THE HIGH COURT

[2023] IEHC 163

[Record No. 2011/6564P]

BETWEEN

FRANCIS DOOLEY

PLAINTIFF

AND

PATTERSON BANNON ARCHITECTS LIMITED,
MCCARTHY CONSULTING ENGINEERS LIMITED,
MULCAHY MCDONAGH & PARTNERS LIMITED,
CALUM MAGUIRE PARTNERSHIP,
AND CLANCY CONSTRUCTION MANAGEMENT LIMITED
T/A CLANCY CONSTRUCTION

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 30th day of March, 2023.

Introduction.

1. This is an application by the fifth defendant (hereinafter referred to as 'the contractor') to have the plaintiff's action against it struck out on grounds of inordinate and inexcusable delay and want of prosecution.

2. This is one of a number of actions that have arisen out of a failed development carried out on the plaintiff's lands in Courtown Harbour, Courtown, County Wexford in 2007 and 2008.

3. The first defendant was sued in its capacity as architect under the contract for the development of the lands. The second defendant was engaged as structural engineers for the works. The third defendant was engaged as project managers. The fourth defendants were the quantity surveyors in respect of the works. The fifth defendant, the moving party in this application, was appointed as replacement contractor, under a contract in writing dated 2 March 2007.

4. To properly understand the issues that arise in this case, it is necessary to set out brief details of the history of this action and of the related litigation.

Background.

5. The plaintiff was at all material times the owner of lands at Courtown Harbour, Courtown, County Wexford. He purchased the lands in 2003. He intended to develop the lands by means of the erection thereon of a mixed use commercial and residential

development; comprising 34 apartments, over 9 commercial units on the ground floor, with a basement underneath the building.

6. The plaintiff set up a special purpose vehicle by means of a company known as Ocean Point Development Company Limited (hereinafter 'OPD'), to develop the site. It is alleged that pursuant to an agreement between the plaintiff and his company, when the units had been constructed and sold, the purchasers would enter into two contracts, whereby 61% of the purchase price would be paid to OPD, with the remaining 39% being paid to the plaintiff.

7. By a contract in writing dated 2 March 2007, OPD engaged the contractor to carry out the building works on the plaintiff's lands. The amount payable to the contractor under the contract was €11,127,577.63. The contractor commenced work on the site in or about March 2007. In October 2008, due to the fact that the plaintiff had countermanded payment of interim payment certificate number 16, in the sum of €768,379.45, the contractor suspended work on the site. While there is dispute between the parties as to whether the contractor simply walked off the site in October 2008, or merely suspended works that month, followed by what it maintains was a valid termination of the contract in December 2008; it is common case that no further construction works were carried out on the site by the contractor after October 2008.

8. The contactor instituted summary proceedings against OPD in respect of the non-payment of the interim certificate. In March, 2009, a receiver was appointed by the plaintiff's bank over the lands and the assets of OPD. In September, 2009, the receiver consented to the contractor entering judgment in respect of the amount stipulated in the interim certificate, together with costs and interest. An order granting the contractor judgment against OPD was granted by the Master of the High Court.

9. In March 2009, the plaintiff had requested permission from the receiver to institute proceedings against the contractor and against a number of other professionals involved in the construction project. He states that he was given permission to do so in April 2010.

10. By plenary summons issued on 19 July 2011, the plaintiff commenced the within proceedings. In essence, the plaintiff claims that due to the negligence and breach of contract on the part of the contractor, it failed to construct the building in a safe and proper manner. In particular, it is alleged that there were serious safety defects in the building from both structural and fire safety points of view.

11. The plaintiff also alleges that the remaining defendants acted negligently and in breach of contract, in failing to design the buildings correctly; and/or in failing to monitor or supervise the carrying out of the building works by the contractor, adequately or at all.

The Present Status of the Defendants in the Action.

12. The plaintiff obtained judgment in default of defence against the first defendant on 7 December 2015. A liquidator had been appointed over the first defendant on 27 August 2014. The company was finally dissolved on 18 August 2020.

13. The second defendant was dissolved on 25 December 2014.

14. The third defendant (hereinafter referred to as "MMP"), was let out of the action on grounds of delay, by a judgment of Heslin J. delivered on 20 December 2021. The court was informed that for some reason the final order has not yet been perfected; so it is not possible for either party to appeal this judgment.

15. The fourth defendant brought a motion to strike out the plaintiff's action against it on grounds of delay. That application was due to be heard before this Court, along with the present application, on 7 March 2023. By consent of the parties, an order was made on that date striking out the plaintiff's action against the fourth defendant.

16. The fifth defendant is the contractor and moving party in this application. As things stand at the moment, the contractor is the only defendant left in the proceedings.

Other Proceedings.

17. The present action is brought by the plaintiff as owner of the lands on which the development works were carried out. Due to the fact that there is a second set of proceedings brought by the same plaintiff, these proceedings will be referred to as 'the Dooley proceedings', where necessary.

18. The plaintiff is the owner of an adjoining site in Courtown, where he carried on business as a publican from a premises known as the Skipper's Bar.

19. By a plenary summons issued on 10 June 2011, the plaintiff sued the contractor, and subsequently joined MMP as a co-defendant, in respect of alleged loss and damage suffered by him in the operation of his business as a publican, due to damage allegedly caused to the pub by the building works carried out by the contractor on the adjoining site. These proceedings will be referred to as the 'Skipper's Bar proceedings'.

20. The contractor has issued a parallel motion in the Skipper's Bar proceedings seeking to have the plaintiff's action struck out on grounds of delay. That motion was heard along with the present application. It is dealt with in a separate judgment.

21. On 22 June 2021, MMP issued a notice of motion in the Skipper's Bar proceedings seeking to have the plaintiff's action against it struck out on grounds of delay. In a written judgment delivered on 21 June 2022, Heslin J. refused that application. MMP appealed that decision to the Court of Appeal. That appeal was listed to be heard on 30 March 2023.

22. When construction work ceased on the site in October 2008, the plaintiff's bank soon took action against him. A receiver was appointed over the development on 5 March 2009. On 18 October 2010, the plaintiff's bank instituted proceedings against him on foot of his loans. Those proceedings were remitted to plenary hearing on 12 May 2011. The plaintiff has stated that when the matter was remitted to plenary hearing, there was a protracted dispute in relation to the making of discovery, in which four affidavits of discovery were sworn by ACC/Rabobank group, including discovery made on foot of a written judgment from Baker J. dated 30 March 2017. The court is not aware of the current status of this action. It appears that the bank's debt may have been transferred to Pepper Finance Corporation (Ireland) Ltd, which may have been substituted as plaintiff in those proceedings.

23. The plaintiff has also sworn that on 4 August 2015, he commenced proceedings on his own behalf, and on behalf of the company, against the receiver, who had been appointed by the bank over the development. He further stated that on 12 July 2016, he had instituted proceedings against Rabobank Group. The exact nature of those proceedings, or the current status of them, has not been made known to the court.

24. On 5 September 2014, OPD issued parallel proceedings (hereinafter 'the OPD proceedings') in almost identical terms to the present proceedings and against the same five defendants.

25. On the application of the contractor, in the OPD proceedings, Barniville J. (as he then was) in a written judgment delivered on 10 May 2019, ruled that the company's proceedings against the contractor be stayed, pending a referral of the dispute under the contract to arbitration. That arbitration is due to be heard on 24 April 2023. It is listed for hearing for six days.

26. While the present proceedings and the OPD proceedings, are separate actions, they are in effect mirror images of each other. The liability issues are identical. It is only in terms

of quantum that they differ. Thus, the progress of one action, inevitably had an effect on the progress of the other.

Chronology of the Present Proceedings.

27. The key dates in relation to the progress of the plaintiff's action against the contractor can be summarised in the following way:

19 July 2011	Plenary summons issued.
26 July 2011	Appearance by contractor.
13 July 2012	Statement of claim delivered.
19 May 2014	Notice for particulars raised by contractor.
19 August 2014	Notice of motion issued by contractor claiming plaintiff's action was frivolous and vexatious.
3 October 2014	Replies furnished by plaintiff to notice for particulars.
26 January 2015	Contractor raises further notice for particulars.
18 May 2015	Hearing of contractor's motion that action was frivolous and vexatious.
2 October 2015	Final orders made by Costello J, two elements of claim against contractor are struck out, but negligence issue remains. Costello J. directs delivery of an amended statement of claim.
16 December 2015	Amended statement of claim delivered by plaintiff.
6 August 2019	MMP issue motion to strike out on grounds of delay.
8 October 2019	Defence delivered by contractor.
17 July 2020	Plaintiff raised notice for particulars on the defence.
24 February 2021	Replies furnished by contractor.
15 September 2021	Contractor issues motion to strike out on grounds of delay.
20 December 2021	Judgment of Heslin J. striking out action against MMP.
March 2022	Unsuccessful mediation held.
7 March 2023	Hearing of contractor's motion to strike out on grounds of delay.

Evidence on behalf of the Contractor.

28. The contractor's application was based primarily on an affidavit sworn by its solicitor, Mr. Seán Carr on 15 September 2021. Having outlined the history of the proceedings down to the date of swearing of his affidavit, Mr. Carr noted that when the contractor's motion to strike out the action against it on the basis that the action was frivolous and vexatious, came

before Ms. Justice Costello for hearing on 18 May 2015, the plaintiff withdrew his claim for damages for breach of contract. He accepted that he had never had a contract with the contractor. Costello J. also directed that the claim in respect of legitimate expectation be struck out. However, she held that because she could not be certain that the claim in negligence was bound to fail, she declined to strike out that element of the case. She directed that an amended statement of claim be delivered. It was delivered on 2 October 2015.

29. Mr. Carr asserted that in the circumstances of the case, while the plaintiff had issued his proceedings against the contractor within the applicable limitation period, they had to be seen as being "late start" proceedings. This was due to the fact that it was apparent from the matters pleaded in the statement of claim, that the plaintiff was in possession of expert's reports from 2008 and 2009, which purportedly supported his allegation that there were defects in the buildings. In these circumstances, it was stated that there was no excuse for the delay in issuing the plenary summons until 19 July 2011, nor for the further delay of twelve months in delivering the original statement of claim.

30. Mr. Carr stated that where there was a late start in initiating proceedings, it was incumbent on a plaintiff to pursue the proceedings thereafter in a diligent manner. He stated that that had not been done. He stated that after delivery of the amended statement of claim in December 2015, the plaintiff had done little by way of updating or pursuing the proceedings.

31. Mr. Carr stated that he believed that the delay in the case was wholly unjustifiable. He also believed that it had prejudiced the contractor in its defence of the proceedings. He set out the grounds of prejudice at para. 13 of his affidavit. He stated that due to the inordinate delay in the case, there would inevitably be considerable deterioration in the memories of witnesses, who would be available to the contractor at the trial of the action. He stated that this was a significant prejudice to the contractor. There was also an issue regarding the availability of documents and the hardcopy paper trail. He stated that both of these issues arose out of the inordinate and excusable delay on the part of the plaintiff in advancing his claim.

32. In addition, Mr. Carr pointed out that since the proceedings had issued the first and second defendants were no longer in existence, having been dissolved in August 2020 and December 2014, respectively. He stated that in all the circumstances, it would be unfair and unjust to permit the plaintiff to continue with these proceedings against the contractor.

33. The averments made by Mr. Carr on behalf of the contractor, were confirmed as being accurate in an affidavit sworn on 7 June 2022, by Mr. John O'Shaughnessy, a director of the fifth defendant. He confirmed all of the averments that had been made by Mr. Carr. He pointed out that a number of reports had been referred to by the plaintiff in resisting this application, which reports had come to hand either at the time of the events, or shortly thereafter, in the period 2008/2009, or had come to hand in 2011. He stated that in these circumstances, there was no excuse for the inordinate delay that had occurred in the prosecution of this case by the plaintiff.

34. He reiterated the assertion that it would be unfair and unjust to ask the contractor to defend the action at this remove, many years after the time of the events complained of by the plaintiff.

Evidence on behalf of the Plaintiff.

35. A number of affidavits were provided by the plaintiff in response to the contractor's application. The first of these was an affidavit sworn by the plaintiff on 8 December 2021. He set out the background to the proceedings. He stated that early on in the course of the development works, it became apparent to him that the quality of the work being done by the contractor, was wholly inadequate. In this regard, he referred to the non-exhaustive list of defects in the works, as set out at para. 36 of the amended statement of claim. The plaintiff stated that he had highlighted these issues to the construction professionals, including the contractor, at various site meetings, but he had been completely ignored. He went on to outline the circumstances in which he had countermanded payment of interim certificate number 16, which he alleged was due to the fact that agreed remedial works in respect of these defects had not been carried out by the contractor. He claimed that when the money was not paid, the contractor abandoned the site, on or about 8 October 2008.

36. The plaintiff stated that subsequent to the contractor abandoning the site in October 2008, the plaintiff became aware that there were further significant structural defects with the building. These were set out at para. 48 of the statement of claim. They included a movement joint, which lacked a sliding bearing, as required under construction drawings; a diagonal crack to the RC beam at mezzanine level; the basement surface water drainage system was inadequate; lack of verticality of gable walls; general poor remedial works to repair concrete; lack of provision of joints to the block work exterior walls; sagging of roof; and poor construction of manholes outside the development.

37. In this regard, the plaintiff exhibited a report from Mr. Francis E. Perri, of FE Perri & Associates, Building Surveyors, dated 9 October 2008, in which Mr. Perri gave the following conclusion: -

> "*Our findings are a significant cause for concern regarding the standard of construction generally. Based on the findings contained in the previous sections, we are of the opinion that there have been serious deficiencies in terms of design, supervision and construction throughout the duration of this project, resulting in a considerable catalogue of defects, ranging from minor to major implication. As previously stated, based on our findings, it is our opinion that in its present condition the areas of the development inspected are currently unfit for use as intended*."

38. The plaintiff stated that that report had been furnished to the defendants, including the contractor, in or about November 2008.

39. The plaintiff stated that prior to the appointment of the receiver in March 2009, the insurer acting for the contractor, Quinn Direct, appointed Mr. Hannon of Thornton & Partners to carry out an initial inspection, with Mr. Randel McGowan of McGowan Surveyors, instructed on behalf of the plaintiff. The plaintiff stated that Mr. Hannon had indicated that he would be accepting the claim on behalf of his insurer and intended to contact Mr. McGowan to arrange for a further inspection to evaluate the level of quantum. However, the plaintiff stated that the appointment of the receiver overtook matters and he was no longer in a position to grant access to the development site, as the receiver had control of the site from 5 March 2009 onwards.

40. The plaintiff stated that the receiver appointed Watts Consultancy Limited to carry out an inspection of the development site and to report on it. In their report dated 21 August 2009, they noted that concerns had been raised by the design team in respect of the quality of the workmanship carried out by the contractor. It noted that while a number of those issues related to items that could be considered superficial, some issues could be considered major. The report stated that they appeared to have been ignored by the contractor. The author stated that their investigations had revealed that there were "serious shortcomings" with the workmanship undertaken by the contractor, or by sub-contractors under their control. The plaintiff exhibited a copy of that report.

41. The plaintiff noted that in that report, the authors were of opinion that the receiver should strongly challenge the claim made by the contractor for payment under interim

certificate no. 16. The plaintiff pointed out that notwithstanding that advice, the receiver failed to do that and instead, he did not object to judgment being entered in favour of the contractor in respect of certificate no. 16.

42. The plaintiff also pointed out that in the report the proposed cost to address the defects and non-compliance issues that arose in relation to the building, was estimated at €2.1m. That excluded the damage to the plaintiff's adjacent public house premises. The plaintiff stated that it was his belief that the receiver had spent millions rectifying the issues on the site, which had been caused by the fifth defendant and the other construction professionals. He stated that the cost of these remedial works was sought to be recovered from the plaintiff by ACC, which proceedings had been taken over by Pepper Finance Corporation (Ireland) Limited, as assignee of the debt.

43. The plaintiff went on to deal with the allegation that the proceedings were "late start" proceedings. He stated that while crucial events occurred in late 2008 and early 2009, soon after the contractor had walked off site in October 2008, a receiver had been appointed in March 2009. The plaintiff stated that on 12 March 2009, the solicitor, who had been acting for him at the time, wrote to ACC seeking permission to sue the construction professionals. He stated that permission was only granted a year later on 20 April 2010. He exhibited the relevant correspondence.

44. The plaintiff went on to outline how proceedings had been instituted by ACC against him on 18 October 2010, which proceedings had been remitted to plenary hearing on 12 May 2011. On 10 June 2011, the plaintiff had issued proceedings in respect of the damage to his public house known as Skipper's Bar. The present proceedings had issued in the following month. The plaintiff stated that in these circumstances, the proceedings could not be seen as being "late start" proceedings.

45. Having set out a detailed chronology of the progress of these proceedings; the Skipper's Bar proceedings; and the OPD proceedings; the plaintiff noted that in December 2020, he had issued case management motions in the within proceedings and also in the OPD proceedings. He had sought to consolidate the two sets of proceedings. However, the contractor had objected to the consolidation of the proceedings.

46. The plaintiff went on to note that mediation had been held in an attempt to resolve all these proceedings in March 2022. However, it had not been successful.

47. The plaintiff went on to outline how he had been required to pursue litigation, either as plaintiff or defendant, on a number of fronts simultaneously. He summarised the various actions in which he had been involved, as outlined above.

48. The plaintiff denied that the contractor had suffered any tangible prejudice as a result of any delay in the proceedings to date. He noted that there was no allegation that any relevant witnesses were deceased, or were otherwise unavailable. He stated that there was no allegation that documents were missing. Furthermore, he stated that given the nature of the case that he was making against the contractor, the action would not turn on oral evidence of witnesses, who were involved in the actual construction works; but would turn on expert evidence as to whether the building that had been constructed by the contractor, had been constructed in a safe and proper manner and in particular, whether it was free from structural defects and defects that rendered it dangerous from a fire safety perspective.

49. The plaintiff further pointed out that discovery had been provided to the contractor in the Skipper's Bar proceedings, which included numerous minutes of site meetings and progress reports from the fifth defendant relating to the development site. Accordingly, he denied that there was any deficit in the oral or documentary evidence, that would be likely to be called at the trial of the action.

50. The plaintiff stated that while the first and second defendants had been dissolved, this had happened effectively as far back as 2014, when the second defendant was dissolved and a liquidator had been appointed to the first defendant.

51. The plaintiff concluded by saying that given the size of the plaintiff's claim to damages, which had been estimated at the time of delivery of the amended statement of claim on 16 December 2015, to amount to approximately €20m; and having regard to the fact that there was no real prejudice suffered to the contractor as a result of the delay, the greater injustice would be suffered by the plaintiff, if the action were to be struck out at this stage.

52. The plaintiff also relied on an affidavit sworn on 28 April 2022, by Mr. Michael Moriarty, Consulting Engineer. Mr. Moriarty stated that he was a structural engineer, with over forty years relevant experience on large structural engineering projects. He referred to a number of reports that he had provided in relation to this development and exhibited same. He outlined that he had found a number of significant structural defects including

the following: a defective halving joint, a possible problem with a movement joint arising from a lack of coordination between drawings and site construction in respect of the joint; insertion of 104 additional mini piles; cracking to a deep diagonal beam. In addition, he noted that there were problems with the basement and there were also examples of poor workmanship throughout the building to include: cracking in the basement floor slab; verticality of columns/wall; concrete defects; cracking of block work and sagging of the roof. He noted that his concerns in relation to the roof were not taken into account. His concerns were subsequently proven to be well founded, when large parts of the roof blew off during a storm in February 2014, and landed in a filling station across the road.

53. Mr Moriarty concluded by stating that he believed that there were "very serious structural and health and safety issues" arising on the development site, most notably in respect of the halving (corbel) joint, the necessity for the insertion of two new columns, the cracked diagonal beam, the storm damage to the roof, the movement joint and also inadequate foundations, that necessitated the installation of 104 mini piles. In addition, he stated that were a plethora of other problems with the overall workmanship on the project; including, but not limited to, the basement, water drainage, cracking in the basement floor slab, verticality of columns/wall and concrete repairs.

54. The plaintiff also relied on an affidavit sworn on 27 April 2022 by Mr. Patrick Fitzpatrick, Chartered Accountant. In that affidavit, he had exhibited a report setting out the loss and damage that had been suffered by the plaintiff and by OPD. He estimated that had the project been successfully carried out, the plaintiff would have made a profit on the sale of the sites, in the sum of €8.9m. He had calculated that OPD separately, would have made a profit of €4.3m. Capital Gains Tax and Corporation Tax would have had to have been paid on those profits. He confirmed that the split of profits between OPD and the plaintiff was 61% for the company and 39% to the plaintiff.

55. His report further set out the sums currently being pursued by the plaintiff's bank, and now by Pepper Finance Corporation (Ireland) Ltd, for an alleged debt of circa €15.4m in relation to the original loan sanction letter dated 20 June 2006; together with a claim against the plaintiff as guarantor of OPD borrowings, believed to be in the sum of €33m. He stated that overall, the total losses to the plaintiff and OPD stood at over €81m, plus the costs of defending and pursuing the claims to date.

56. The plaintiff also relied on an affidavit sworn on 11 May 2022, by Mr. Michael Lyons, Chartered Engineer. In that affidavit, he exhibited a report in relation to fire safety aspects of the building. He stated that the conclusions of his report clearly showed that it was his opinion that the building was grossly deficient from a fire safety point of view. He quoted from various aspects of the report. He also noted that there was a danger of unexpected collapse of the building, due to the reinforced structural element in the event of a fire in the basement. He gave the following conclusion at para. 10 of the affidavit: -

> *"I say that the overall conclusion of the report was that the building 'as constructed' failed to meet the requirements of the Building Regulations, 1997, such that the building was not suitable to be occupied at that time".*

57. Finally, the plaintiff swore a supplemental affidavit on 13 June 2022. He stated that, as was clear from the affidavit sworn by Mr. Moriarty, his site visits had taken place on 20 August 2011 and on 1 and 28 September 2011. These were carried out pursuant to an order of McMenamin J. dated 18 July 2011, which had been made in the proceedings brought by ACC against the plaintiff, giving him liberty to carry out the said inspections.

58. The plaintiff asserted that the conclusions reached by Mr. Moriarty were significant, in that they showed that, contrary to what had been said in the Watts report, the defects in the construction of the building were significant from a safety point of view.

59. The plaintiff stated that subsequent to the site visit carried out by Mr. Moriarty, the receiver engaged an independent consulting engineer, DBFL, to conduct an independent inspection of the property. Ultimately, a new column was provided to the underside of the beam on the western side of the halving joint and a second new column was installed adjacent to the movement joint in the building. The plaintiff stated that these were very serious health and safety matters. He stated that it was notable that no sales of the properties took place until after the aforementioned remedial works had been undertaken. Finally, the plaintiff took issue with the assertion by the contractor that due to the passage of time, there may be any difficulty in relation to relevant documentation needed for the trial of the action.

60. That is a brief summary of the extensive evidence that has been put before the court on the hearing of this application.

Submissions on behalf of the Contractor.

61. Mr. Keaney BL on behalf of the contractor, submitted that, having regard to the fact that the plaintiff had a number of experts' reports available to him from the time of the occurrence of these events in 2008, or shortly thereafter, his delay in issuing the proceedings until July 2011, meant that these had to be regarded as "late start" proceedings. It was submitted that even where proceedings were issued within the relevant limitation period, where a plaintiff had delayed unreasonably in issuing proceedings, it was incumbent on a plaintiff thereafter to move with speed: see *Millerick v. Minister for Finance* [2016] IECA 206; *Tanner v. O'Donovan* [2015] IECA 24.

62. It was submitted that given that the plaintiff had delayed in instituting the proceedings, his delay thereafter in prosecuting same, was all the more inexcusable. When counsel was pressed by the court as to when he submitted proceedings ought to have been issued, if they had been issued in a timely manner; counsel stated that the proceedings ought to have been issued at the latest by the end of 2009.

63. In relation to post-commencement delay, counsel submitted that a delay of over ten years since the issuance of the plenary summons, could only be seen as being inordinate. It was submitted that the delay in this case was also inexcusable. The plaintiff had the necessary expert reports from early on. He was in a position to estimate his losses by means of expert accountancy evidence. In these circumstances, it was submitted that there was no valid reason why he did not bring the action on for hearing far sooner. Counsel submitted that the plaintiff had been guilty of culpable delay, both prior, to and subsequent to the issue of the summons. After the summons had issued, he had delayed in serving the statement of claim. There had also been delay by the plaintiff in making discovery, which he had agreed in December 2020 to do within a period of eight weeks, but had not done so until May 2021.

64. Turning to the third limb of the *Primor* test, counsel stated that the balance of justice favoured striking out the proceedings on a number of grounds. He stated that it was well established in the case law that memories of witnesses will fade with the passage of time. It was submitted that in this case, where the events that were the subject matter of the dispute had occurred in 2007/2008, it was inevitable that the memories of those witnesses, whom the contractor would seek to call at the trial of the action, would have been adversely affected by this inordinate delay. In this regard counsel referred to the following cases: *Anglo Irish Beef Processors v. Montgomery* [2002] 3 IR 510; *Carroll v.*

Seamus Kerrigan Ltd [2017] IECA 66; *Manning v. Benson & Hedges Limited* [2004] IEHC 316.

65. It was submitted that once a defendant had established that there was inordinate and inexcusable delay by a plaintiff in the prosecution of his action, it was only necessary for the defendant to establish moderate prejudice, in order to have the action against him struck out: see *Millerick v. Minister for Finance; Cassidy v. The Provincialate* [2015] IECA 74. Furthermore, counsel submitted that it was not necessary for a defendant to establish specific prejudice, in order to obtain its order; general prejudice would suffice. It was submitted that the general prejudice here arose by virtue of the fact that there was an inordinate delay between the events giving rise to the action and the likely date of the hearing of the trial, which counsel estimated would not occur before the Michaelmas Term 2024.

66. Counsel submitted that this was not a "documents only" case. It had been accepted by Heslin J. in a parallel application brought by MMP, that this was a case in which oral evidence would be required, in relation to what was said at site meetings and what directions, may or may not have been given by both the employer and by those supervising the construction works. It was submitted that in this regard, the diminution in the memories of witnesses was of particular significance.

67. Counsel further submitted that the case law established that not only was there an obligation under the European Convention on Human Rights, to ensure a timely trial of the action, but there was also an obligation under the Constitution to ensure that actions were brought on for hearing within a reasonable time: see *Millerick v. Minister for Finance; Carroll v. Seamus Kerrigan Ltd*. Counsel submitted that where there would be a lapse of approximately 16/17 years between the date of the events complained of and the likely date for the hearing of the action, it could not be said that these obligations were being complied with.

68. It was submitted that a further prejudice to the defendant had arisen due to the delay on the part of the plaintiff and the loss of the other defendants, from whom the contractor could have claimed an indemnity or contribution. In this regard, it was noteworthy that the first and second defendants had been dissolved and the third defendant had already been let out of the proceedings on grounds of delay. As the plaintiff

had abandoned his action against the fourth defendant, this meant that the contractor had been left in the proceedings as the sole defendant.

69. Mr. Keaney BL submitted that while it could be argued that the contractor had delayed in putting in its own defence, there were two answers to that: first, the defendant was entitled to sit on its hands and wait and see if the action would wither on the vine, or be abandoned by the plaintiff. Secondly, the plaintiff could have pushed for delivery of a defence by exercising his right under the rules to bring a motion seeking judgment in default of defence, but he had not done so. Accordingly, it was submitted that any delay by the defendant in filing a defence to the amended statement of claim, was not culpable delay in all the circumstances. In this regard, counsel referred to the Tanner decision and to the decision of Heslin J. in the application brought by MMP.

70. It was further submitted that the fact that the plaintiff was engaged in other litigation, was not relevant to the issues that the court had to decide on this application. The key issue for the court on the hearing of this application, was whether it was reasonable to allow the plaintiff to proceed with his action against this defendant, notwithstanding that there had been a delay of over ten years since the issuance of the plenary summons. It was submitted that the fact that the plaintiff may have issued proceedings against other parties, or may have been facing proceedings brought by other parties against him, was not relevant to the issue of the conduct of these proceedings, which had been brought by the plaintiff against this defendant.

71. In summary, it was submitted that the plaintiff had chosen to start the present actions some three years after the events alleged to have given rise to the cause of action. Thereafter, he had delayed in progressing the action for over ten years, with the result that the defendant's witnesses would have to recall conversations and discussions at meetings that had occurred some 16/17 years prior to the likely date of the hearing of the action. It was submitted that that clearly caused prejudice to the fifth defendant.

72. It was submitted that the principles set down in the *Millerick* and *Cassidy* cases, which had been affirmed by the Court of Appeal in its seminal judgment in *Cave Projects Limited v. Gilhooly* [2022] IECA 245, made it clear, that it was only necessary for the defendant to establish moderate prejudice, once he had established that there was inordinate and inexcusable delay on the part of the plaintiff. It was submitted that these three limbs of the test were clearly satisfied in this case.

Submissions on behalf of the Plaintiff.

73. On behalf of the plaintiff, Mr. Hayden SC submitted that this was not a "late start" case. It was submitted that this was complex multiparty litigation, which had been commenced by the plaintiff when only half of the available limitation period had expired. It was submitted that that was not unreasonable.

74. It was submitted that any delays that occurred post commencement of the proceedings, were either not inordinate in the circumstances, or were excusable, due to the complex nature of the litigation. It was submitted that the court should have regard to the fact that at the relevant time, the plaintiff was involved in a large number of actions, both as plaintiff and defendant. Not only did he have to deal with applications by the defendants in this action, such as applications by the contractor to strike out the proceedings as being frivolous and vexatious and an application by MMP to be let out of the action on grounds of delay; but the plaintiff also had to deal with a similar action by MMP in the Skipper's Bar proceedings and an application by the contractor to stay the OPD proceedings and remit same to arbitration. It was submitted that the court should not look at this case in isolation from the other related litigation, which all stemmed from the same events in 2007 and 2008.

75. It was submitted that the contractor was responsible for a large part of the delay of which it complained, due to the fact that it had delayed for three years and eight months in filing a defence to the amended statement of claim. It was submitted that it was well established that when considering the balance of justice, the court was entitled to look at the actions of both parties to the litigation. It was submitted that it would be ludicrous to suggest that the delay by the contractor in delivering its defence, was not culpable delay, just because the plaintiff had not chased up the issue of the filing of a defence by the defendant. In this regard, counsel referred to *Hogan & Ors. v. Jones & Ors*. [1994] 1 ILRM 512, where it was held that a party to litigation was not entitled to sit on their hands and do nothing. This was all the more so, where they were under an obligation under the rules to do something, such as file a defence.

76. It was submitted that when looking at the application in the round, the court should be mindful of the dicta of Collins J. in the *Cave Projects* case, to the effect that an order dismissing a plaintiff's action against a defendant, had to be seen as being a most

draconian order, as it deprived him of his constitutional right to pursue an action before the courts.

77. In relation to the balance of justice, counsel submitted that there was no evidence of any discernible prejudice to the contractor in this case. They could not point to any witnesses being unavailable; nor to any documents being lost or missing. All they had done was make a vague averment that the memories of some unidentified witnesses, on some unidentified topics, would be adversely affected by the passage of time. That averment had not been made at the initial stages by anyone on behalf of the contractor. It had not been pleaded in its defence. It had simply been made by the solicitor acting for the company. It was only some years later, with the swearing of an affidavit by Mr. O'Shaughnessy on 7 June 2022, that the company had sought to assert any prejudice. Even then, it merely confirmed the vague averments of prejudice that had been made by Mr. Carr in his earlier affidavit.

78. Counsel further submitted that this was not a case that was going to turn on the oral evidence of any witnesses, who carried out any of the construction works in 2007 or 2008. The key issue, which the court would have to determine, was whether the building that was constructed, was structurally sound and was safe from a structural and fire safety point of view. That would be determined exclusively on expert evidence. There was no evidence that the contractor had been deprived of an opportunity to obtain the necessary expert evidence on its own behalf. It was submitted that in these circumstances, there was no prejudice at all suffered by the contractor due to the lapse of time that had occurred since the issuance of the plenary summons.

79. Insofar as it was asserted that any variations in the works that were carried out by the contractor, had been directed or mandated by representatives of OPD, the employer; it was submitted that that argument was unsustainable, due to the fact that the contract provided that any variation from the contract specifications, which was agreed orally, had to be confirmed in writing within a short number of days thereafter. Thus, if there were any variations from the contract documents upon which the tender had been based, such variations would have to be confirmed in writing in order to be effective.

80. Counsel submitted that it was clearly stated in the *Cave* decision, that where prejudice was asserted by a defendant, there had to be an evidential basis for that

assertion and it had to be linked to the delay that had occurred in the action. Counsel submitted that neither of these requirements were complied with in the present case.

81. It was submitted that in the parallel proceedings, which had been brought by OPD against the contractor, these had been remitted to arbitration and were due to be heard in April 2023. It was submitted that it would be anomalous that this Court would hold that the case brought by the plaintiff could not proceed due to delay, when the identical parallel proceedings brought by the company, would be determined by way of arbitration.

82. In relation to the loss of the other defendants from the action, it was submitted that, while the first defendant had been dissolved in August 2020, a liquidator had been appointed over it in August 2014. The second defendant had been dissolved in December 2014. Thus, those parties had long departed from the proceedings. It was submitted that the fact that those parties and the third defendant were no longer defendants in the action, was not relevant, due to the fact that the contractor had not served any notice of indemnity/contribution on any of these defendants. Therefore, it could not make the case that it was prejudiced in the defence of its action due to their absence from the action. Insofar as they may have relied on any witnesses that may have been called on behalf of those defendants, there was no evidence that the relevant witnesses were unavailable to the contractor to give evidence at the trial of the action.

83. Counsel submitted that the court should also have regard to the fact that subsequent to the issue of the motion seeking to strike out the plaintiff's action on grounds of delay, the plaintiff had incurred additional expense at the behest of this defendant, by agreeing to make discovery, and by so doing; and also, by engaging in mediation in March 2022. It was submitted that the court was also entitled to have regard to the fact that due to the Covid Pandemic, it was not possible to list any witness actions for hearing in the period March 2020 to June 2021.

84. In conclusion, it was submitted that this was a very large case, of enormous significance to the plaintiff. It was submitted that it should be allowed to continue, as there was no real prejudice to the contractor in defending the action at this remove; whereas, enormous prejudice would be caused to the plaintiff, if he was denied the opportunity to pursue the contractor in respect of the alleged defects in the building and the losses that had flowed to the plaintiff therefrom.

The Law.

85. The principles which the courts must apply when considering an application to strike out a plaintiff's action on grounds of delay and want of prosecution are well known. They were set out in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR 459. It is not necessary to set out those principles again.

86. Since the decision in the *Primor* case was handed down, there have been multiple decisions applying those principles to various factual situations. This has given rise to a plethora of decisions, which sometimes differ one from the other, in emphasis and tone. In *Cave Projects Limited v. Gilhooley & Ors*., the Court of Appeal carried out an extensive review of the principles and summarised the case law on which they were based. That summary is set out at para. 36 of the judgment; which is itself, a very long paragraph. For that reason, I will not quote it in full, but instead, I will highlight some of the relevant principles that were identified by Collins J. in the course of that judgment. He outlined the following principles as being applicable in applications such as the present one before the court:

- The onus is on the defendant to establish all three limbs of the *Primor* test *i.e.,* that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable and that the balance of justice weighs in favour of dismissing the claim.
- An order dismissing a claim is a far reaching one; such order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed.
- Case law has emphasised that defendants also bear a responsibility in terms of ensuring the timely progress of litigation; while the contours of that responsibility have yet to be definitively mapped out, it is clear that any culpable delay on the part of the defendant will weigh against the dismissal of the action.
- The issue of prejudice is a complex and evolving one. It is central to the determination of the balance of justice. It is clear from the authorities that absence of evidence of specific prejudice, does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice.

- The authorities suggest that even moderate prejudice may suffice where the defendant has established that there was inordinate and inexcusable delay on the part of the plaintiff. However, Collins J. stated that marginal prejudice, if interpreted as being of a lesser standard than moderate prejudice, would not be sufficient.
- Collins J. noted that notwithstanding certain *dicta* in the *Millerick* case, which suggested that even in the absence of proof of prejudice, it may still be appropriate to dismiss an action, it had to be remembered that the jurisdiction was not punitive or disciplinary in character and the issue of prejudice had been acknowledged as being central to the court's consideration of the balance of justice.

87. Collins J. concluded his summary of the relevant principles by stating as follows at para 37:

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

Conclusions.

88. In reaching its conclusions herein, the court has had regard to the extensive evidence that has been put before it, along with the very able and helpful submissions of counsel, both written and oral.

89. The court finds that this is not a "late start" case. This was complex litigation arising out of the failure of a reasonably substantial construction project. The plaintiff has

put before the court expert evidence from the relevant period, that suggests that there were serious structural defects in the building as constructed by the contractor. There is evidence that these defects rendered the building structurally unsafe and unsafe from a fire safety point of view.

90. In these circumstances, the plaintiff had to consider the liability, not just of the contractor, but also of a range of professionals, who had been responsible for (a) designing the building and (b) for monitoring and supervising the construction works. In effect, he had to mount professional negligence proceedings against the first three defendants as architect, engineer and project managers; along with a defective workmanship case against the contractor. The plaintiff would have had to have obtained expert reports on the liability of each of these defendants. Counsel would then have had to draft the proceedings with considerable care. That takes time.

91. The court holds that to issue such proceedings approximately three years after the accrual of the cause of action, was not unreasonable. Therefore, I hold that these are not "late start" proceedings.

92. Turning to the issue of post-commencement delay, the court notes that when the plaintiff served the original statement of claim, the contractor delayed twenty-two months in raising a notice for particulars thereon. This has not been explained by the contractor. It is hard to see how that delay arose, in light of the fact that the contractor had been furnished with the Perri report in October or November 2008, so it was well aware of the case that was going to be made against it. I find that the contractor ought to have been able to raise a notice for particulars within four months of delivery of the statement of claim; therefore, the contractor was guilty of culpable delay of approximately eighteen months.

93. It seems to me that for the purpose of this application, the key period for examination is the period from July 2012, being the date of delivery of the original statement of claim to 15 September 2021, being the date of issue of the contractor's notice of motion seeking to strike out the action on grounds of delay.

94. The plaintiff had delayed one year from issuance of the plenary summons to delivery of the original statement of claim. I do not regard that period as being grossly unreasonable. The defendant then delayed twenty-two months in raising its notice for particulars. As already stated, the contractor was guilty of culpable delay of about eighteen

months in this period. The contractor eventually served its notice for particulars on 19 May 2014. That was replied to on 3 October 2014. I do not regard that period as being excessive.

95. In August 2014, the contractor issued its motion to strike out the action on grounds that the plaintiff's action against it was frivolous and vexatious. That put a brake on the progression of the action. The plaintiff could not proceed further with the action, until that issue was resolved.

96. A notice seeking further and better particulars was issued by the contractor on 26 January 2015. It is not clear whether this was ever replied to. However, I am satisfied that the issuance of that notice for particulars was probably overshadowed by the existence of the motion that had issued by the contractor the previous August, seeking to strike the matter out as being frivolous and vexatious; which application was pending before the High Court.

97. That application was heard by Costello J. on 18 May 2015. Her final order was made on 2 October 2015. The plaintiff had withdrawn his claim for breach of contract against the contractor. The court had struck out the claim based on legitimate expectation. Costello J allowed the plaintiff to continue with his claim in negligence against the contractor. She directed that an amended statement of claim be delivered. That was done by the plaintiff in December 2015.

98. The contractor then delayed three years and eight months in delivering its defence. I find that this constitutes culpable delay on its part.

99. The contractor argued that it was entitled to sit on its hands and adopt a wait and see approach, as to whether the plaintiff would press on with his action. If that was their belief, it was misplaced. The case law is replete with dicta stating that when considering applications such as the present one, the court must look at the conduct of both parties. The rules of court provide that a defence must be delivered within eight weeks from delivery of the statement of claim. While it may be that in complex litigation, some extra time can be allowed to a defendant to formulate its defence, a delay of three years and eight months is totally inordinate.

100. The submission that a defendant can sit back and do nothing when it should be putting in its defence, was firmly rejected by Cross J. in the Australian case of *Calvert v. Stollznow*, which was not reported, but the decision was affirmed on appeal in [1982]

NSWLR 749. In *Hogan & Ors. v. Jones & Ors*., Murphy J. cited with approval the following passage from the note of the judgment of Cross J.:

> "*And the defendant in such a case is not blameless. I realise that Lord Salmon has at least twice said that the defendant is entitled to let a sleeping dog lie in the hope that it will expire. Yes he is. But in my respectful opinion the defendant cannot or should not have it both ways. A defendant faced with litigation which the plaintiff is not actively pursuing has an election. He can either press the plaintiff to get on with the action; i.e. he may cause a letter to be sent to the plaintiff's solicitors to that effect or he may approach the court in a proper case - and if it is a proper case he can do so at no cost to himself - for an order that the plaintiff take the necessary procedural step reasonably quickly; or he may allow the matter to lie. But if he chooses silently to acquiesce in the delay in the hope that it will eventually result in his financial advantage in the sense that the matter will "die" i.e. if he seeks and hopes to advantage himself by that delay, is he then entitled to point to that delay, which he could have taken steps to prevent, as prejudicial to him - though in some fashion not prejudicial to the plaintiff - and seek to achieve by a court order striking the matter out what he hoped, wrongly as it turned out, to achieve by deliberately lying silent himself? In my opinion, no. Considerations of justice transcend all other considerations in these matters. Of course justice is best done if an action is brought on while the memory of the witnesses is fresh. But surely imperfect justice is better than no justice at all*."

101. These dicta in the *Calvert* case were also cited with approval by Collins J. in the *Cave* case.

102. The circumstances in the *Hogan v. Jones* case bear some resemblance to the present proceedings. That case arose out of the design and construction of the west lower stand in the old Lansdowne Road stadium. The contract for the construction of the stand was dated 16 June 1977. A certificate of practical completion of the works was issued on 6 March 1978. Murphy J. noted that by the time that he came to deliver his judgment on the defendant's application to strike out the action on grounds of delay, which judgment was delivered on 12 January 1994, a period of more than fifteen years had elapsed since the wrongdoing alleged by the plaintiff in the proceedings. He noted that the defendants had failed to deliver their defence until 2 February 1988, a delay of almost four years.

103. That delay had been explained by the defendants by the fact that negotiations were taking place between the parties as to whether the defendants would abandon their right to have the issue resolved by arbitration, in light of the fact that other defendants in the action would remain in the proceedings. Eventually, agreement had been reached to the effect that the third defendant would waive their rights to go to arbitration, in return for the plaintiffs admitting the amount of the costs of the investigations carried out by the third defendant into the alleged defects and subsequently quantified in their counterclaim. Murphy J. went on to make the following comment in relation to the delay in furnishing the defence in that case: -

> "*I think it must be accepted that the delay in processing this action between January '84 and February '88 was exclusively that of the defendants. Perhaps the same thing may be expressed by saying that such delay as occurred in that period has been excused so far as the plaintiffs are concerned*."

104. Later in the judgment Murphy J. pointed out that the draconian penalty of dismissing proceedings as against a particular defendant in circumstances which will wholly defeat the claim of the plaintiff, is not an order which is made with a view to punishing a party for his dilatoriness in proceeding with the action, or for his failure to meet some artificial regime. The order is made only where it is necessary to protect the legitimate interests of the party sued and in particular to protect his constitutional right to a trial in accordance with fair procedures.

105. Having referred to the *Calvert* decision, Murphy J. held that he was required to have regard to the delay on the part of the defendant and the failure on his part to exercise his right to apply to dismiss at an earlier state for want of prosecution, as an ingredient in the exercise of his discretion as to whether or not to grant the relief claimed. He went on to hold that notwithstanding that one of the witnesses, whom the third defendant intended to call at the trial of the action, had died; he nevertheless held that the defendant's application should be refused.

106. In *Kileen v. O'Sullivan* [2022] IEHC 625, Simons J. held that failure to deliver a defence, could be characterised as culpable delay on the part of a defendant. However, he went on to hold that on the facts of that case, the prejudice to the defendant caused by the overall delay in the case, was so weighty, that the balance of justice required that the proceedings be dismissed, notwithstanding the defendant's default in pleading.

107. The contractor relied heavily on the decision of the Court of Appeal in *Tanner v. O'Donovan & Ors.* [2015] IECA 24. In that case the first and second defendants were architects and the third defendant, was a consulting engineer, who had been retained by the plaintiff in relation to the construction of a hotel between 1998 and 1999. By the late summer of 2009, the action had not been set down for trial. The first and second defendants issued a motion on 10 September 2009 to strike out the proceedings on grounds of delay. The third defendant did likewise on 30 September 2009.

108. Delivering the judgment of the court, Hogan J. noted that the construction work on the hotel had been completed in March 1999, when the hotel was opened for business. The proceedings had been instituted by the plaintiff on 1 September 2003. There was a dispute as to when the third defendant actually filed its defence. A consent order had been made in January 2007, which allowed a period of four weeks for delivery of a defence by him. The third defendant maintained that the defence had been served by him in February 2007. The plaintiff maintained that it was not actually received until some date in early 2009. Hogan J. made it clear that there was an obligation on a plaintiff to take steps to pursue a defendant that was in default of delivering its pleadings. He stated as follows at para. 35: -

> "*If the plaintiff is correct, then the question arises as to why no further action had been taken by him to compel the delivery of the defence prior to August 2009 well over five years since the delivery of the statement of claim and in excess of two and a half years since the order compelling the third defendant to file a defence. Even on that version of events, the plaintiff's further delay in not taking active steps to prosecute the proceedings after such a length of time – even allowing for the delays on the part of the third defendant – was itself entirely inexcusable. The fact that a defendant has been inactive does not excuse a plaintiff from prosecuting proceedings with the appropriate degree of expedition and vigour, not least where (as here) the plaintiff has delayed before issuing proceedings. This is perhaps especially so when the other defendants (i.e., in this case, the first and second defendants) had already long since served their defence some three years earlier.*"

109. Having found that there was inordinate and inexcusable delay on the part of the plaintiff, Hogan J. went on to consider the balance of justice. He found that this was in

favour of striking out the proceedings. However, in that case oral evidence was going to be particularly relevant, because it was clear from the pleadings that the agreement contended for by the plaintiff, was an oral one. The third defendant had denied the existence of any such agreement, or as also claimed by the plaintiff, that he had made representations to the plaintiff prior to his appointment.

110. Hogan J. held that the case would rest largely on the existence of an oral contract, the terms of which (if there was one) were in dispute. He held that any fair hearing of the claim would thus be very dependent on oral evidence and on the recollection of detail associated with architectural and engineering services and the construction of a building. He held that the lapse of time between 1998 and 2010 was accordingly inherently prejudicial, since the capacity of the witnesses to recollect this detail had doubtlessly been considerably impaired.

111. Another relevant factor in his consideration of the balance of justice, was the fact that the main electrical contractor and the lighting contractor, had died before the motions to dismiss had issued. Hogan J. noted that while the plaintiff had disputed any suggestion that these were critical witnesses, he held that their absence hampered the ability of the defendants to reconstruct the events of 1998-1999. In addition, an employee of the first and second defendants, who had inspected the building on their behalf, had since emigrated to the US. It was unclear whether he would have been available for the trial. Having considered all the relevant factors in the case, Hogan J. affirmed the decision in the High Court, which had been to dismiss the plaintiff's proceedings against the defendants.

112. Two days prior to the delivery of the Court of Appeal judgment in the *Cave* case, the Court of Appeal also delivered judgment in *Kirwan v. Connors* [2022] IECA 242. One of the issues which arose for decision in that case, was whether the plaintiff could excuse the delay in the case due to the failure of the defendant to reply to a notice for particulars that had been raised by the plaintiff. Delivering the judgment of the court, Power J. held that this was not a good excuse for some of the delay that had occurred in the proceedings. She stated as follows at paras. 131-132: -

> *"… In the absence of any reply to his alleged notice for particulars, Mr. Kirwan was not entitled to simply 'sit on his hands' and allow the proceedings to stagnate. He had tools available to him to compel the replies he sought and his status as a litigant in person does not absolve him from his responsibilities in this*

regard. Irvine J's observations in Flynn (albeit in that case on the failure to cooperate in seeking full and proper discovery) are apposite. She stated (at para. 33):

> *'… the onus is on a plaintiff to prosecute their claim with reasonable diligence and if a defendant fails to co-operate, for example by ignoring correspondence in relation to discovery, the rules of court provide a method whereby that co-operation can be secured. Mr. Flynn had, as was considered material in O'Domhnaill, the ability to control any such delay.'*

132. The appellant in this case also retained the ability to control the delay that ensued. Faced with the lack of response to the notice for particulars, he was obliged to use the machinery of the rules of the court to move matters on. His failure to do so cannot be relied upon as a valid ground for excusing the delay and the trial judge was correct so to find."

113. The court noted that on 16 March 2023, the Supreme Court allowed leave to appeal in the *Kirwan* case: see [2023] IESCDET 34.

114. Having regard to the authorities cited above, I hold that where there has been a failure by a party to deliver pleadings, or to answer correspondence in relation to making discovery, that delay cannot be relied upon by a plaintiff to excuse the overall delay in the action, if the plaintiff has done nothing to force the defendant to take the steps required. However, such delay by a defendant remains culpable delay, which is reckonable when considering where the balance of justice lies.

115. Returning to progression of this action, just before the contractor delivered his defence in October 2019, MMP had issued their motion to strike out the action against them on grounds of delay, on 6 August 2019. The bringing of that motion, again, put a brake on the plaintiff's ability to progress the action. A plaintiff cannot set a matter down for hearing against only some of the defendants, while leaving his claim against the remaining defendants extant. He must either clear some of the defendants off the slate, by either obtaining judgment in default against them, or by letting them out of the proceedings; only then can he set the matter down for hearing against the remaining defendants.

116. Thus, the filing of the motion by MMP in August 2019, meant that the plaintiff could not progress his action in a meaningful sense to a hearing, until that application had

been determined. That was done by virtue of the judgment handed down by Heslin J. in favour of MMP on 20 December 2021. As already noted, that order has not been perfected, so it has not been possibly for any party to appeal it at present.

117. Some two years after MMP had issued their motion to strike out the action on grounds of delay, the contractor issued its motion seeking the same relief, on 15 September 2021, which was three months before the judgment was delivered on the MMP application. The contractor's motion came on for hearing before this Court on 7 and 8 March 2023. The plaintiff cannot be blamed for the delay that arose after the issuing by MMP of its motion in August 2019 and the hearing of the subsequent motion issued by the contractor herein.

118. Having considered all the relevant periods of delay, the court holds that notwithstanding that some of the periods of delay were due to the fault of the defendant, and some were due to other applications in the proceedings; I find that looking at the proceedings in their totality, the plaintiff has been guilty of inordinate and inexcusable delay. It is difficult to think of any circumstances which would excuse a delay of over ten years from commencement of the action. That being the case, the court must now consider the third question under the *Primor* test, being the balance of justice.

The Balance of Justice.

119. The central issue that arises for consideration under the balance of justice is the issue of prejudice to the defendant in being required to answer the plaintiff's claim in light of the delays that may have occurred in the proceedings.

120. In this case, the contractor does not allege specific prejudice. It does not contend that any relevant witnesses are unavailable, nor that any relevant documents are no longer available to it. The contractor relies on general prejudice, based on the inevitable diminution in the memories of witnesses due to the passage of time between the date of the events complained of by the plaintiff and the likely date for the trial of the action, which would probably be towards the end of 2024.

121. I do not think that the contractor's argument in this regard is well founded. I have reached that conclusion for a number of reasons. First, the core issue in this case is whether the building that was constructed by the contractor, was structurally safe and whether it was safe from a fire safety point of view, which will include the issue of whether the building complied with the relevant building regulations and fire safety regulations.

122. In this case, it will not be necessary to call evidence from the workmen who actually did the building work on the site in 2007/2008. The core issue is whether, what was actually put on the ground, was safe or not. That will be decided by expert evidence. It is not suggested that the contractor has been prejudiced in any way in obtaining whatever expert evidence it may require to defend itself at the trial of the action.

123. Indeed, it seems to me that the key evidence in this case would be that given by the receiver. The plaintiff has alleged in his affidavit that the receiver spent millions of Euro remedying defects in the building, prior to putting the units on the market for sale. While the plaintiff did not produce any documentary evidence to support that assertion, it is noteworthy that the contractor did not deny that assertion when Mr. Shaughnessy swore his affidavit sometime later. In addition, the plaintiff asserts that the cost of these remedial works has been added to his debt to the bank, which Pepper Finance is now pursuing through litigation.

124. It seems to me that if the receiver did have to spend substantial sums of money remedying defects in the building, that would be highly probative evidence, because he was an unconnected third party, who was not involved in the dispute between the plaintiff and the contractor; whose only aim was to realise the security as quickly and cheaply as possible. He would not have spent any money, provided by the bank, unless it was necessary to do so, in order to place the units on the market. Thus, evidence as to what remedial works, if any, were carried out by the receiver, will be highly probative at the trial of the action.

125. In addition, insofar as there may have been variations to the building, from the drawings in the original design on which the contractor had based its tender; these matters will have been recorded in both the minutes of relevant site meetings and, as suggested by counsel for the plaintiff, they would have had to have been confirmed in writing, pursuant to the terms of the contract. Given the size of this project and the extent of the defects, as set out in the reports put in evidence on behalf of the plaintiff, it is inconceivable that, if these defects existed in the building, they arose as a result of variations orally agreed between the parties.

126. It is also relevant to note that parties cannot agree any variations which would cause the development to depart from the planning permission granted to the employer,

nor could they agree variations that would have the effect of breaching either the building regulations, or the fire safety regulations.

127. There is also the fact that the roof apparently blew off the building in 2014. That is an event that is easily capable of proof. One could argue that for a roof to blow off a relatively newly constructed building, that is almost *res ipsa loquitur* in respect of an allegation of defective workmanship on the part of a builder.

128. I would emphasise that I am making no finding in respect of any of these matters. Much will depend on the state of completion of the building when the contractor left the site in October 2008. The significance of these matters, is purely to show that the issues in this case are unlikely to turn on oral evidence of those involved in the actual construction works in 2007/2008; rather, the oral evidence will concern the evidence of experts in relation to what was actually constructed at the site.

129. This case is not like a personal injuries action, where the issue of liability may turn on the recollection of parties and independent witnesses as to what happened in the moments leading up to an accident. In such circumstances, the effect of the passage of time on the memory of witnesses, could give rise to substantial prejudice on the part of a defendant. However, for the reasons outlined above, the circumstances of this case are very different.

130. I pause here to state that I have not taken into account the averment contained at para. 22 of the affidavit sworn by the plaintiff on 8 December 2021. In that paragraph, he recounted an apparent meeting between Mr. Hannon of Thornton & Partners, on behalf of the insurers representing the contractor, and Mr. McGowan, a surveyor, who had been instructed on the plaintiff's behalf; wherein Mr. Hannon apparently indicated to Mr. McGowan that on behalf of the contractor's insurer, he would be accepting the claim made by the plaintiff. While it is permissible in interlocutory applications for a party to rely on hearsay evidence, the plaintiff is attempting here to rely on hearsay upon hearsay. He is seeking to place reliance on a comment apparently made by Mr. Hannon, which was made to Mr. McGowan, which was in turn relayed to the plaintiff. It is not permissible to have hearsay upon hearsay. The court has not had regard to this evidence.

131. The plaintiff submitted in argument, that the court should take account of the fact that the issue of delay was not pleaded in the defence filed by the contractor in October 2019. I am of the view that this is not relevant. A party is entitled to plead whatever it

wants in its defence. It is entitled to bring an application seeking to strike out an action on grounds of delay, whenever it feels that it is appropriate to do so. There is no requirement that the issue of delay should be pleaded in a defence prior to bringing any such motion. Indeed, it could often happen that a defence would be filed long in advance of the bringing of such a motion by a defendant. There is no substance in this submission.

132. In relation to the issue of alleged prejudice suffered by the contractor due to the delay in the progress of these proceedings, I find that there is not even moderate prejudice caused to the contractor by virtue of the delay in the progression of these proceedings. I find that notwithstanding the delay that has occurred in the proceedings to date, the contractor will be more than able to defend itself adequately at the trial of the action.

133. There are also a number of additional factors that have to be weighed in the balance when considering where the balance of justice lies. First, the court is entitled to have regard to the position that the plaintiff found himself in when the contractor ceased work at the site in October 2008. The plaintiff had in his possession at that time, a report which suggested that there were serious structural problems with the building as constructed, which rendered it structurally unsafe. There were also serious fire safety issues with the building.

134. All of that happened during the recession which commenced circa September 2008. The court can take judicial notice of the fact that the recession plunged the national economy, property values generally and anything touching the construction industry, into a terminal decline.

135. The recession, allied to the problems with this development site, put the plaintiff in a most precarious position with his financiers. Having regard to the number of cases outlined earlier, in which the plaintiff was involved in one guise or another, it is fair to say that he was plunged into a vortex of litigation in the years that followed 2008. While that, of itself, was not a licence to adopt a dilatory approach by the plaintiff, the court has to look at the reality of what this plaintiff was facing at the time, and in the years thereafter, when considering the culpability of his delay in the context of the balance of justice.

136. The court is entitled to have regard to the fact that not only was the plaintiff and his company, suing in relation to the alleged breach of contract and negligence on the part of a significant number of defendants arising out of the carrying out of these development

works; the plaintiff also had to mount a separate claim in respect of the alleged damage to his public house premises. He was also involved in litigation with his bank.

137. In the course of the Skipper's Bar proceedings, the plaintiff had to repel applications by both MMP and the contractor, to be let out of that action on grounds of delay. He was successful in relation to the application brought by MMP. For the reasons set out by this Court in its judgment in the application brought by the contractor in those proceedings, the plaintiff has also been also successful in resisting the contractor's application. The court is entitled to have regard to the multiplicity of litigation in which the plaintiff was involved and the number of applications that were involved in each case.

138. In argument at the bar, counsel for the contractor relied heavily on the decision of Heslin J. in the application brought by MMP in these proceedings, to be let out of the action on grounds of delay, which application was successful. That judgment is reported at [2021] IEHC 852. While the court has had regard to the detailed and careful judgment of Heslin J, the court accepts the submission made by Mr. Hayden SC on behalf of the plaintiff, that as the court is being asked to exercise its discretion, it must look at the facts of the individual plaintiff *vis-à-vis* the individual defendant, when ruling on each application. For that reason, this Court is satisfied that it must make up its own mind in relation to the application that is before it, notwithstanding the determination that was made by Heslin J. in the application brought by MMP.

139. The court has had regard to the fact that in the parallel proceedings brought by OPD, that matter will proceed by way of arbitration before an arbitrator in April 2023. Thus, the identical issues that are raised in these proceedings, will fall for determination by an arbitrator in the dispute between the company and the contractor.

140. Taking all of these matters into account the court finds that when considering the balance of justice in this case, the balance is tilted in favour of allowing the action to proceed for the following reasons: The contractor was guilty of culpable delay in waiting twenty-two months to raise a notice for particulars arising out of the original statement of claim; it was also guilty of culpable delay in failing to deliver its defence to the amended statement of claim for a period of three years and eight months. It is inconceivable that a party can be in breach of its obligation under the rules to provide a defence for such a protracted period of time, yet can still rely on their default in that regard, to ground an application to strike out a claim against them on grounds of delay.

141. The court has had regard to the fact that there is no claim to specific prejudice in this case. Insofar as the contractor makes the assertion that the memory of its witnesses will have diminished by the passage of time; for the reasons set out earlier in the judgment, the court is not satisfied that the contractor has established even moderate prejudice in this regard.

142. When looked at in the round, when one has regard to the nature of the dispute that exists between the parties; the hugely adverse circumstances in which the plaintiff was placed in the years following 2008; coupled with the culpable delay on the part of the defendant to file its defence, and having regard to the size of the claim that is brought by the plaintiff in these proceedings; the court is satisfied that the greater injustice would be caused if the action were to be struck out on grounds of delay.

143. For the reasons set out herein, the court refuses the reliefs sought by the fifth defendant in its notice of motion dated 5 September 2021.

144. As this judgment is being delivered electronically, the parties will have four weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

145. In their submissions, the parties may make proposals as to what should be done with the outstanding discovery motion, which was let stand to await the determination of the within application.

146. The matter will be listed for mention at 10.30 hours on 4 May 2023 for the purpose of making final orders.