THE HIGH COURT

[2024] IEHC 26

[Record No. 2014/2455P]

BETWEEN

BRIAN EGAN

PLAINTIFF

AND

THE GOVERNOR AND THE COMPANY OF THE BANK OF IRELAND, JOHN G. DILLON-LEECH AND ROBERT POTTER-COGAN, PRACTISING UNDER THE STYLE AND TITLE OF T. DILLON-LEECH & SONS SOLICITORS, AND SEAN MALONEY & ASSOCIATES

DEFENDANTS

JUDGMENT of Mr Justice Barr delivered on the 19th day of January 2024.

Introduction.

1. This is an application by the fourth defendant for an order pursuant to O.19, r.28 of the Rules of the Superior Courts, to strike out the plaintiff's action against him as failing to disclose a cause of action and as being bound to fail. The fourth defendant also seeks to have the action against him struck out pursuant to O.122, r.11 and pursuant to the inherent jurisdiction of the court, on grounds of delay and want of prosecution.

Background.

2. The background to this case goes back many years. It is also somewhat complex. However, the essential aspects of it can be summarised in the following way: The plaintiff purchased a petrol station in Dunmore, County Galway, in 1993. In 2004 he purchased an adjoining site, on which there was a substantial building, consisting of seven commercial units. Unfortunately for the plaintiff, the building on the site had planning difficulties, in that the building as constructed, did not accord with the plans that had been submitted and on which planning permission had been obtained.

3. It subsequently transpired that the plaintiff had a more fundamental problem: in that the building as constructed, extended beyond the two folios which the plaintiff had purchased in 2004. Part of the building extended onto unregistered land at the rear of the property, which led down to a river.

4. In 2014, the plaintiff commenced these proceedings. The first defendant is the bank which gave him a mortgage to purchase the adjoining folios. It was let out of the proceedings on consent in November 2020.

5. The second and third defendants were partners in the firm of solicitors who represented the plaintiff at the time of the purchase of the folios in 2004 and in the years after that. For ease of reference, the second and third defendants will hereinafter be referred to cumulatively as 'the solicitor'.

6. The solicitor brought a motion to strike out the action against him on grounds of delay. The solicitor was successful before the High Court. The plaintiff appealed that judgment. The Court of Appeal upheld the High Court judgment in a reserved judgment delivered on 20 December 2022, reported at [2022] IECA 294.

7. The fourth defendant is an architectural technician. He had been retained by the plaintiff to furnish a certificate in 2008, confirming that the buildings which had been constructed on the land following a fire in 2006, complied with the retention permission that had issued in respect of that development. He certified that the building as constructed, complied with the terms of the retention permission and came within the boundaries of a map that was edged in red annexed, to the certificate. The plaintiff alleges that the fourth defendant was negligent in and about the furnishing of that certificate and in particular, for failing to inform him that the buildings as constructed, extended beyond the folios that he owned.

8. The fourth defendant filed his notice of motion on 30 November 2022, seeking to have the proceedings against him struck out on grounds of delay. That application was heard before this Court in December 2023.

Chronology of Key Dates.

9. The key dates in this case are as follows:

1993	Plaintiff purchases the petrol station.
March 2004	Fourth defendant is retained to review planning drawings and the planning permission that issued and to compare those with the buildings that had been constructed on the adjoining two folios, which the plaintiff intended to purchase. The fourth defendant advised that there were planning difficulties with what had been constructed. He advised that an application for retention permission would be necessary.
April 2004	Plaintiff signed a contract to purchase the adjoining plot of land with the buildings on it. It was contained in two separate folios.

September 2004	Sale closed.
2006	There was a fire on the adjoining property and the buildings were damaged. The fourth defendant was involved in a subsequent planning application lodged on behalf of the plaintiff in respect of the buildings. The plaintiff carried out the construction without getting planning permission.
2008	The plaintiff obtained retention permission for the buildings that had been constructed.
19 November 2008	The fourth defendant inspected the buildings and certified that they complied with the terms of the retention permission. There were some very minor matters outstanding, such as signage, marking of carparking spaces and manhole covers, which the fourth defendant had advised the plaintiff should be put in hand.
2010	Plaintiff alleges that he lost an opportunity to sell the entire site for €1.8m to one Martin Smith, who had pulled out of the sale due to planning and title issues with the property.
13 February 2014	Plaintiff issues his plenary summons. He was acting as a lay litigant.
31 March 2014	Delivery of statement of claim.
March 2015	Defences are filed by the first and second defendants.
May 2015	Defence filed by fourth defendant.
March 2016	A firm of solicitors come on record for the plaintiff.
2018	Although the plaintiff and the fourth defendant had mutually agreed to make voluntary discovery in 2015, neither party did so until 2018.
18 November 2018	Fourth defendant's solicitor requests that the matter be set down for hearing against his client.
10 October 2019	The bank issued its motion to have the action against it struck out for failure to disclose a cause of action and on grounds of delay. A consent order was made in November 2020 letting it out of the proceedings.

05 December 2019	A motion is brought by the solicitor to have the action against him struck out on grounds of delay. The solicitor is successful in the High Court. That judgment is appealed by the plaintiff.
30 November 2022	Fourth defendant files his motion to have the action against him struck out on grounds of delay.
20 December 2022	Judgment of the Court of Appeal striking out the plaintiff's action against the solicitor on grounds of delay.

The Certificate of Compliance dated 19 November 2008.

10. Notwithstanding some ambiguity in the statement of claim, it was confirmed at the hearing of this application, that the plaintiff was not suing the fourth defendant in relation to any advices that he furnished to the plaintiff in relation to the purchase of the folios in 2004. His claim against the fourth defendant solely related to the certificate that the fourth defendant had issued on 19 November 2008.

11. That certificate was a certificate of compliance with the retention permission that had issued in 2008. The relevant parts of the certificate for the purposes of this action are paras. 4, 5 and 13 of the certificate, which were in the following terms:

> *"4. The Grant of Permission was issued on 01/10/08, planning reference no. 08/43 and it relates to permission to retain the change of use of part of the existing building to retail use. Full permission also sought to retain the existing extensions and alterations to the elevations of the existing retail property (gross floor area 379sqm) at Dunmore, County Galway (referred to hereafter as the 'relevant works'). This certificate refers specifically to the building contained within the area outlined in red, marked on the accompanying map.*
>
> *5. It is also certified that the property is contained within the aforementioned area on the accompanying map, and that no part of the property or its essential services are outside the said area.*
>
> *[…]*
>
> *13. Take note that this certificate is issued solely with a view to providing evidence for title purposes of the compliance of the 'relevant works' within the requirements of planning legislation and the Building Control Act 1990, and the regulations thereunder. Except, insofar as it relates to compliance with the said requirements and regulations, it is not a report or survey on the physical condition, or on the*

structure of the 'relevant works' NOR does it warrant, represent or take into account any of the following matters: (a) the accuracy of dimensions in general, save where arising out of the conditions of the permission or the building regulations aforesaid; (b) matters in respect of private rights or obligations; (c) matters of financial contributions and bonds; (d) development of the 'relevant works' which may occur after the date of issue of this certificate."

12. As already noted, the plaintiff's case against the fourth defendant, as set out at para. 12 of the statement of claim (where the fourth defendant is incorrectly referred to as the 'third named defendant') and as more particularly set out in his replies dated 07 August 2014 and 22 February 2015, is to the effect that the fourth defendant was negligent in or and about the provision of the certificate in 2008, in particular for failing to inform the plaintiff that part of the buildings as reconstructed, extended beyond the folios which he owned.

13. In his defence filed on 15 May 2015, the fourth defendant accepted that he had furnished the said certificate in 2008. However, he pleaded that the certificate was expressly limited in its scope. The fourth defendant stated that he had issued a certificate of substantial compliance with the relevant planning permission in which he had certified that in his opinion the premises had been constructed substantially in compliance with the relevant grant of permission, bearing reference number 08/43. The fourth defendant denied that he was guilty of the alleged or any negligence, breach of duty, or breach of contract in relation to the furnishing of that certificate. The fourth defendant also denied that the plaintiff had suffered the alleged or any loss or damage.

Submissions on behalf of the Fourth Defendant.

14. Counsel for the fourth defendant, Mr Keating SC, complained that he had only been provided with a copy of a report which had been obtained by the plaintiff from Gaynor Architects and Design Services Limited in 2020, wherein Mr Gaynor had stated that he was of opinion that the fourth defendant had been negligent in and about the provision of the certificate in 2008. He stated that the previous Gaynor reports, being reports of 2016 and 2018, which had been furnished to the fourth defendant, did not contain any assertion that there had been any negligence on the part of the fourth defendant in and about the provision of the certificate in 2008. Counsel accepted that the existence of the

Gaynor report of 2020 changed the underlying situation somewhat in respect of the fourth defendant's application for an order under O.19 of RSC.

15. Counsel submitted that the court could still strike out the action as being bound to fail, as the evidence clearly established that the fourth defendant had never been retained to 'identify the property', meaning that he was not concerned with the boundaries to the folios. It was submitted that his only retainer was to certify whether the building as constructed after the fire in 2006, complied with the retention permission that had been obtained by the plaintiff in 2008.

16. It was further submitted that the certificate that had been issued by the fourth defendant, made it abundantly clear that it did not purport to certify anything in relation to private rights. That being the case, it was submitted that the action should be struck out against the fourth defendant, as being bound to fail.

17. On the delay point, counsel submitted that this was a late start case, which meant that there was an obligation on the plaintiff to move the action forward in a timely manner. While the certificate complained of had issued in November 2008, the plaintiff had pleaded that he was well aware of difficulties concerning planning and title issues as and from 2010, when he alleged that a purchaser pulled out of a prospective sale. Notwithstanding that, he had delayed until 13 February 2014 to issue his plenary summons.

18. Counsel submitted that while the plaintiff had commenced the litigation in 2014 as a lay litigant, the pleadings had closed relatively swiftly by May 2015, when defences on behalf of all the defendants had been filed. Counsel pointed out that the plaintiff had been legally represented by various firms of solicitors from March 2016, to the present. It was submitted that in these circumstances, the delay that had ensued in the conduct of the litigation, could not be excused by lack of legal representation.

19. Counsel submitted that the key period of delay was that which occurred after 2018. The solicitor for the fourth defendant had written to the plaintiff's solicitor on 18 November 2018, requesting that the action against his client be set down for hearing. The plaintiff did nothing to progress the action against the fourth defendant.

20. It was submitted that due to the delay on the part of the plaintiff in progressing his action against the other defendants, the bank had been let out of the proceedings on consent in November 2020 and the solicitor had been let out of the plaintiff's action following delivery of the judgment by the Court of Appeal in December 2022. Counsel

accepted that those parties remained in the action on foot of the notices of indemnity and contribution that had been served on behalf of the fourth defendant on the bank and the solicitor in September 2015.

21. It was submitted that due to the delay by the plaintiff, the fourth defendant would be required to give evidence in an action, which would probably come on for trial in the latter part of 2024 at the earliest. This would mean that he would have to give evidence in relation to a certificate that he had furnished some sixteen years earlier, in 2008.

22. Counsel stated that while the circumstances of the solicitor and the fourth defendant were not identical, it was submitted that the fourth defendant's case came within the same broad parameters as those identified by the Court of Appeal in the motion brought by the solicitor; such that this Court should follow the decision of the Court of Appeal and strike out the action against the fourth defendant.

23. Insofar as the plaintiff had asserted that he had had health difficulties in the years after 2014, it was submitted that that was not sufficient to excuse the inordinate and inexcusable delay that had occurred in the prosecution of the plaintiff's action. This was all the more so, because the plaintiff had been legally represented since 2016. It was pointed out that many plaintiffs, who are very badly injured as a result of road traffic accidents or medical negligence incidents, bring actions in relation to their injuries in a timely manner. It was submitted that it was relevant that there was no assertion on the medical reports that the plaintiff was incapable of giving instructions to his legal team at any relevant time.

24. It was submitted that the fourth defendant had suffered prejudice by having this claim hanging over him for a protracted period of time. There was evidence before the court that he had lost work on account of having an "open claim" extant against him; there was evidence that his professional indemnity insurance premium had increased due to the existence of the claim and it was asserted that he had suffered reputational damage due to the ongoing litigation.

25. It was submitted that in all the circumstances, where there had been inordinate and inexcusable delay and where the balance of justice was in favour of dismissing the proceedings, the court should make an order striking out the plaintiff's action against the fourth defendant.

Submissions on behalf of the Plaintiff.

26. On behalf of the plaintiff, Mr Quirke SC submitted that one could not argue that the plaintiff did not have a cause of action, or was bound to fail in his action for professional negligence against the architect, when the plaintiff had a professional liability report from an expert witness, stating that in his opinion, the fourth defendant had been negligent in the provision of the certificate in 2008.

27. It was submitted that the court could not decide the extent of the fourth defendant's retainer and in particular, whether he was not required to "identify the properties" on an application such as this. That could only be determined following the hearing of evidence at the trial of the action.

28. On the delay point, it was submitted that this was not a late start case. It was submitted that the court should take account of the fact that the plaintiff was an ordinary man, who had relied on his solicitor and architect in advising him in relation to a particular business project. Due to a combination of negligence on the part of the solicitor and the architect, he had ended up purchasing and then constructing a building on land that he did not own. That had had catastrophic consequences for him: he could not sell the property; the bank had taken action to recover their loan; they sought repossession of his farm; his marriage had broken down, leading to acrimonious divorce proceedings; his health had deteriorated greatly from 2011 onwards. It was submitted that in these circumstances, one could not criticise his commencement of proceedings as a lay litigant in February 2014, as being culpable late start proceedings, notwithstanding that the proceedings were issued towards the end of the limitation period.

29. It was submitted that there had been no delay after the proceedings had initially been commenced in 2014. A statement of claim had been delivered in the following month. The pleadings had closed between all parties, with delivery of the fourth defendant's defence in May 2015.

30. Thereafter, the fourth defendant, who had agreed to make voluntary discovery in 2015, had delayed three years in so doing. It was accepted that the plaintiff had also been in default in that regard. Both had made discovery in 2018.

31. It was submitted that while the fourth defendant's main complaint of inaction on the part of the plaintiff arose after 2018, that ignored the fact that from the time of issuance of the motions by the bank and the solicitor in 2019, the plaintiff could not set the

matter down for hearing, until after the Court of Appeal had delivered a judgment in the application brought by the solicitor, which judgment was delivered in December 2022, by which time the fourth defendant had issued the present motion in the previous month.

32. It was submitted that it was relevant that the fourth defendant had delayed until November 2022 in filing their motion to strike out the plaintiff's action on grounds of delay. It was submitted that the fourth defendant had sat on his hands, while the other defendants had brought similar motions by notices of motion issued in 2019. It was submitted that the fourth defendant was guilty of culpable delay of three years in this regard.

33. Counsel submitted that the court should have regard to the very serious health difficulties that had been experienced by the plaintiff in the years from 2011 onwards. In this regard, it was submitted that the plaintiff had provided cogent evidence of all his medical difficulties, by furnishing copies of a report from his GP; a full copy of his GP records from 2011 to date; medical reports from the doctor who had treated him for septicaemia and cellulitis; and a psychiatric report from Dr Anne Leader. It was submitted that the evidence demonstrated that he had suffered very significant physical and mental health problems from 2011 to date. In addition, the court was urged to have regard to the fact that he was fighting a multiplicity of actions, such as the family law proceedings with his former wife; the summary proceedings brought by the bank and the proceedings seeking repossession of his farm. It was submitted that his conduct of the present litigation, had to be seen in the context of the overall circumstances, which included his dire financial circumstances; the fact that he was facing a multiplicity of actions and his extensive health difficulties.

34. Counsel submitted that it was noteworthy that there was no forensic prejudice alleged to have been suffered by the fourth defendant as a result of any delay in the conduct of the proceedings. It was not asserted that he was unwell, or was otherwise incapable of giving evidence in his defence. The issue of liability would turn on expert evidence in relation to the adequacy of the certificate that he had furnished in 2008. This was not a case in which oral evidence would be essential. Accordingly, it was submitted that he had suffered no real prejudice in the conduct of his defence.

35. It was submitted that the court was entitled to take all the circumstances of the case into account when considering the balance of justice. It was submitted that when

these circumstances were considered, the balance of justice was clearly in favour of allowing the action to proceed.

The Law.

36. 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.

37. 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 6 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.

38. 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 7 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*."

39. 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*."

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

Conclusions.

41. In relation to the application by the fourth defendant to strike out the action as failing to disclose a cause of action, or on the basis that the plaintiff's action against the fourth defendant is bound to fail, the court is not persuaded that the fourth defendant has established either of these grounds.

42. The expert report furnished by Mr Gaynor in 2020, clearly establishes that there is a basis for arguing that the fourth defendant acted negligently in providing the certificate in 2008. Where a plaintiff has a report from an expert supporting his claim in professional

negligence against a professional defendant, it cannot be said that he does not have a stateable cause of action.

43. Insofar as it may be argued that the plaintiff's action against the fourth defendant is bound to fail, on the ground that the fourth defendant was never retained to "identify the property" and had never purported to do so in the certificate; the extent of his retainer and the true interpretation of his certificate, are matters that can only be resolved at the trial of the action. This Court cannot resolve these issues on an application for an order pursuant to O.19 RSC.

44. From a reading of the certificate that was issued by the fourth defendant in 2008, it is clear that the fourth defendant was warranting that the buildings as constructed, came within the boundaries of a map that was "edged in red". This Court has not been provided with that map. The significance of that map and the consequences that flow from that warranty, will have to be resolved at the trial of the action.

45. The court notes that the fourth defendant accepted that he gave a warranty about the development being located within the boundary of a site map. In his affidavit sworn on 27 July 2023, the fourth defendant stated as follows at para. 11:

> *"I note that at paragraph 7 of the Egan affidavit, Mr Egan states that the 2008 certificate is in error in that large portions of the property were not contained within the area on the map accompanying the 2008 certificate. It is not entirely clear what Mr Egan is referring to when he says that large portions of the 'property' were not contained in the area on the accompanying map. I say that the property the subject of the development and essential services were encompassed within the site map attached to the 2008 certificate."*

46. In these circumstances, it cannot be said that the plaintiff's action against the fourth defendant is bound to fail.

47. Turning to the delay point, while it is true that the proceedings issued towards the end of the available limitation period, there were considerable factors which excuse the delay in commencing the proceedings. While the court is cognisant that it is making a different finding of fact, to that made by the Court of Appeal in the application brought by the solicitor, this Court has had the benefit of a considerable volume of additional evidence, that was not available to the Court of Appeal.

48. In particular, as well as exhibiting his GP records from 2011 to date, the plaintiff also exhibited a report from his GP, Dr Jarlath Deignan, dated 13 July 2023, wherein the doctor outlined how the plaintiff has required medication since in or about 2012 for anxiety symptoms relating to business and domestic issues that he had to deal with. He continues to require medication to the present time, including Rivotril; Prozac and Zispin. He concluded by stating that in his opinion, the plaintiff's mental health had suffered severely due to ongoing stress exacerbated by ongoing litigation and has had a profound impact on his ability to cope and adjust to these issues. He stated that the stress and pressure the plaintiff had been under was colossal. He continued to have concerns for his safety to the present time.

49. Included in his medical records, was a letter dated 03 September 2018, from the plaintiff's GP, outlining how on 28 August 2018, after having collapsed at Heuston Station, Dublin, the plaintiff was brought in a semiconscious state to hospital. He was diagnosed with preseptal cellulitis. He was commenced on intravenous antibiotics. He was discharged on 31 August 2018, but was confined to home for the next ten days. He had an intravenous line in his left forearm and a nurse administered daily antibiotics to him through an IV. The plaintiff also furnished reports from Dr Gergely Kasa, in relation to a medical condition that flared up in May 2022, which prevented him from walking without the aid of a Zimmer frame for a number of months.

50. The plaintiff also exhibited two reports from a consultant psychiatrist, Dr Anne Leader. It is not necessary to recount the entire content of these reports, save to note that the plaintiff has suffered symptoms of anxiety and depression since 2011. She noted that he was involved in acrimonious family law proceedings, which, for the reasons outlined in her report, were particularly stressful for the plaintiff. She noted that he has been on a significant quantity of antidepressant and psychotropic medication. She concluded her report by stating "*He has suffered from chronic severe anxiety and depression since at least 2011. I believe the severity of his psychiatric illness prevented him from taking legal action at an earlier stage*."

51. The court has also had regard to the fact that the plaintiff was embroiled in multiple forms of litigation, including a number of actions that he commenced; family law proceedings that were particularly acrimonious; and summary proceedings brought by the bank and proceedings brought by them to repossess the plaintiff's farm.

52. When looked at in light of the fact that the plaintiff had considerable mental health problems and the fact that he could not obtain the services of a solicitor, the fact that as a lay litigant, he did not start his professional negligence proceedings against the two professional defendants, the solicitor and the architect, until 2014, is understandable. The court finds that there was no culpable pre-commencement delay. However, the court accepts that that does not take from the fact that when there has been delay in starting proceedings, a plaintiff should then seek to progress his action in a timely manner.

53. The court is satisfied that once the action was commenced against the three defendants, it initially moved quite quickly. The plenary summons issued on 13 February 2014. A statement of claim was delivered in the following month. Defences were filed on behalf of all defendants by May 2015. That was not unreasonable.

54. Thereafter, the fourth defendant and the plaintiff, both delayed in making discovery to each other. They had agreed to make discovery in 2015. Neither of them did so until 2018. The fourth defendant cannot be heard to complain of delay, when he did not keep to his agreement to make voluntary discovery and instead delayed until 2018 in so doing.

55. In fairness to the fourth defendant, his main complaint concerning delay, arises in the period after 2018. On 18 November 2018, the fourth defendant's solicitor requested the plaintiff to set the action down for hearing against his client. That was a reasonable request. The plaintiff's solicitor did not do so.

56. However, by October 2019, the plaintiff could not have taken that step, due to the fact that motions had been issued by the bank and the solicitor in October and December 2019, to have the action against them struck out. The bank's application was determined on consent. The proceedings were struck out against the bank in November 2020.

57. The application by the solicitor was successful in the High Court and on appeal, resulting in the judgment of the Court of Appeal delivered in December 2022.

58. What had the fourth defendant done during that period? The answer is: nothing. He sat on his hands until a month before delivery of the judgment by the Court of Appeal, when he issued his motion to strike out the action on grounds of delay. While he is entitled to bring whatever applications he deems appropriate at whatever time he chooses; this Court can have regard to the fact that the fourth defendant delayed in bringing his motion

to strike out on grounds of delay, when the other defendants had taken the same action some three years earlier.

59. Therefore, insofar as the fourth defendant complains of the overall period that will have elapsed between the date of the furnishing of the certificate by him and the likely date of the trial of the action, that period was, to some extent, contributed to by his own delay in bringing this motion. Had he done so at the same time as the other defendants, he would have obtained a result, even on appeal, in or about December 2022.

60. Instead, his application to strike out the action was heard in December 2023. This judgment on that application may be appealed to the Court of Appeal, meaning that the issue may not ultimately be determined until some time in 2025, thereby further delaying the trial of the action in the event that the fourth defendant is unsuccessful in his application. However, that is his own fault.

61. The court is satisfied that the plaintiff cannot be blamed for not progressing the action against the fourth defendant after 2018. The only step remaining was to set the matter down for hearing against him. However, where a plaintiff has sued multiple defendants, he cannot set the action down for hearing until all the defendants have been accounted for. He must either (a) obtain a judgment in default against a defendant; or (b) the action must be discontinued against a defendant, either on consent, or by having the action against it struck out; before the plaintiff can set the matter down against the remaining defendant, or defendants. A plaintiff cannot have multiple trials against selected defendants on one occasion and have another trial against the remaining defendants, at a later date.

62. Thus, the plaintiff could not have set the action down for hearing while the motions brought by the bank and the solicitor were extant. The motion brought by the solicitor remained extant until delivery of the judgment by the Court of Appeal in December 2022, by which time, the fourth defendant had issued his notice of motion in this application. The plaintiff could not set the matter down for hearing while this application was pending before the courts. Accordingly, in these circumstances, I find that the delay that ensued after 2018 to date, was excusable.

63. Even if I am wrong in that, if the delay is held to be inordinate and inexcusable, I am nevertheless satisfied that the balance of justice is in favour of allowing the action to proceed for a number of reasons. First, the fourth defendant has not suffered any forensic

prejudice as a result of the delay. He does not allege that he is unwell, or is otherwise unable to recall relevant events. There is no assertion that any critical witnesses are unavailable, or incapable of giving evidence.

64. Furthermore, this is largely a documents case. The central issue will be whether the fourth defendant was negligent in failing to highlight that the buildings as constructed, extended onto lands that were not owned by the plaintiff. That will turn almost exclusively on the evidence of the expert witnesses, as to the adequacy of the certificate that was issued by the fourth defendant in 2008, having regard to the terms of his retainer by the plaintiff. All relevant documents remain available. There is no reason why the experts cannot deal with that issue at this remove.

65. Secondly, this case is not the same as the circumstances that were before the Court of Appeal in the application brought by the solicitor. In that application, there was clear evidence that Mr Potter-Cogan had been the only solicitor in the firm who had dealt with the plaintiff's affairs. The uncontested evidence was that he had retired in 2011, suffering from multiple sclerosis and that in the succeeding years he had gone on to develop significant cognitive impairment. There was uncontested medical evidence that he would be incapable of giving evidence, or furnishing instructions to a legal team, if the matter were to proceed to a hearing. It was primarily in those circumstances, that the Court of Appeal reached the determination that the balance of justice was in favour of striking out the action against the solicitor. No such considerations apply in this case.

66. Thirdly, while the court accepts that there is some prejudice to the fourth defendant due to the fact that these proceedings have been extant for a considerable period; which prejudice is in the form of reputational damage, some loss of work; an increase in his insurance premium; and an increase in stress due to the ongoing litigation; however, that prejudice does not constitute forensic prejudice in that it does not prevent the defendant from properly defending himself at the trial of the action. The court is satisfied that these forms of prejudice could not on their own, in the absence of some forensic prejudice to a defendant, be sufficient to tilt the balance of justice in favour of striking out the action.

67. Taking all the circumstances of this case into consideration, I am satisfied that the balance of justice is in favour of allowing the action to proceed. Accordingly, the court will refuse the reliefs sought by the fourth defendant in his notice of motion.

68. As this judgment is being delivered electronically, the parties shall have two 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.

69. The matter will be listed for mention at 10.30 hours on 8 February 2024 for the purpose of making final orders.