THE HIGH COURT

[2010 No. 8090 P.]

BETWEEN

NIAMH O'LEARY

PLAINTIFF

AND

SEAMUS TURNER, JOHN O'LEARY, BRIDE O'LEARY, CATHERINE O'CONNOR, SEAN NOLAN, CORMAC MULLANE, ALL PRACTISING UNDER THE STYLE AND TITLE OF M.J. O'CONNOR AND COMPANY

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 18th day of January, 2018.

1. The defendants bring two motions in these proceedings: a motion to strike out or dismiss the plaintiff's claim for delay or want of prosecution, and a motion to set aside the renewal of the plenary summons.

2. I propose dealing with the delay motion first, as it may be dispositive of the application.

Material facts:
3. The plaintiff's claim is for damages for alleged professional negligence by the defendants, partners in a firm of solicitors retained by the plaintiff in or about the month of March, 2005 for the purpose of the purchase by her of commercial premises at 18 Selskar Street, Wexford. At the time of the purchase, the premises were held subject to and with the benefit of a commercial occupational lease made on the 5th March, 2002.

4. The claim of the plaintiff in essence is that the defendant firm failed to advise her regarding the statutory renewal rights of the tenant pursuant to the Landlord and Tenant (Amendment) Act 1980, as amended.

5. The claim is for €1.72 million, calculated as the purchase price of the premises, compensation paid to the tenant for vacant possession, legal and professional fees and banking charges. The plaintiff also claims damages for personal injuries in the form of stress and anxiety suffered by her as a result of the alleged negligence.

Chronology:
6. In March, 2005, the plaintiff retained the defendant firm to act for her in relation to the purchase. The contract for sale was signed by her on 2nd May, 2005, and the sale closed on 6th September, 2005. The plaintiff's husband died on 28th March, 2006.

7. By letter of 1st March, 2007, the plaintiff first complained to the defendant firm regarding the advice she had received at the time of the contract. The parties met on 2nd March, 2007, and the meeting was followed by a formal letter of that date from the firm to the plaintiff agreeing to act on her behalf in negotiations with the occupational tenant, Mr. Hamilton, or his legal representatives with a view to obtaining vacant possession.

8. On 21st June, 2007, Mr. Hamilton served a statutory notice of intention to claim relief under the 1980 Act. Following negotiations on 12th June, 2008, a settlement was reached with Mr. Hamilton for the payment to him of compensation in satisfaction of his claim to a new lease.

9. The plenary summons issued on the 26th August, 2010, and is not in the standard short general form but in a form akin to a statement of claim. The plaintiff had the benefit of legal representation at that time, but now instructs Messrs Holohan Solicitors, who formally came on record on 23rd November, 2011.

10. Thereafter correspondence was had between that firm of solicitors and the defendant firm regarding the sale and other matters related to the estate of the deceased husband of the plaintiff, not relevant to these proceedings.

11. The plenary summons was served on 23rd August, 2011, on the first, second and fourth defendants. It was renewed on 24th October, 2011, and served on the sixth defendant on 8th December, 2011, on the third defendant on 12th January 2012 and on the fifth defendant on 7th February, 2012.

12. Service therefore on the first, second and fourth defendants were made within the currency of the summons, and on the other three defendants within the currency of its renewal. But service was effected at or close to the latest possible dates, viz on the first, second and fourth defendants, 11 months and 28 days after the summons issued, i.e. just within the 12 month life of the summons. Service on the other three defendants of the renewed summons was not finally effected until February, 2012, some months after the order renewing the summons on the 24th October, 2011.

13. A notice of intention to proceed was served on 16th February, 2015. The only other formal step taken between the date of service on the fifth defendant (the last defendant to be served) and the notice of intention to proceed was a letter of 6th March, 2012, from Holohan Solicitors to the fifth defendant consenting to the late filing of an appearance by that defendant.

14. An appearance was entered by Messrs. Cantillons on behalf of the first, second and fourth defendants on 30th May, 2016. Up to that time, the defendants were not separately legally represented and, insofar as any engagement was had, it was had through the members of the firm personally. Appearances have now been entered on behalf of all defendants.

15. The two present motions issued on 28th September, 2016.

16. The statement of claim was served on the 6th December, 2016, after the present motions had issued.

The principles
17. There is no real argument in this case that the delay on the part of the plaintiff been anything other than inordinate. The proceedings were commenced five years after the cause of action accrued. There were significant periods of delay in the intervening years and, twelve years after the cause of action accrued, the case is not yet ready for trial, the pleadings have not closed and,

even on an optimistic estimate, it will take at least a year before the matter comes on for trial. In *Stephens v. Paul Flynn Ltd*. [2008] 4 I.R. 31, the Supreme Court approved the approach of Clarke J. that a period of 20 months for delivering a statement of claim was "totally outside any period of time that might be considered appropriate or reasonable" and was "inordinate" (para. 28). The delay in the present case is far in excess of that time and must be considered to be inordinate.

18. Correspondence from Messrs. Cantillons commenced on the 16th February, 2016, and, on the 23rd February, 2016, in reply to a threat of a motion for judgment in default, that firm said that "we cannot see why there is any urgency in issuing a motion for judgment in default of appearance at this stage". Messrs. Cantillons said they were investigating the matter, that they would conclude their investigations in "the very near future" and asked that the plaintiff would "hold off issuing a motion in the circumstances". I consider that it is at least arguable that time ceased to run against the plaintiff for the assessment of the delay in the prosecution of the case at that stage and that the absence of any procedural step could then be explained as a response to this request. It is the delay therefore between February, 2012 and February, 2015, when the notice of intention to proceed was served, and the delay thereafter until 5th February, 2016, when Holohan Solicitors confirmed they had identified the defendants' insurers that is my focus in this judgment.

Is the delay to be excused? The principles

19. The plaintiff argues that the delay was excusable. A plaintiff facing an application to dismiss for delay must offer an explanation for the delay which offers a real and justifying excuse.

20. The jurisprudence regarding the correct approach to delay is well established and recent. The applicable legal principles were set out in the judgment of Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 and have been approved and followed in numerous cases thereafter, including *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, and *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 ILRM 290. I do not propose repeating the principles set out by Finlay P. in his judgment, save and insofar as specific aspects of the principles form part of the argument of either side or of my conclusions.

21. The Court of Appeal has considered the correct approach to an application to dismiss in a number of judgments, and, whilst it did not depart from the approach already identified by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* and *in Rainsford v. Limerick Corporation*, the principles have been refined and elaborated.

22. The present case must be seen as a "late start", having regard to the fact that the proceedings issued more than five years after the contract for sale.

23. In *Tanner v. O'Donovan & Ors* [2015] IECA 24, Hogan J., giving the judgment of the Court, considered that it was relevant to take into account the period from the date of the accrual of the cause of action to the issue of proceedings and quoted with approval the dicta of Lord Diplock in *Birkett v. James* [1978] A.C. 297, at 322, that:-

"A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

24. In *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J., giving the judgment in the Court, noted the proceedings had been issued very close to the expiration of the end of the statutory limitation period. She affirmed the position that, when proceedings were issued late, there is "a special obligation of expedition on a plaintiff to move matters forward once proceedings are commenced" (para. 21).

Application to the facts

25. The explanations offered by the plaintiff are varied. The plaintiff's husband died soon after the sale closed and I accept her evidence that the distress caused to her by the sudden and unexpected death of her husband made it difficult for her to formulate a clear approach or come to a decision whether she would commence proceedings. It is not argued on her behalf that the difficulty caused to her by her husband's death continued to impact on her ability to instruct a solicitor and to commence the proceedings and she did instruct solicitors to issue the proceedings in August, 2010, instructing Messrs. Holohan thereafter in October, 2010. At that point, had the plaintiff moved with reasonable expedition, the delay may be excused.

26. While I do not purport to measure the extent of her grief response, it seems to me that the death of her husband could not afford an explanation which might reasonably excuse the length of the plaintiff's delay in prosecuting the proceedings after they were commenced. Having regard to the fact that the proceedings were commenced five years after the alleged cause of action accrued, the proceedings are to be treated as "late start" proceedings, in respect of which recent jurisprudence, especially that of the Court of Appeal, supports an argument that compels the plaintiff to move with expedition.

27. The plaintiff first engaged the firm of Messrs Holohan in October, 2010 and the plenary summons had been issued on her behalf by a different firm of solicitors in August of that year. One significant element of the explanation given by the plaintiff for her delay in prosecuting the case is that Messrs Holohan had contacted the defendant firm in an attempt to resolve the matter "to avoid the need for litigation". Mr. Holohan, the senior partner in the firm, is a mediator and an arbitrator and is said to be a "strong advocate" of alterative dispute resolution. The affidavit of Amy Shine, a solicitor in that firm, sworn at an unidentified date, for the purposes of grounding the application to renew the summons, avers that there was, in the year leading up to August 2011, "a process of ongoing communications and engagement" involving the "service of a non-legally qualified intermediary", an accountant and financial adviser with no legal qualifications.

28. The defendants make a robust denial of Ms. Shine's characterisation of the role of the so-called intermediary, who the defendants say was at best an "emissary" and was not jointly appointed, but rather was sent or "simply dispatched" by the plaintiff or her solicitors, contacted the defendants by telephone in a "unheralded fashion" and met John O'Leary, the second named defendant, on only one occasion, on the 5th September, 2011.

29. The defendants aver that the identified person had sought to discuss "a rolling series of allegations" against the firm, only one of which is the subject matter of the present proceedings. Some of the allegations are described as "extreme, also entirely lacking any factual bases and some so serious to the point of being actionable". Messrs Holohan had, in a letter of the 14th March, 2011, made allegations of "fraud and forgery" and the defendant firm explains that its tentative agreement to meet with the emissary or intermediary arose in part from its concerns regarding such serious allegations in correspondence.

30. Those other allegations were not pursued in the present or any subsequent litigation or correspondence.

31. I consider that the attempt by the solicitor for the plaintiff to characterise the engagement of the intermediary or emissary as a

step of substantial "ongoing" engagement is not borne out by the facts. One meeting between the identified intermediary or emissary happened before the application to renew the summons, and after the summons had expired. The engagement was at best a tentative attempt to resolve the matter without litigation and took place in 2011. It does not justify the delay thereafter and, in my view, the fact that the intermediary or emissary failed to achieve a positive or favourable response to her overtures made the prosecution of the litigation with a degree of expedition more pressing. It does not offer a justifying excuse for the delay.

32. The proceedings were served on three of the defendants, three months after the meeting with this identified person. Therefore, the engagement of that person did not delay the prosecution of the claim to any real extent and does not explain the culpable delay after service.

The question of indemnity insurance

33. Another element of the explanation given by the plaintiff for the delay is that the defendant firm had been asked by Messrs Holohan to identify its insurers, which it is said they "repeatedly failed, refused and neglected" to do. Ms. Shine avers that the reason for this request was that Messrs Holohan had "hoped to communicate" directly with the insurers of the defendant firm with a view to negotiating a resolution without litigation. Mr. Holohan in his replying affidavit sworn on 15th November, 2016, avers that he, and presumably his client, had hoped to avoid litigation because of the "not inconsiderable expense" likely to be incurred, but also because he was anxious not to prosecute the matter further until it was clear to him that he was dealing with insured defendants. He says that, in the absence of professional negligence cover, a successful prosecution of the claim would "be of no practical benefit to the plaintiff".

34. Mr. Holohan also avers that the defendants had "sought to frustrate" any direct contact by the plaintiff's solicitors with their insurers by refusing to disclose the identity of the insurers or positively confirm that indemnity insurance was in place.

35. Mr. Holohan said that he ascertained the identity of the insurers through "investigation and inquires" in January, 2016, and thereafter communicated directly with the insurers. Mr. Holohan avers that he was "led to believe" that the defendant firm notified its insurers of the possible claim in March or April of 2007.

36. Between February, 2016 and May, 2016, leading up to the entry of an appearance on behalf of the defendants on the 30th May, 2016, and the request thereafter for delivery of a statement of claim, correspondence was had between the respective solicitors.

37. Mr. Holohan avers that he was "concerned" when Messrs Cantillons first communicated with him on the 16th February, 2016, and by letter of the 25th February, 2016 asked Messrs Cantillons "to confirm the extent of your retainer" and asked whether that firm was acting "on behalf of the identified insurers, on behalf of the solicitors or if it was a combination of both". Messrs Cantillons replied saying that they were "retained by" the loss adjuster and Messrs Holohan reverted to say they were "somewhat confused and bemused in relation to your retainer". The letter then went on to say that, as the plaintiff had "no contractual relationship" with the loss adjusters and it was not envisaged that litigation would be taken against them, further clarification was sought as to "whether you were retained on a dual retainer basis". A reminder and request in regard to that letter was sent on the 16th March, 2016. A holding letter was sent on the 29th March, 2016, and Messrs. Holohan by their letter of the 8th April, 2016, described themselves as by then being "somewhat dismayed" that the clarification had still not been given.

38. On the 11th April, 2016, Messrs Cantillons confirmed that they were instructed on behalf of the defendants and identified that they had received instructions through the agents for the insurance company. That seems to bring an end to the confusion around this issue, if such there was.

39. The question of who insured the defendant firm, and whether they had insurance, is one that, in my view, ought not to have prevented the proper and expeditious prosecution of the claim. I am at a loss to understand how Messrs Holohan might have thought it was appropriate for them to deal directly with the insurers for the defendant firm. The defendant firm is a reputable firm of solicitors and was obliged by the rules of its professional body to carry professional indemnity insurance. The insurance contract is made between the firm and its insurers and it is expected in the normal course that communication would be had between the insured person and the insurance company and not, absent an invitation by the insurance company, between the insurers and a claimant. The defendant firm has expressed concern that this information was sought or obtained by Messrs Holohan directly from the insurance company and without reference to the defendants, and I agree that the course taken by the solicitors for the plaintiff was unusual. It does not explain the delay in dealing with the proceedings and in my view it would have been reasonable and in line with the usual approach of a solicitor contemplating action against a firm of solicitors to operate on the assumption that indemnity cover was in place. The affidavit evidence does not show any facts that might have led Mr. Holohan to take the unorthodox approach he did take and does not, in my view, offer his client a justifying excuse for the delay. Furthermore, the question regarding insurance, while it may have been a concern for Mr. Holohan, did not result in correspondence from him during the four year period between the service on the last defendant and the taking of the next substantive step in the action. It does not explain the inordinate delay during those years, years which, to my mind, are crucial.

40. Finally, the matter of insurance is tendered as a concern which might have influenced the plaintiff's decision to continue the proceedings, but does not explain the earlier delay and on the facts it is not connected with the failure to take any steps in the years 2012 to 2015. The question of insurance came first to be raised in late February 2016.

Culpable inaction by a defendant?

41. Between 2010 and 2016, there was no material advance in the proceedings. The defendants primarily rely on the argument that the plaintiff has engaged in an impermissible level of inactivity but the plaintiff counters this by arguing that the defendants did not themselves take any steps to enter an appearance or move the proceedings along in any way.

42. It is established in the authorities that a court must have some regard to the balance of the fault which may be levied against each of the parties to litigation. As Ó Dálaigh C.J. said in *Dowd v. Kerry County Council* [1970] I.R. 27 at p. 41:-

> " … in weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution. There is the provision of Order 27, r. 1, and the provision of Order 108, r. 11, where there has been no proceeding for two years. The adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances it is acted upon by a defendant in the hope that he will "get by" without having to face the peril of being decreed. Litigation is a two-party operation, and the conduct of both parties should be looked at."

43. That dictum was quoted with approval by Fennelly J. giving the judgment of the Supreme Court in *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510, where he stressed, however, that "the defendant should not be lightly blamed for delay which is

the fault of the plaintiff". Fennelly J. attached little weight to the "understandable" response of the defendants "to let sleeping dogs lie".

44. In *Tanner v. O' Donovan & Ors*, Hogan J. considered that the fact that a defendant had been inactive did not excuse a plaintiff from proceeding with "expedition and vigour, not least where (as here) the plaintiff has delayed before the issuing proceedings" (para. 35)

45. In *Millerick v. Minister for Finance*, Irvine J. took the view that the defendant could not be deemed culpable for "mere inactivity" and, at para. 37, said the following:-

> "No defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise. In many cases the plaintiff has no valid claim and they may be no mark for any award of costs that a defendant may obtain following a successful defence of the proceedings. Often times, a defendant's personal or professional reputation may be badly scarred regardless of having mounted a successful defence to a claim.
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> 38. Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?"

46. Irvine J. did not depart from the approach already identified in the authorities that the conduct of a defendant was a relevant factor, but she considered that it was relevant only if it could be said that conduct was "culpable in causing part or all of the delay", and that a simple failure on the part of the defendant to take steps would not be sufficient to offer a justifying reason. She went on to say as follows in para. 39:-

> "Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."

47. The matter was reviewed again by the Court of Appeal in *Leech v. Independent Newspapers (Ireland) Ltd.* [2017] IECA 8, a decision most useful for the approach Irvine J. identified with regard to the question of how a court should assess the balance of justice, so that, while a delay or inaction on the part of a defendant could be relevant to the question of the consideration of the balance of justice, the relevant behaviour of a defendant had to be more than mere inactivity and to amount to some form of culpable acquiescence from which a plaintiff "might reasonably infer that they remain willing to meet the case on its merits not withstanding any delay that has occurred" (para. 61).

48. The plaintiff relies on the recent judgment of Murphy J. in *McNamara and Others v Irish Life Assurance plc* [2017] IEHC 469, in which she refused to strike out proceedings where there was a delay of eleven and a half years from the date of the institution of the proceedings. While it was accepted that the delay was inordinate, Murphy J. considered that there was "something of a general hiatus" following the delivery of the defence and replies to particulars and that the defendant had some responsibility for its default in furnishing replies to particulars and for its failure to respond to any request for discovery for four unexplained years.

49. Murphy J. refused to strike out the proceedings because she considered that there was a "bigger issue at play" and, having noted that the defendant was a major provider of life assurance and that life assurance contracts can, by their nature, subsist for decades, she considered that it was foreseeable that such actions could be commenced many years, even 30 years, after the policy was entered into and "the balance of justice" for that reason favoured permitting the plaintiff to proceed.

50. No circumstances have been identified in the present case that point to a "bigger issue" of the type to which Murphy J. referred and the present proceedings are inter partes professional negligence proceedings of a type that ought, in a general way, be processed with expedition because of the likely reputational damage or other prejudice that may be suffered by a defendant to a stale action: noted by the Court of Appeal in *Farrell v Arborlane Ltd. & Ors* [2016] IECA 224.

51. The plaintiff's solicitor attempted to reach agreement with the defendant firm with regard to service and did ask on two separate occasions in early 2011 that the defendant firm would nominate a firm of solicitors to accept service. The failure on the part of the defendants to then nominate solicitors or accept service cannot excuse or explain the delay from 2012 to 2016.

52. However, apart from the events in 2011 I do not consider the later inaction of the defendants to have caused or contributed to the delay and the plaintiff cannot point to a concrete action or inaction that might have led her to believe that she was not at risk from delay.

The interests of justice: the personal difficulties of the plaintiff

53. A court hearing an application to strike out for delay will look to the balance of justice

54. Ms. O'Leary gives details of medical interventions that she received in 2007 and 2013. The medical report she exhibits is short and general, albeit it does say that she suffered from understandable stress, anxiety and depression triggered by financial and personal turmoil in her life.

55. Proceedings were threatened against her by Bank of Scotland in January, 2010 and, in May, 2010, receivers were appointed to the property in Selskar Street and another commercial property she owned. She had great difficulty with the family of her late husband, which led to proceedings that concluded in September, 2016, although it seems the last step of substance was in July, 2012. She left her home in early January, 2013. She made a settlement with Revenue in 2014.

56. In her long affidavit, Ms. O'Leary avers that it was not until 2015 "that she had recovered sufficient mental focus to address my action against the defendants" and that it was not until then that she had the financial means to prosecute her claim. She describes a most unfortunate and tragic chain of events in her life which had "catastrophic repercussions".

57. The personal circumstances of the plaintiff do not, in my view, offer her an excuse for not expeditiously prosecuting the present proceedings. Taking her argument at its height, the circumstances she describes do not offer justification for me to depart from the

clear line of authority that mandates that she proceed efficiently and expeditiously to bring her claim on for hearing. Her personal circumstances were most unfortunate but I cannot excuse her delay on account of circumstances which became less acute in the years after the service of the summons, and her personal difficulties were not at a level that caused her to be incapable of instructing solicitors to commence the proceedings, to engage the intermediary and to engage other litigation and continue, albeit in a limited way, her business interests. No authority has been identified that permits a court to excuse culpable and otherwise unexplained delay on account of personal and financial circumstances of the type identified.

Prejudice
58. The existence of a degree of prejudice to a defendant is a factor in the engagement of the interests of justice.

59. The affidavit evidence of the defendants aver in a general way that it is "neither fair nor reasonable" to have such a claim "hanging over" them.

60. The defendants also argue that the firm has suffered concrete and specific prejudice as a result of the delay, as the relevant principal witness, Ms. Connors, retired in 2008.

61. Ms. Connors remains identified as a senior legal executive on the website exhibited in the affidavit of Mr. Holohan of 7th November, 2016. The first defendant swore a further replying affidavit to deal with this fact on the 7th March, 2017, in which he explains how Ms. Connors remains an identified member of staff in the website of the defendant firm. The firm's website was established and copyrighted in 2006 and the firm that designed and hosts that website went out of business and took with it the codes necessary for making any significant amendments. Mr. Turner says that he was not aware until he read Mr. Holohan's replying affidavit that a search within the website would have identified Ms. Connors. He confirmed that Ms. Connors did in fact leave the firm in 2008, that she has not worked since that time and that she cares for family members who are unwell.

62. The uncontroverted evidence is that Ms. Connors is the only member of the defendant firm who would be in a position to give evidence in regard to the advice and information given to the plaintiff at the time of her purchase in 2005. The plaintiff argues that the case is a "documents case" and that the evidence will mostly derive from the examination of the files. However, a reading of the statement of claim and the affidavit evidence would suggest at the very least that some narrative is likely to be essential from both sides as to the conversations that occurred and the extent and nature of the information sought or given to Ms. O'Leary at the time of her purchase regarding the commercial tenant.

63. Two factors lead me to conclude that there is a degree of actual prejudice in the present case. There were a number of dealings between the defendant firm and the plaintiff at the time of the purchase. This fact alone would suggest that the memories of the parties to the transactions could be confused or confusing, but also that it would be difficult at this remove for any witness to be entirely clear as to the conversations that occurred in relation to the different files. A single engagement is more likely to be recalled than a number of engagements, even if they are not related.

64. The other factor is of more significance. The plaintiff's claim is for special damages in the form of the compensation paid to the commercial tenant to obtain vacant possession and related costs. The plaintiff also claims the sum of approximately €1.6 million as consequential loss and service payments arising from her borrowing, from the fact that the premises were repossessed by the mortgagee and from the effect that the loss of this premises had on her associated borrowings. The defendants argue that, at this remove, it is difficult, but not admittedly impossible, to identify the extent to which the general difficulties encountered by the plaintiff at the time of her alleged loss were attributable in part or at all to the economic collapse generally.

65. While I accept that the defendant firm did receive a long and detailed initiating letter from Mr. Holohan on the 22nd November, 2010, following some engagement with the case between 2011 and 2012 when service was ultimately affected on all six defendants, nothing happened for four years. The evidence that might be relevant to defend this action would, at a minimum, include evidence of the loss of value of the premises and an assessment of the extent to which the loss of value could directly or indirectly be attributable to the economic downturn. Much of that evidence will now be coloured by the passage of time and the various shifts in economic prospects and the value of real property in the State over the intervening years.

66. Ms. O'Leary is herself an auctioneer and she says that she kept meticulous records of the changing values of comparative properties for the years from 2006 to date. That factor may assist her in prosecuting the claim but will not be of assistance to the defence. It does not relieve the actual prejudice likely to be suffered by the defendants, were the action be permitted to continue.

67. Finally, Mr. Turner says that it is his belief, and that of the other members of this firm, that the plaintiff was not genuinely intending to proceed with this claim, having regard to the delay and lack of any communication with the firm over the intervening years. He bases that belief in part on the length of the delay and the fact that there was total silence for four years, but also in the fact that there were various other allegations made in correspondence which were never advanced by the plaintiff. One further factor in the balance of justice is that the authorities suggest that a defendant may be prejudiced in a general way if he or she is unaware of the existence of an intention to sue or that existing proceedings are intended to be pursued *Chambers v. Kenefick* [2005] IEHC 402, [2007] 3 I.R. 526

68. These factors amount, in my view, to concrete prejudice sufficient to tilt the balance of justice in favour of the dismissal of the action.

Decision
69. Accordingly, I am of the view that the delay of the plaintiff has been inordinate and is not excused by the facts relied on and that the interests of justice suggest that the action should be dismissed.

70. I do not therefore propose to deal with the motion to set aside the order renewing the summons.