occasion that the plaintiff allegedly stressed to the deceased the importance to him of the lands being in Dublin. It is the location of the lands in County Meath rather than County Dublin which is the lynchpin of the plaintiff's case.

13. The defence and counterclaim delivered on 10 March 2015 admits that special condition 3 of the contract provided that was conditional on the property the subject thereof being zoned for residential development in the Fingal County Development Plan but says that should be construed as a reference to the East Meath Local Area Plan (South) or alternatively should be rectified to so provide.
14. It is claimed in the defence that when the plaintiff and the third defendant entered into the contract they and their advisers were aware that any rezoning would have to be provided for in the East Meath Local Area Plan (South), and they were aware, when their solicitor furnished the revised special conditions, that the draft of the next East Meath Local Area Plan (South) had been published and did not provide for the rezoning of the contract lands for the purposes of residential development.
15. At paragraph 7 of the amended defence and counterclaim it was specifically pleaded that the reference to Fingal County Council was introduced into the contract at the instigation of the solicitor for the plaintiff and the third defendant, and did not accurately record the agreement between the parties. It is also denied that the representations were made and that, if they were, they were made fraudulently or negligently, or that the plaintiff relied on the representation, or that he was induced to enter into the contract on foot of any alleged misrepresentation.
16. The counterclaim seeks the payment of additional deposits due to be paid on the third and fourth anniversary of the date of execution of the contract, as well as the sums of €200,000 payable on the fifth and each subsequent anniversary thereof. Accordingly, the counterclaim seeks the sum of €1 million, which was the sum outstanding on foot of special condition 8 as of the date of delivery of the counterclaim, together with a declaration that the contract is correctly interpreted in the circumstances as referring to the East Meath Local Area Plan (South) or alternatively an order for rectification to the same effect.
17. Although the defendants' solicitor states in the grounding affidavit that the sum of €1,000,000 is sought on the basis that the contract would have been rescinded in 2014, there is no evidence that either party attempted to rescind on that basis, and the amended counterclaim seeks a declaration that the contract is subsisting. However, nothing turns on that for the purpose of this application as the defendants have stated that, should the plaintiff's action be dismissed, the counterclaim will be withdrawn. This appears to be most material to the balance of justice, which I deal with below.
18. The essence of the defendants' position is set out in para. 6 of the grounding affidavit, where they say that the reference to Fingal County Council is clearly in error as the lands were situate in County Meath. They said the agreement was conditional on the lands being rezoned for residential development within eight years and the reference to Fingal County Council Development Plan should simply be a reference to the East Meath Local Area Plan (South), the appropriate plan.

### **Procedural history**

19. The plenary summons was issued 7 January 2012, the statement of claim was delivered 5 April 2012, and the defence and counterclaim was delivered 26 June 2012.
20. There was then correspondence between the parties as to the mutual exchange of conveyancing files, before the plaintiff served an amended statement of claim on 2 October 2013, simply correcting the date of death of the deceased. A defence to counterclaim and a separate reply to the defence were then delivered on 2 October 2013, and on 10 October 2013 the plaintiff filed a certificate of readiness and notice of trial.
21. On 17 July 2014 the plaintiff issued a notice of motion seeking to join the third defendant as a party. Apparently, this was done at the insistence of the defendants in response to the plaintiff's efforts to set the matter down for trial. However, the plaintiff did not seek any determination of the issue but merely acquiesced in joining Mr Monahan as a defendant. The third defendant was joined on 31 July 2014 and the matter was listed for mention on 20 October 2014, with a view to fixing a date. However, the amended statement of claim was not delivered until 3 November 2014. Furthermore, no amended plenary summons was ever filed and taken out of the Central Office as required by Order 15 (15) RSC and it appears, therefore, that the third defendant has never in fact been joined to the within proceedings.
22. The defendants raised particulars on 27 November 2014, and replies are dated 12 February 2015. An amended defence and counterclaim was then delivered on 10 March 2015. No defence to this amended counterclaim seems to have been delivered, but as a defence to counterclaim and separate reply to defence had been served in 2013, I do not think this is anything more than an oversight and is not particularly relevant to what I have to decide on this application.
23. The Order of Gilligan J. of 17 July 2014 directed that the parties would exchange requests for discovery after delivery of a defence. While the parties appear already to have exchanged conveyancing files in 2012 by the time that Order was made, no formal discovery process had been undertaken and the first formal letter from the defendants seeking voluntary discovery was 9 March 2015. The plaintiff sought voluntary discovery by letter dated 8 July 2015, and by letter dated 27 October 2015 sought a reply and threatened a motion striking out the defence and counterclaim. It appears that there was no substantive reply until 2 December 2015, when the defendants' solicitors wrote asking that the category would be refined somewhat. The proposed refined category was itself quite broad and it was suggested that it would capture everything the plaintiff was really looking for without inadvertently capturing documents which were not in fact of interest to the plaintiff. The plaintiff, by letter dated 18 January 2016, set out his reasons for seeking discovery in the terms originally sought and expressed his expectation that discovery would simply be made in those terms. However, since there was no reply from the defendants agreeing to make discovery in those terms, discovery was not in fact agreed. There is a draft letter from the defendants' solicitors which it seems was intended to go out on 20 January 2016, simply enclosing copy correspondence rather than an affidavit of discovery, but it does not seem that it was ever sent.

24. Both parties are, therefore, somewhat in default so far as discovery is concerned. The plaintiff did not follow up and motion the defendants to get the discovery he sought, while the defendants appear never to have replied to the letter of 18 January 2016, nor do they seem to have ever progressed their own letter seeking voluntary discovery.
25. In the interim, it would appear that the matter was adjourned for mention in the chancery list on numerous dates between 20 October 2014 and 26 February 2018.
26. The defendants served notices of intention to proceed on 1 August 2017, 12 September 2019, and 7 October 2020.
27. The result, therefore, is that the plaintiff has taken no steps on proceedings since January 2016, a period of almost six years, and that the proceedings, more than ten years after they were issued, are not ready for trial, even though they relate to a contract dated 16 February 2006 and to events dating back to 2004.
28. This motion issued on 4 November 2020 and was apparently listed in June 2021, before being adjourned to 5 November 2021 for hearing. In his replying affidavit of 14 April 2021 the plaintiff says that the issues the subject matter of the proceedings were raised in correspondence in November 2009. He became aware of the deceased's death from an article in a newspaper in February 2010 and he points out that he issued proceedings within two weeks of the first extraction of the grant of probate on 26 January 2012.

#### **Relevant legal principles**

29. In support of the application to dismiss the proceedings for delay and/or want of prosecution, the defendants rely on first, the general jurisdiction recognised in *O'Domhnaill v. Merrick* [1984] I.R. 151 and more recently confirmed in *Comcast Int. Holdings v Minister for Public Enterprise* [2012] IESC 50, secondly, the jurisdiction recognised in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459, and thirdly, Order 122 RSC.
30. As the first of these has been recognised as exercised only in "exceptional" cases (see the judgment of McKechnie J. in *Comcast*, approving the judgment of Hogan J. in *Donnellan v. Westport Textiles Ltd.* [2011] IEHC 11), I will first consider the jurisdiction confirmed in *Primor*.
31. As stated by the Court of Appeal (per Irvine J.) in *Millerick v. Minister for Finance* [2016] IECA 206, the *Primor* principles require the court to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied, the application must fail. If on the other hand the court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.
32. I now turn to consider these three issues.

### **Whether the delay was inordinate**

33. One of the most striking features of the case is that the defendant was deceased almost two years before the proceedings were issued, and that almost six years had passed from execution of the contract before the plaintiff instituted proceedings. He says on affidavit that he first raised the difficulty with the contract by letter to the defendants' solicitors in November 2009. This letter was not put in evidence by either side, but the averment has not been contradicted.
34. The essential complaint of the plaintiff relates to the fact that the lands in sale were in County Meath and not in the Fingal administrative area and therefore not in County Dublin. It seems somewhat surprising that the plaintiff, who was entering into a contract for the purchase of lands, apparently in the hope that he and the third defendant would be in a position to develop them, was not aware of the county in which they were situated. It seems even more surprising, if it were critical to the contract that the lands would be situated in County Dublin, that he did not become aware they were situated in County Meath for almost six years after executing the contract.
35. However, there is no evidence before the court as to when the plaintiff, or anyone acting on his behalf, first became aware that the lands were in County Meath. As the onus is on the defendants to show that there was inordinate and inexcusable delay, and as there is no evidence as to the dealings between the parties or their solicitors between the signing of the contract and the letter of November 2009, and whether the plaintiff was aware before then that the lands were in County Meath but only complained of it in November 2009.
36. Unfortunately, the deceased then died in February 2010 and it appears that there was a delay in taking out a grant. Counsel for the plaintiff says it would not be appropriate to apply for the appointment of an administrator *ad litem* when next of kin intended to take out a grant. This is not on affidavit but is hardly controversial.
37. In the circumstances, I do not think there is any relevant pre-commencement delay, albeit that as the proceedings issued only after the death of the deceased and almost six years after the conclusion of the contract, there was an obligation on the plaintiff to move matters forward once the proceedings were commenced: see *Millerick v. Minister for Finance* at para. 21.
38. However, the situation is quite different as regards post-commencement delay. The proceedings were issued nearly ten years ago and rely on representations made between 15 and 17 years ago. The contract at the centre of the dispute was concluded nearly 16 years ago. Despite this, the proceedings are still not ready for hearing as it appears that discovery remains outstanding.
39. Counsel for the plaintiff very properly conceded at the hearing of the motion that it would be difficult to argue that the delay in this case was not inordinate. I think that was an entirely fair and professional approach to the issues, given the procedural history set out

above. I therefore find that the delay in progressing the proceedings since their institution has been inordinate.

40. The real dispute at hearing concentrated on whether the delay could be said to be inexcusable and, if it could, whether the balance of justice favoured the grant or refusal of the relief sought.

**Whether the delay was inexcusable**

41. Counsel for the defendants relied on the statement of this Court (Quirke J.) in *O'Connor v. John Player and Sons Ltd.* [2004] IEHC 99, where he stated (at para. 66):

“Although the onus of establishing that the delay complained of has been inexcusable clearly rests upon the parties so alleging, the onus may be discharged by way of evidence and argument demonstrating that no reasonable or credible explanation has been offered, or can reasonably be said to exist, which would account for, or excuse, the delay.”

42. The excuses offered by the plaintiff in this case are:
- a. the defendant delayed the discovery process from the date of the Order of Gilligan J. in July 2014 to the end of 2016;
  - b. the plaintiff’s solicitors ceased practice in December 2016 and his file was taken over by another solicitor “in 2017”. However, no notice of change of solicitor was filed;
  - c. the plaintiff was suffering from certain medical difficulties which prevented him from prosecuting the claim from 2016 to 2020.

**a. Allegation that the defendant delayed the making of discovery**

43. As regards the first of these, I do not believe that this is a reasonable excuse. As is evident from the Order of Gilligan J., the Court took steps to case manage the proceedings, and it would therefore appear that the case adjourned on at least 28 occasions between 2014 and early 2018. While the plaintiff has stated on affidavit that the adjournments were, up to the end of 2016, “due to the defendants’ obfuscation and discovery requests”, this rather bald assertion is contradicted by the correspondence, which shows no correspondence at all after the letter of 18 January 2016 from the plaintiff’s solicitors, insisting on voluntary discovery in the terms previously sought. From the correspondence, it would seem that the parties simply disagreed as to the appropriate categories in respect of which discovery should be made with the defendants making the usual objection that the categories needed to be redrafted slightly so that they would not be too wide. While the defendants’ solicitors failure to reply to that letter cannot be commended, it was open to the plaintiff’s solicitors to issue a motion if no agreement was forthcoming. Instead, the proceedings became completely dormant.

44. In my view, the onus was on the plaintiff to issue a motion to resolve the dispute as to the extent of the discovery which would be made. The attempt to lay the blame for this on the defendants cannot be accepted, as the defendants did not raise further particulars,

seek discovery, or otherwise engage in conduct which would suggest that they condoned or acquiesced in the plaintiff's delay. The mere fact that the defendants failed to agree discovery in the terms sought does not constitute obfuscation or obstruction and it was open to the plaintiff to resolve the matter by simply issuing a motion. Neither is there any evidence of any communication from the plaintiff to the defendants advising them of the plaintiff's medical difficulties or any other reason why the proceedings could not be progressed for a time.

45. Accordingly, I do not accept that the defendants' failure to agree discovery in the terms sought by the plaintiff provides any excuse for the inordinate delay which occurred.

**b. Alleged transfer of files to another firm of solicitors**

46. The next excuse covers the period 2016 to 2021. In effect, the plaintiff says that he changed solicitors because his former firm, Messrs. Daniel J. Byrne and Co. (which he had originally founded, though he himself apparently ceased practice in 2008), closed down in December 2016. It appears from the booklet of correspondence, and particularly the correspondence between the defendants' solicitors and the Law Society which is exhibited in the supplemental affidavit of service of 2 March 2021, relating to the service of this motion, that some of the files of Messrs. Daniel J. Byrne and Co. were moved to another firm, but not the file relating to these proceedings. The plaintiff has given no explanation of this nor has his current solicitors averred as to how and from whom they obtained the file. This is unsatisfactory, as is the fact that it is evident from the supplemental affidavit of service of 2 March 2021 that the defendants' solicitors did not know, nine years after the issue of proceedings, how the plaintiff could be served with this motion. It is common case that no notice of change of solicitor was filed, and Messrs. Daniel J. Byrne and Co. remained on record for the plaintiff in the proceedings.

47. In his replying affidavit the plaintiff appears to blame the defendants for failing to prompt his new solicitors into action, but his averments on this point are unsatisfactory. He stated at para 13 of his replying affidavit:

"I was unaware that no notice of change of solicitor was lodged. However, in any event, contact could have been made to my former solicitor on record by the defendants. Contact was eventually made by the defendants' solicitors to my former solicitor's email address in January 2021, on foot of which I made direct and immediate contact with their office."

I do not think it was for the plaintiff in a commercial property action to sit back and wait for the defendants to point out to him that his new solicitors may be in default.

48. Furthermore, I have significant doubts as to whether the firm who took over other files from Daniel J. Byrne and Co. were ever instructed in this matter. I say this for several reasons.
49. First, the averment set out above raises more questions than it answers. If the plaintiff's former solicitors closed their offices in December 2016 how could the defendants'



solicitors contact them? Furthermore, what was the “*former solicitor’s email address*” which they used in January 2021? Was it the plaintiff’s own email address or was it the address of the solicitor, Ms. Tara Byrne, who had previously acted, and what was her relationship (if any) to the plaintiff?

50. Secondly, it would appear that, while the case was adjourning on 35 occasions between 31 July 2014 and 26 February 2018, the plaintiff was at all times represented, frequently by counsel. This seems to have occurred on a relatively informal basis between counsel but counsel for the plaintiff said at the hearing of this application that she was never instructed by the firm who, according to the plaintiff, took over the file.
  51. Thirdly, it is clear from the booklet of correspondence exhibited by the defendants’ solicitors that they were not aware of the involvement of the solicitors who are said to have taken over the file in 2017, as they served a notice of intention to proceed on Daniel J. Byrne & Company that year and on 12 September 2019. They also served that firm with a notice of intention to proceed on 12 October 2020, and with this motion by letter dated 17 November 2020.
  52. In my view, the plaintiff has given an entirely inadequate account of the involvement of this second firm of solicitors, and, in line with the *dictum* of Quirke J. in *O’Connor v John Player and Sons Ltd.* [2004] IEHC 99, I think the plaintiff has failed to discharge the evidential onus on him to demonstrate how the alleged involvement of this firm somehow excuses the delay. Counsel for the plaintiff said that the court could take judicial notice of the fact that transfer of files to a new firm would inevitably result in some delay. The problem is that there is no evidence of any such transfer. The plaintiff has plainly failed to excuse his inordinate delay by reference to any such alleged transfer.
- c. Health difficulties**
53. This leaves the plaintiff’s reliance on his health difficulties. In his replying affidavit, he exhibited a report of a consultant psychiatrist in the NHS, which states that on 20 July 2020 he diagnosed the plaintiff as suffering from an adjustment disorder. This report states that the disorder existed from 2013 through to July 2020. It also states that the author believes on the balance of probability that the plaintiff would not have been in a position to adequately pursue litigation. Apparently, the plaintiff himself reported to his consultant psychiatrist that he was greatly improved since August/September 2020.
  54. Although this report is also the nature of hearsay, no objection was taken on that basis, and it must be difficult for a defendant to contradict a report of this nature. While a redacted report was exhibited to the grounding affidavit, an unredacted report was subsequently made available to the court and was the subject of submissions.
  55. It is not entirely clear from the report, but it seems that the author of the report believes that the plaintiff could not have conducted litigation from 2013 onwards, as the report states that he was suffering from a mental health disorder which would have prevented him from adequately pursuing litigation and it is also stated that the plaintiff suffered from that disorder from 2013 onwards.

56. If that is so, then it may be that the doctor was not informed that active steps were taken in the proceedings from 2013 to 2016. While in his affidavit, the plaintiff asserts that his adjustment disorder progressed in severity in the period 2016 to 2020, his consultant psychiatrist does not say this and I do not think the court should take the plaintiff's assertion at face value when the relevant medical professional has said something different, particularly when the timeline in the plaintiff's averment coincides somewhat conveniently with the period during which no steps at all were taken by him in the litigation.
57. Furthermore, as pointed out by the defendants' counsel in submissions on the unredacted report, the most serious and acute episode occurred in 2013, at the time when the plaintiff most actively pursued the litigation. Indeed, the plaintiff served a certificate of readiness and notice of trial on 10 October 2013, and throughout 2014 and 2015 significant steps were taken in the proceedings. I note that replies to particulars were furnished on 12 February 2015 giving details of fundamental aspects of the plaintiff's case, and the plaintiff must have been in a position at that time to give instructions.
58. The plaintiff relied quite heavily on the dictum of Fennelly J in *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 I.R. 510 to the effect that delay might be excusable where an individual was handicapped by *inter alia* illness, and by the subsequent judgment of the *Court of Appeal in McLoughlin v. Garvey* [2015] IECA 80, where a four year period of delay was excused on the basis of the serious medical condition and deteriorating health of the plaintiff's son.
59. In that case the medical report furnished specifically said that the plaintiff would have been unable to partake in any court proceedings, given the very serious medical condition suffered by her son. This was such that it was "beyond the realm of possibility that she would have been able to partake, either physically or psychologically, in any court proceedings in that time" (para. 26). Not only was the view of the doctor as to the ability of the plaintiff in that case to maintain the proceedings expressed in stronger terms than is the case here (where the report expresses a view on the balance of probabilities rather than stating that it would have been impossible for the plaintiff to prosecute the proceedings), but the Court of Appeal seemed to take particular account of the fact that, while the plaintiff's son had always suffered from a serious medical condition, his deterioration from 2008 onwards had caused the delay. The report in that case therefore seems to have been directed quite particularly to the period of delay (see paras. 25-27) and the Court took particular note (at para. 28) of "the extent to which [the plaintiff's son's] medical condition deteriorated in 2008."
60. As a result, the Court of Appeal, noting (at para. 22) that it could exercise its own discretion in the matter and that it was not required to find an error in principle by the High Court, found that the delay was excusable.
61. It appears to be accepted in all of the caselaw that each case will turn on its own facts. In this case, the medical report is not as strong as that in *McLoughlin v. Garvey*. First, it confirms that the plaintiff suffered health difficulties from 2008 onwards, as a result of the

banking crash. This did not stop the plaintiff instituting the proceedings. Secondly, it assesses the plaintiff's incapacity in a more cautious way than was the case in *McLoughlin v. Garvey*. Thirdly, it identifies the period of incapacity as 2013 to 2020, which does not align with the period of delay.

62. Fourthly, it identifies 2013 as a time when the plaintiff's health difficulties were particularly acute. However, as already noted, the plaintiff was actively pursuing the proceedings at that time and indeed attempted to set them down for trial. I would be interested to know what the opinion of the consultant psychiatrist would be on the plaintiff's ability to pursue litigation if he had been told that the litigation had been pursued actively from 2013 to January 2016.
63. It is critical to recall that this report is proffered as an excuse to explain the complete inactivity of the plaintiff in the litigation from January 2016 to November 2020 when this motion issued, a period of almost five years. Its purpose, so far as this litigation is concerned, is to demonstrate that the plaintiff could not have prosecuted the litigation within that period. There is nothing in the report, however, to corroborate a sudden or significant event in early 2016 to explain why the plaintiff was so overcome by his condition that he could not pursue the litigation. On the contrary, the most significant event in the plaintiff's medical history occurred in 2013, but it is evident from the procedural history of this case that that did not prevent the plaintiff from prosecuting the proceedings at that time.
64. Fifthly, although the matter adjourned on numerous occasions throughout 2016, 2017 and until early 2018, there is no evidence of any application to adjourn generally on the basis of the plaintiff's health. Although no significant steps were taken in the litigation while the matter adjourned for approximately two years, solicitors and counsel must have felt they had instructions.
65. While I obviously must take into account that the plaintiff was suffering from a diagnosable mental health condition from 2013 onwards, I am not persuaded by the opinion of the doctor that the plaintiff could not have pursued litigation when it appears that the plaintiff was in fact pursuing litigation from 2013 to early 2016.
66. It is therefore my view that the plaintiff's health difficulties, the existence of which is undoubtedly confirmed by the report from the consultant psychiatrist in the NHS, are insufficient to excuse the delay in this case and that *McLoughlin v. Garvey* is distinguishable on its facts. The medical report in this case therefore does not offer an excuse for the inordinate delay which has occurred.
67. The delay being both inordinate and inexcusable, I now turn to consider the balance of justice.

#### **Balance of justice**

68. As set out in *Primor*, consideration of the balance of justice involves a consideration of a variety of factors, including, as set out by Hamilton C.J. in *Primor* itself (at p. 475):

- 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.
69. Of course, not all of these considerations may be present in every case. Furthermore, in considering the balance of justice, the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation: see Fennelly J. in *Anglo-Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510, at 518.
70. There are a number of material factors to be weighed in the balance in considering where justice lies in this case.
- i. Nature of the proceedings and the risk of injustice**
71. In this case, which will not now be heard before, at the very earliest late 2022, and quite possibly 2023, the statement of claim requires this Court to consider whether or not negligent or fraudulent misrepresentations were made by a person long since deceased, the earliest of which is alleged to have happened in 2004, and the latest of which is said to have occurred in 2006. The court would therefore be considering representations allegedly made between 16 and 18 years prior to the date of hearing. Of necessity, this claim will require oral evidence and that of itself gives rise to a risk that the issues cannot now be fairly tried.
72. This is material to the likelihood of injustice arising from the inevitable dimming of the memory of other witnesses who may give evidence at trial. As stated above, each of the

alleged representations, insofar as they did not relate to the preparation of the contract, are said to be witnessed. The problem is that these people will now have to recall evidence of an event dating back to 2004, 2005 or 2006, in which it appears, as was stressed by the defendants at hearing, they have no interest. It has long been accepted by the courts that, of necessity, recollection fades over time: see, for example, *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510, at p. 520, per Fennelly J.

73. The plaintiff makes the fair point that the defendants have not in fact identified any witnesses, and I think that is certainly something to be weighed in the balance. But whoever their witnesses may be, that issue will apply to all of them, so it is not a case where specific difficulties attaching to the evidence of a particular witness are weighed in the balance of justice, but rather one of a more general prejudice affecting the recall of all witnesses called by the parties.
74. Furthermore, the defendants will not have the advantage of the evidence of the deceased, but counsel for the plaintiff submits that this cannot be taken into account as any prejudice arising from this has existed since the proceedings were issued and does not arise as a result of the inordinate and inexcusable delay.
75. I do not accept this. As previously stated, where a plaintiff issues proceedings just before the Statute runs, there is a higher obligation thereafter to prosecute the proceedings with reasonable dispatch. In my view, a similar obligation arises where proceedings are issued on the basis of alleged oral misrepresentations made by someone who has died. The pre-existing risk of unfairness should not be compounded by additional delay after the institution of proceedings. The fact that a key witness for the defendants is deceased is therefore still relevant to this application, not as prejudice in itself, but as a matter to be considered as part of the context in which prejudice arising from the period of delay itself is assessed.
76. The plaintiff says that he has "reliable and credible witness statements, including two solicitors and corroborating documents" and he points to the fact that the defendants' solicitors acted in connection with the sale and that all of the solicitors still have their files.
77. I do not think that witness statements are a magic formula which negates the inevitable difficulties involved in recollecting matters which have taken place up to 18 years earlier. They may well not cover aspects of the matter which the opposing party would wish to explore in cross examination. Furthermore, it seems probable, from the nature of the case and the replies to particulars, that the plaintiff is relying heavily on conversations which took place in the absence of the solicitors preparing the contract and which he will say require the court to look behind the contract in some way, or indeed to set it aside completely. The witness statements of solicitors and the documents said to corroborate the plaintiff's case will not remove the risk of injustice from the inevitable reliance on oral evidence as to conversations at which the solicitors acting in the transaction were not present.

78. It is the case, of course, that the parties have been aware since early 2012, and most likely before that, of the nature of the dispute. It appears that the relevant files have been retained (and indeed exchanged) which should make those aspects of the case which turn on the preparation of a contract which referred to Fingal County Council instead of Meath County Council easier to deal with in a fair manner. In this regard, I note that the defendants, by letter dated 9 March 2015, sought voluntary discovery by the plaintiff of documents including correspondence with planning consultants and with Mr. Monahan. It appears this may not have been pursued but clearly it was a matter which it was open to the defendants to pursue back in 2015.
79. Nevertheless, as regards the representations allegedly made in conversations with the plaintiff in February 2004, late November 2005, and February 2006, these present a greater risk of injustice which the availability of documents is unlikely to prevent. It seems to me that this risk of injustice tips the balance of justice in favour of dismissal of the proceedings.
80. Of course, there are causes of action other than misrepresentation pleaded in the statement of claim. It appears that the other main cause of action pleaded is that of mistake. In order to establish a common mutual or unilateral mistake sufficient to void the contract, oral evidence is admissible and would appear to me to be inevitable that would be tendered in this case. In practice, the evidence relating to mistake and misrepresentation will overlap as it will deal with the same transactions, conversations and events, and therefore the same risk of injustice exists in relation to the determination of this related cause of action.
81. Furthermore, as is common in cases involving misrepresentation and mistake, there is a counterclaim seeking rectification. Although technically a counterclaim is a separate cause of action, it is clear from *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510, that the effect of delay on a related action (in that case, the death of a witness who was likely to have given critical evidence in a claim for indemnity and contribution against a third party) is material in considering the balance of justice under the *Primor* principles and is also relevant to the exercise of this jurisdiction. It is undoubtedly the case that the claim for rectification will require oral evidence.
82. At hearing, when pressed on the issue of whether oral evidence would be required for the resolution of the issues in the case, counsel for the plaintiff also maintained that paragraph 12 of the further amended statement of claim delivered on 3 November 2014, just over seven years ago, pleaded a separate cause of action from that of misrepresentation or mistake. It pleads:

*"In the circumstances the contract is void and/or voidable in equity by reason of common and/or unilateral mistake and/or was never of any legal effect by reason of the fact that the condition regarding rezoning and special condition 3, on which the contract was conditional, was incapable of being fulfilled from the outset."*  
[Emphasis added.]

83. At the hearing of the motion, the plaintiff sought to rely on the words emphasised in the above quoted paragraph of the statement of claim as encapsulating the claim that the contract was void for lack of consideration. As counsel for the defendants pointed out, this claim does not leap to mind when one reads the pleadings. It is, for example, notable that the word "consideration" or the phrase "failure of consideration" is entirely absent from the paragraph.
84. Despite the ingenuity of the arguments made on behalf of the plaintiff at hearing, there is a limit to the latitude which the court must afford when interpreting pleadings. I cannot see how this argument arises from paragraph 12 of the statement of claim and, in saying this, I take into account the fact that this was the third version of the statement of claim delivered over the course of several years to the defendants. At no point were the more general phrases in the paragraph clarified so as to refer to a failure of consideration.
85. It is therefore my view that core elements of the plaintiff's case will require oral evidence as to conversations with the deceased in 2004, 2005 and 2006 and that there is a real risk of prejudice to the defendants in asking them to now meet this case.
- ii. Alleged injustice arising if the plaintiff is denied the chance to recover the payments made**
86. As part of her submissions, counsel for the plaintiff complained about the injustice of the contract itself. The fundamental bargain made between the parties back in February 2006 was that the plaintiff and the third defendant paid the deposit and anniversary payments mentioned above in the hope that the lands would be rezoned for residential development on or before 16 February 2014. If it wasn't rezoned by that date, either party (whether vendor or purchaser) could rescind the contract. Of course, that contract was made at a time when property prices were rising rapidly and when it was not envisaged there would be a downturn, let alone a financial and economic crash of the scale which subsequently occurred.
87. The plaintiff's counsel described this as a "bet". However, it seems to me to have been in effect an enforceable option to purchase land, the cost of the option being the deposit which was non-refundable if the contract was rescinded in accordance with its terms, which appear to have related to whether or not the lands were ever rezoned.
88. While counsel for the plaintiff sought to link the apparently one-way nature of the payment to the vendor to the claim that the provisions for rezoning could never have been satisfied by reason of the reference to the wrong local authority, such that it was always the case that the deceased would have been entitled to rescind from 16 February 2014 onwards, such that the plaintiff's investment was in effect for nothing, I do not think I can take this into account in the balance of justice as this proposition assumes that the defendants' defence and counterclaim have no merit.
89. On the other hand, insofar as the deceased would have had a right to rescind after 16 February 2014, even if the contractual provisions referred to the correct local authority, that is the bargain that the parties made. It was open to the plaintiff to insist on a contract which provided for the return of the deposit and anniversary payments if

rezoning did not occur. Many contracts at the time provided for a right to rescind if a purchaser had not succeeded in obtaining planning permission within two years, and for the return of the deposit without interest, costs or expenses. It is not clear why this contract did not so provide but there is no issue in these proceedings which would allow the plaintiff to now dispute the fairness of the non-refundable nature of the deposit. I do not think the plaintiff's concern now about the wisdom of this aspect of the contract is material to the balance of justice.

90. Turning to the next consideration, the defendants have stated quite explicitly that should the proceedings be dismissed for delay or want of prosecution, the defendant will not proceed with a counterclaim. Insofar as he seeks rectification that inevitably follows and insofar as he seeks additional anniversary payments of €100,000 which he claims are due and owing to him on foot of the contract. However, this is not sufficient to negate the fact that the sum of €350,000 may have been paid by the plaintiff on foot of misrepresentations on the part of the deceased or on foot of an actionable mistake in entering into the contract. Dismissing the proceedings at this stage arguably denies the plaintiff of his right to recover quite a considerable sum of money. This factor does not, therefore, tip the scales either way.

**iii. Prejudice to the administration of the estate**

91. The defendants claim prejudice to the administration of the estate. However, there is no information as to the value of the estate. While costs could well be considerable and therefore the exposure to the estate is not limited to the claim for the return of €350,000, I note that on 5 March 2012 the plaintiff's solicitors asked that the estate would undertake not to deplete its assets below €550,000, which they presumably felt would cover the sum claimed plus interests and costs, but appears to have received no reply to that request. It is therefore difficult to assess the prejudice to the administration of the estate.

**iv. Prejudice arising from the non-joinder of the co-purchaser**

92. Finally, I am not convinced that the situation of Mr. Monahan is as critical to the proceedings as the defendants say. On the one hand, they say they did not need to join him in the counterclaim in which additional deposit payments are sought, because the liability is joint and several. On the other hand, they say the plaintiff cannot sue for the return of the deposit payments unless he joins in the proceedings. The plaintiff is suing only for the return of the sums due to him and is not purporting to sue on behalf of Mr Monahan. Furthermore, the plaintiff does not rely on any representations made to Mr. Monahan nor is he said even to have been present when any alleged representations were made. I am therefore not satisfied that the non-joinder of Mr. Monahan to the proceedings is such as to present a risk of injustice to the defendants.

**Conclusion on the balance of justice**

93. However, it is my view that the balance of justice favours dismissal of the proceedings as, if the matter is allowed to go to trial, the court will be required to resolve fundamental issues of fact relating to alleged representations made by the deceased between 15 and 17 years ago as of the date of this judgment. Discovery remains outstanding and the



lapse of time will be even greater before the matter is heard. In those circumstances, there is a real risk of injustice and the proceedings should be dismissed.

**Conclusion**

94. In conclusion, the delay is both inordinate and inexcusable and the balance of justice favours the dismissal of the proceedings. There is a real risk of injustice in seeking at this remove of time to determine the issues in the proceedings and a real risk of prejudice to the defendant, who was always disadvantaged by the death of the deceased and who has had that disadvantage compounded by the addition of a period of five years delay occasioned by the inaction of the plaintiff.
  
95. In the circumstances, I do not need to consider the exceptional jurisdiction recognised in *O'Domhnaill v. Merrick* or the more specific jurisdiction pursuant to Order 122 RSC.