THE HIGH COURT

[2010 No. 5323 P]

BETWEEN

MARY MCGRATH, PATRICK JOSEPH MCGRATH

AND THOMAS MCGRATH

PLAINTIFFS

AND

REDDY CHARLTON MCKNIGHT

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 30th day of March, 2017.

1. This judgment is given in the application by the defendants for an order dismissing the claim of the plaintiffs claim for want of prosecution and/or on the grounds of their inordinate and inexcusable delay in prosecuting the proceedings.

2. The first, second and third plaintiffs are siblings and business partners and at all material times carried on the business of property investors, landlords and property managers. Proceedings were commenced by plenary summons dated 3rd June 2010 against the defendants, a firm of solicitors who acted for them and provided professional advice and services in regard to certain property transactions including the purchase of certain commercial property.

3. In 1991 the plaintiffs purchased the reversionary interests in two shopping centres, in Ballyfermot and Finglas, County Dublin. Until or around the month of October 2006 in circumstances which will appear below, the plaintiffs say they were unaware that the positive freehold covenants on the part of the occupants of the anchor shops in the shopping centres, including and in particular the positive covenants to provide services to the common areas and to pay service charges were not enforceable.

4. In or around the month of July, 2003 a lessee of one of the units in the Finglas Shopping Centre, Cardiff Meats Limited, commenced Circuit Court proceedings against the plaintiffs arising from a failure to provide services to the common areas of the shopping centre. For convenience I refer to this litigation as "the Cardiff Meats proceedings". The plaintiffs in the present proceedings, the defendants in the Circuit Court proceedings joined the occupiers of the anchor store in the Finglas Shopping Centre as third parties to the proceedings and claimed against them an indemnity arising from a breach of an alleged covenant to pay service charges.

5. The Circuit Court proceedings concluded in a decision by Murphy J. on appeal to the High Court on Circuit in May, 2007 that the positive freehold covenants were unenforceable by the plaintiffs against the owners of the anchor shop and the third party claim was therefore dismissed.

6. Following the decision of the High Court on Circuit the plaintiffs concluded a settlement with Cardiff Meats Limited and with other lessees of the Finglas Shopping Centre. It was also required to pay the costs of the plaintiffs and of the third party.

7. In the present proceedings the plaintiffs claim in respect of advice received in or about the time of the purchase of the Finglas and Ballyfermot properties in 1991, arising from the fact that in each case the positive covenants to provide or contribute to the costs of services did not run with the land and were not enforceable against the freehold owners of the adjoining lands. The claim is made that the defendants acted negligently and in breach of duty in failing to advise the plaintiffs of the full import and the nature of the positive covenants, and in failing to advise or properly advise the plaintiffs in the conduct of the defence of the Cardiff Meats proceedings, following receipt of advice from counsel with an expertise in conveyancing in November, 2006 that the positive freehold covenants did not run with the land.

8. The claim is framed as a claim for damages measured as the diminution in value of the reversionary interests, and for the costs and damages paid in and arising from the Cardiff Meats proceedings.

9. The defence pleads inter alia that the claim is barred under the Statute of Limitations 1957, but this motion is not concerned with that plea, but rather with the application by the defendants to dismiss the claim on the grounds of the inordinate and inexcusable delay of the plaintiffs in prosecuting the proceedings.

Chronology of proceedings

3rd June, 2010 plenary summons issued claiming damages for professional negligence.

23rd July, 2010 an appearance entered on behalf of the defendants.

23rd Nov, 2010 statement of claim delivered.

8th Mar, 2011 motion for judgment in default of defence issued.

24th Oct, 2011 the defendants were given four weeks for the delivery of a defence.

18th Nov, 2011 defence delivered (one year after service of statement of claim).

18th Nov, 2011 notice for particulars served by defendant.

22nd Nov, 2012 the plaintiffs serve first notice of intention to proceed.

5th Feb, 2013 plaintiffs serve a notice for particulars on the defence, fifteen months after the defence was served. A motion by the plaintiffs to compel replies to these resulted in a consent order of 4th June, 2013, that the defendants furnish replies.

7th Feb, 2013 the plaintiffs furnish replies to notice for particulars served on 18th November, 2011.

20th June, 2013 replies to particulars furnished by defendants in compliance with order of 4th June, 2013.

30th July, 2015 plaintiffs serve notice of change of solicitor and second notice of intention to proceed (five years from plenary summons).

31st July, 2015 plaintiffs raise further notice for particulars relating to para. 46 of the defence, which pleads the Civil Liability Act 1961.

10. As can be seen from the chronology at the date of the issue of the motion seeking to dismiss on 30th March, 2016, almost six years had elapsed since the plenary summons had issued, and while the pleadings may have closed, save perhaps for the furnishing of a reply to defence, no request for discovery or other ancillary procedural steps have been taken by either the plaintiffs or defendants.

The arguments

11. The claims in respect of which the proceedings are brought relate to matters that occurred surrounding the purchase of the shopping centres in 1991, and between the time of the commencement of the Cardiff Meats proceedings in July, 2003 and their ultimate conclusion following an appeal to the High Court on Circuit in 2007. At the latest, the plaintiffs were aware since receiving substantial advice from counsel in November, 2006 that the positive freehold covenants were unenforceable, save for the prospect of arguing that an estoppel might ground a claim. The defence pleads, inter alia, that the plaintiffs knew since 1991 of the informal nature of the arrangement for the services for the common areas, and that no enforceable legal agreement existed for the provision or costs of such services in the absence of a formal management company structure. It asserted that the plaintiffs with that knowledge proceeded to purchase the shopping centres in anticipation of reaching an agreement for ongoing provision of or payment for services. The plaintiffs deny they had such knowledge, and say that it was only when the Cardiff Meats proceedings were commenced in July, 2003, and following the taking of advice from counsel not associated with those proceedings and with specialist knowledge in conveyancing matters, that they knew of the legal difficulties in enforcement.

12. The defendants argue that there has been a serious delay on the part of the plaintiffs in prosecuting this case, and in particular an unexplained two-year delay between June, 2013 and July, 2015, which of itself is argued to be sufficient to justify the dismissal of the proceedings, taken in conjunction with the delay in the commencement of the proceedings part of which relate to a transaction which occurred in 1991.

13. The defendants also argue that the proceedings are a "direct attack on the professional competence and reputation of the defendants as an established firm of solicitors". The affidavit evidence is that some of the solicitors who might be witnesses in the case are no longer employed in the defendant firm and that to ask these persons to recall and deal with events going back to 1991 in relation to complex litigation is "to place an unfair and seriously prejudicial burden on the defendants".

14. The evidence of the solicitor for the plaintiffs, Ms. Helen Sheehy, is that she has prosecuted the claim with expedition "to the best of my ability", but because of the nature of the claim, as involving the professional competence and reputation of a firm of solicitors, she has "taken great care to ensure that the case has been properly investigated, that counsel have been fully instructed and their advices followed". She goes on to say that expedition cannot "come at the cost of care and circumspection" having regard to the fact that the professional reputation of the defendants, and to the "extremely complicated" legal and factual nexus and "voluminous" paperwork, her delay is excusable and arises from a professional and justifiable caution.

15. Patrick Joseph McGrath, the second plaintiff in an affidavit sworn on 4th May, 2016 on his own behalf and on behalf of, and with the authority of, the other two plaintiffs explained in particular the pre-commencement delay. He says that neither he nor the other plaintiffs were advised with regard to the difficulty in enforcing the covenants and that it was not until advice was given by a solicitor in the conveyancing department of the defendant firm on 3rd October, 2006 that they became aware that the title to the property was "unmarketable" because there was no lawful mechanism to enforce the service charges. After judgment was delivered by Murphy J. sitting as a judge of the High Court on Circuit, a meeting took place in the offices of the defendant firm on 29th August, 2007, at which the plaintiffs "expressed our anger and frustration" that the incorrect advice had been given to them.

16. He says that the member of the firm he met was forceful in his assertion that the defendant firm had no culpability whatsoever and that in the light of his close relationship with that solicitor, and trust developed over twenty years, his strong assertions "sowed doubt in our minds whether we should sue our solicitors". He says in those circumstances it took a number of months before they decided to proceed with that course of action. The instructed their solicitor to seek the correspondence, files and pleadings in June, 2008.

Difficulties in briefing counsel

17. An initiating letter to the solicitors was sent on 7th July, 2008, was drafted by junior counsel who had indicated that he was not prepared to act formally or to have his name disclosed. This counsel later indicated, after an auctioneer's report was received on 17th November, 2009, that he would not continue to act "he having only agreed to get the matter started" and another counsel had to be found.

18. Counsel and "a conveyancing expert" were identified in March, 2010 and both were briefed. On 20th April, 2010, a letter of advices was received from the new counsel, who provided further advice concerning the draft pleadings which were ultimately signed off on 4th June, 2010. Counsel at that stage indicated that further work was required before the statement of claim could be ready. On 16th August, 2010, an opinion was received from conveyancing counsel but he was not in a position to engage a full consultation with the plaintiffs until 29th September, 2010. It was at that stage, following advice from conveyancing counsel, and from junior counsel briefed, that the statement of claim was finally prepared and served on 23rd November, 2010. This is more than three years after the plaintiffs had discovered the import of the freehold covenants.

19. This not being a motion to strike out some or all of the claims by reason of the plea that the action is statute barred, the first question to be determined is whether the plaintiffs unduly delayed in commencing these proceedings. On the evidence before me I am satisfied that the plaintiffs did not know of the conveyancing and title difficulties until 2006 or 2007 and the delay in obtaining advice on a complex and technical conveyancing and title matter is fully explained in the affidavit evidence. I consider that for present purposes, the correct approach is that the conflict on affidavit evidence with regard to the date on which the plaintiffs became aware of the title difficulties should be resolved in favour of the plaintiffs, and I take that date as November, 2006, albeit I note that the defendants have pleaded that the plaintiffs were well aware of a possible difficulty in enforcing covenants against the freehold owners when they purchased the two shopping centre developments in 1991. The plaintiffs have made out a credible and reasonable excuse for the pre-commencement delay.

The plea of the Civil Liability Act
20. The defence and counterclaim was served a year after the statement of claim on 18th November, 2011, and contained a plea which the solicitor for the plaintiffs said caused much of the delay in further prosecuting the proceedings. Paragraph 46 of the defence pleaded as follows:

> "If, which is denied, the Plaintiffs were incorrectly and/or negligently advised in breach of contract or otherwise wrongfully, whether by advice given or not given, as alleged or at all in relation to the Cardiff proceedings and/or the third party proceedings therein, and/or the compromise thereof, such wrong was the wrong of counsel whom the Plaintiffs have not sued herein and the Defendants will at the trial of this action rely on s. 35(1)(i) of the Civil Liability Act 1961".

21. The solicitor for the plaintiffs says that as a result of this plea the plaintiffs "were faced with the scenario where they had to consider suing the barristers engaged in the Cardiff Meats proceedings", and that a consultation was held and the counsel then engaged in November, 2011. An opinion was furnished on 26th July, 2012 by junior counsel who advised that "everything needed to be reviewed again" and further particularity was required in the instructions. Senior counsel said he would not act if proceedings were to be issued against colleagues, but was "persuaded not to bow out immediately". Ultimately, on counsel's advice a protective plenary summons against counsel issued on 15th February, 2012, and which did not contain the names of counsel instructed. The plaintiffs then replied to the detailed memorandum from junior counsel on 31st May, 2012 and a consultation was arranged with that counsel on the July, 2012 and further instructions taken. An "O'Byrne type" letter was sent then on 3rd October, 2012 in which the plaintiffs said that their clients had no option but to issue proceedings against counsel.

22. Mediation in respect of both disputes was suggested by this letter.

23. Following the service of the plenary summons on 16th February, 2012 on the three named counsel, two senior counsel and one junior counsel, one of these contacted the solicitor for the plaintiffs directly and indicated his view that he should not be included in the claim. The solicitor for the plaintiffs agreed to send his letter to the defendants which she duly did and asked the defendants to explain the negligence claimed against that barrister. She received no reply to this letter, or to reminders, and her affidavit evidence is that counsel made direct contact with the defendant firm, and when no reply was received by him, he suggested that a notice for particulars should be served.

24. The notice for particulars was then prepared by junior counsel and sent on 5th February, 2013. A motion was issued on 28th March, 2013 with a hearing date of 4th June, 2013 and a reply was received on 20th June, 2013 in which the defendants said "it is clear that the plaintiffs' own advisors have very clearly identified counsel against whom it was considered appropriate to commence proceedings", and no further reply of substance. A more detailed reply to particulars was served, following a further notice on 28th October, 2016, after the present motion issued, which set out the full sequence of the briefing of counsel in the Cardiff Meats proceedings.

25. The plaintiffs then had a further difficulty in constituting the action against counsel, in that both counsel, senior and junior, who had been acting on an advisory basis and for the purpose of drafting proceedings in the present case, confirmed that they would not be in a position to act "due to professional conflict" once the action against counsel had issued, and the evidence of the solicitor for the plaintiffs is that she had difficulty in finding a barrister who was prepared to advise or act. She made direct contact with the Bar Council, and sent a brief to them on 27th June, 2013. Reminders were sent on 18th October, 2013, 12th November, 2013, 25th November, 2013 and 17th December, 2013 and she "eventually" received the name of a senior and junior counsel. Senior counsel when contacted also said that she had a personal conflict and suggested an approach to a senior from the criminal side of the Bar with whom contact was made. The solicitor for the plaintiffs did not consider he had the "necessary skills" to act, but he did assist her with the names of three other counsel, the first of whom advised that he was conflicted, but who identified another senior counsel who did agree to act and who, while reluctant to act, agreed to look at the brief. A consultation was had with that counsel in April, 2014, who agreed then to provide an opinion. That counsel required to see the entirety of the files and noted there were missing attendances of meetings and missing letters of instructions to counsel. When these were furnished, senior counsel provided an opinion on 3rd March, 2015.

26. The solicitor then went about finding a junior counsel who would draft the statement of claim, which she said took "some time to identify", but he was briefed in June, 2015, consultations were held with him in June and July, 2015 and a statement of claim prepared and delivered at the end of July, 2015.

27. The solicitor's affidavit concludes with her assertion that the delay was excusable having regard to the difficulty she encountered.

28. Some difference in evidence exists between the parties as to whether there were in fact further documents in the file of the defendant firm. The solicitor for the plaintiffs said that she considered that it "never occurred to me that documents had been retained, accidentally or otherwise", and that she made an assumption, which counsel had challenged, that some of the documents including instructions or case to counsel simply did not exist. The evidence of the defendant firm is that no letter was received from the solicitor for the plaintiffs during the eleven month period between April, 2014 and March, 2015 after the consultation with senior counsel at which he agreed to provide his advice, and the furnishing of that opinion by him on 3rd March, 2015. The solicitor for the plaintiffs explains that she believed that all documentation in its possession was being handed over in April, 2008. The question of documents being retained is as yet unresolved but does not need to be resolved by me.

The law
29. The legal principles applicable to an application to strike out a claim are well established and the present case primarily engages the principles as set out in the Supreme Court by *Primor plc v. Stokes Kennedy Crowley & Anor*. [1996] 2 I.R. 459. The principles were recently restated and explained by the Court of Appeal in a number of judgments, in particular *Millerick v. Minister for Finance* [2016] IECA 206; *McNamee v. Boyce* [2016] IECA 19 and in the context of professional negligence, in *Farrell v. Arborlane Limited & Ors.* [2016] IECA 224. A party seeking to engage the inherent jurisdiction of the court to dismiss a claim where the interests of justice require it, must show that a delay in the prosecution of a claim was both inordinate and inexcusable. If a delay is inordinate and excusable, the court will then engage the question of whether the balance of justice favours the continuation of the proceedings or their dismissal, and the court may take into account a number of considerations, including delay on the part of the defendant, conduct or acquiescence of the defendant, whether there are special circumstances which give rise to a substantial risk that a fair trial is impossible or that the delay has caused, or is likely to cause, serious prejudice to a defendant.

30. In the judgment of the Court of Appeal in *Farrell v. Arborlane Limited & Ors.*, the Court placed some emphasis on the fact that the seventh defendant who had brought the motion was a professional person whose affidavit evidence was that the delay in prosecuting the proceedings impacted on his professional reputation and on his ability to obtain professional indemnity insurance cover.

31. The plaintiffs say that it was not until 2006, or at the latest, 2007, that they became aware of the frailty in their title which gave rise to a difficulty in enforcing the covenants and to what they say is a significant diminution in the value of the two shopping centres. That they did not proceed with due expedition once that had been discovered is explained by matters which, in my view, are excusable, albeit the fact of the pre-commencement delay of twenty three years is a factor that ought to have weighted on the plaintiffs in regard to the subsequent prosecution of the proceedings once the claim had been commenced. As Sheehan J. identified in Farrell v. Arborlane Limited & Ors., the court may have regard to any significant delay prior to the institution of proceedings and:

> "A plaintiff who waits until relatively close to the end of the limitation period prior to issuing proceedings is then under a special obligation to proceed with expedition once the proceedings have commenced." (para. 20(iv))

32. The plaintiffs cannot be faulted for the delay in preparing a statement of claim in such a complex case, and nor can the defendant be faulted for the delay of almost one year in furnishing a defence. But over five years have elapsed between that date and the date of the motion which was heard in late November, 2016 and finished in late January, 2017.

33. For the purposes of considering whether delay has been inordinate and inexcusable, the court examines the period that has elapsed subsequent to the commencement of proceedings. The assessment of the balance of justice engages a wider discretion and can take into account pre-commencement delay, and the interests of justice come to be examined only if a delay is held to be inordinate and inexcusable.

34. There are two periods of delay subsequent to the commencement of these proceedings that have been the focus of the argument before me. The first period, between November, 2011 when the defence was served, and 3rd October, 2012, when a notice of intention to proceed issued, is explained by the solicitor for the plaintiffs arising from the plea in the defence in reliance on the Civil Liability Act 1961. I will deal more fully with the difficulty arising from that plea, but no explanation is given for the delay in serving a notice for particulars on the defence until 5th February, 2013, and counsel originally briefed did not come out of the case until June, 2013. However, having regard to the fact that a notice of intention to proceed was required to be and was, in fact, served on 22nd November, 2012, the period for the service of a notice for particulars was not inordinate.

35. What is particularly troubling is that the explanation offered for the initial period of delay and the second period of delay between June, 2013 and July, 2015, arises from the plea grounded in the Civil Liability Act, and no explanation is offered for the failure of the plaintiffs to deal with the other matters arising from the balance of the matters pleaded in the very complex and detailed defence which ran to 61 paragraphs. A short notice for particulars was served on 5th February, 2013, seeking particulars of the plea in reliance on Civil Liability Act, but no other particulars.

36. A more complete notice for particulars was delivered on 31st July, 2015, where this question was repeated, and although it is fair to say that the notice of particulars is more detailed, it is one that deals solely with the plea regarding the possible liability of the barristers who were not sued by the plaintiffs.

37. I accept the explanation given by Ms. Sheehy in her replying affidavits regarding the period of delay between June, 2013 and July, 2015, and it is understandable and perfectly appropriate for her to have required that all pleadings and notices in the present case be drafted and settled by counsel having regard to the complexity of the matter and also having regard to the fact that she clearly did not take lightly taking the proceedings against a professional colleague and possible proceedings against counsel.

38. I accept also her proposition that it was in the interest of her clients that there be explored possible proceedings against counsel, and that she issued a protective writ to stop the time running in difficult circumstances where she did not have counsel who would permit his or her name to be included on a statement of claim. I also accept that she was correct to brief the same counsel in both actions.

39. The primary purpose of the invocation of the court's inherent jurisdiction to dismiss for want of prosecution as explained by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley & Anor*. was the inherent jurisdiction of the courts to control their own procedure and to dismiss a claim where the interest of justice required that this be done. The particular interest that the court has in controlling its own procedures and processes, and ensuring that the "culture of delay" is not supported by inactivity on the parts of litigants or the court, has found a particular focus in recent jurisprudence including in the Supreme Court decision of *Comcast International Holdings Incorporated & Ors. v. Minister for Public Enterprise & Ors.* [2012] IESC 50 and the Court of Appeal decisions that I have referred to above.

40. Equally important, however, to the administration of justice is that a plaintiff, suing a professional person arising from alleged professional negligence or breach of contract arising from the performance of a professional duty, not do so lightly.

41. Clarke J. in *Greene v. Triangle Developments Limited & Anor*. [2008] IEHC 52 at para. 4.3 said the following:

> "It is, of course, the case that no party should issue proceedings (or join a third party to existing proceedings) without having a credible basis for so doing. That situation applies with particular force in cases where it may be considered appropriate to maintain a claim for professional negligence. It would be most inappropriate for any party to issue proceedings alleging professional negligence or join a third party against whom professional negligence was to be alleged, without having a sufficient expert opinion available that would allow an assessment to be made to the effect that there was a stateable case for the professional negligence intended to be asserted. In some types of litigation it may well be possible for solicitors or counsel to form a judgment as to the existence of a stateable case on the basis of evidence without the benefit of expert reports. However, it seems unlikely, at least in most cases, that any such judgment could responsibly be formed in relation to a claim in professional negligence without having an appropriate expert report which addressed the alleged failings on the part of the professional person concerned."

42. I consider that the solicitor for the plaintiffs was acting responsibly and reasonably in holding off on the formulation of a claim against counsel, and in continuing the present proceedings without having the expertise of counsel in advising and drafting such proceedings, having regard to the fact that a concrete plea under the Civil Liability Act might have given the defendants a full or partial defence to the proceedings. Furthermore, the interests of justice are furthered by the prosecution of the present proceedings in conjunction with, whether by way of consolidation or listing a separate trial to be run sequentially, the proceedings with against counsel. The factual nexus is broadly speaking the same and the legal issues, at least those surrounding the transactions, will be identical.

43. The interests of justice that complex proceedings such as these be dealt with efficiently and efficiency in regard to court time and resources and those of the parties is best achieved by the engagement of the same counsel, or at least some of the same

counsel in the two sets of proceedings.

44. The primary difficulty I have with the explanations offered by Ms. Sheehy regarding her delay is that they relate exclusively to the Cardiff Meats proceedings and the claim under the Civil Liability Act, and she nowhere deals with the proceedings relating to the purchase of the two shopping centres in 1991, and I accept the argument for counsel for the defendants that this is a separate and distinct cause of action.

45. In order to show that a delay is not inexcusable, a party must provide an explanation that credibly excuses the delay by reference to concrete facts and not generalities. The concrete facts must relate to the particular difficulties or reasons in continuing to prosecute the proceedings.

46. No reason or explanation has been given as to why no reply to defence has been served regarding the plea that the claim is statute barred. In the course of submissions, counsel for the plaintiffs have argued that time had not run for the purposes of the statute for reasons of concealment or because the cause of action had not accrued until the last date on which the title defect could have been remedied. This is not pleaded in reply, and the matter remains one yet to be resolved, if necessary by a preliminary application, and the plaintiffs have nowhere in correspondence identified a possible defence to this plea, or indeed to the other pleas that the plaintiffs were advised by the defendants prior to the 1991 purchases as to the nature of the title and the informal nature of the arrangements for the provision of services in the common areas of the shopping centre in Finglas. It is surprising that no notice for particulars has been raised in this regard. The plaintiffs have offered no explanation for this delay and although it may be the case that the plaintiffs do not see any need to raise particulars, it is accepted that a reply to the defence is necessary having regard to the specific matters that need to be traversed.

47. I consider the delay to have been excusable insofar as the delay arises from the difficulty presented by the Civil Liability plea in the defence. What is less satisfactory is that this explanation for the delay does not at all deal with the delay in the prosecution of the proceedings generally. A plaintiff cannot hope to preserve a stale claim by joining it in another claim. It would have been appropriate for the plaintiffs to have notified the defendants in correspondence that it would be defending the claim on the statute of limitations in particular by reference to particular legal and factual context, and to have kept them informed regarding the difficulty in briefing counsel and their ultimate objective to have the cases progressed together. Some case management of the part of the proceedings relating to the 1991 purchases was also possible, including agreeing facts and legal principles, an attempt to narrow the issue surrounding the purchases etc. This work needed to be done and could have been done while the other proceedings were being formulated.

48. The plaintiffs do not adequately deal with the fact that a reply was not drafted to the defence save to say that counsel was not briefed until the summer of 2015, and that the replies to particulars were received in November, 2016, after the issue of the present motion.

49. No particulars have been sought in regard to the other matters pleaded in defence, and I am not persuaded by the explanation that the plaintiffs needed to have comprehensive replies to particulars before drafting a reply to deal with the entirety of the defence as was asserted in submissions.

50. Therefore, while I am satisfied that the delay in prosecuting that part of the proceedings relating to the Cardiff Meats proceedings is fully explained by the affidavit of Ms. Sheehy, I am not satisfied that the explanation is sufficient regarding the prosecution of the claim generally, particularly as the solicitor for the plaintiffs has nowhere said on affidavit that counsel has advised, or that she takes the view, that a notice for particulars is not warranted in respect of the balance of the matters pleaded in the defence. The interplay between the proceedings now commenced against counsel and the present proceedings is relevant only to part of the claim, and not to all of it.

51. In those circumstances, I turn to consider whether the balance of justice favours the continuation of the proceedings as a whole. The matters that are to be taken into account by a court in considering the interests of justice are well established and were explained by Hamilton C.J. in *Primor plc v. Stoke Kennedy Crowley & Anor*. at p. 475 as follows:

> "(d) in considering this latter obligation the court is entitled to take into consideration and have regard to
>
> (i) the implied constitutional principles of basic fairness of procedures,
>
> (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
>
> (iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,
>
> (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
>
> (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
>
> (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
>
> (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

52. These principles have been considered and applied in a number of cases most recently by Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206.

53. I will deal with each of the factors identified by the case law in sequence.

Constitutional principles

54. The constitutional principles at play are the interests, of basic fairness of process, but also that principle that a party is entitled to access the courts to achieve justice and to prohibit a person from continuing litigation is, as explained by Murphy J. in *Hogan & Ors. v. Jones & Ors*. [1994] 1 I.L.R.M. 512, as "draconian". However, recent case law has identified as an element in the basic constitutional principles of fairness, the dismissal of stale claims and a discouragement of a "culture of delay". Taken alone, the claim regarding the 1991 purchase might be called "stale" and Hogan J. in *Donnellan v. Westport Textiles Limited & Ors*. [2011] IEHC 11 at para. 31, explained the constitutional imperative of the "speedy and efficient dispatch of civil litigation" as well as "the public interest in ensuring the timely and effective administration of justice". Irvine J. in *Millerick v. Minister for Finance*, at para. 40 explained the matter as:

> "… the constitutional imperative to bring to an end the all too long standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures. These decisions have emphasised the constitutional provisions contained in Article 34.1 which requires the courts to administer justice. This constitutional obligation presupposes that the court itself will strive to ensure that litigation is conducted in a timely fashion."

55. At the latest, the plaintiffs were aware in 2007 that the title to the Finglas Shopping Centre was defective, to the extent that it did not carry with it the right to enforce the positive covenants. Pre-commencement delay is relevant in considering the interests of justice, but I do not consider that after 2007 the plaintiffs were tardy having regard to the complexity of the legal questions, and their solicitor adopted a correct and rational approach in not pursuing the litigation without expert advice and assistance. The constitutional imperative does not of itself justify the dismissal of the present case as it imports the corollary that a professional person ought not be sued without expert and specific prior advice as to the nature of the obligation undertaken by that professional and the extent and nature of any departure from reasonable standards.

56. The first consideration does not warrant the dismissal of the case as a whole.

Prejudice
57. In applying the *Primor* test, the courts have made it clear that a defendant need show only moderate prejudice albeit, that the prejudice must be concrete and real. The defendants have adduced evidence of a particular difficulty, that some of the solicitors in the firm at the time of the 1991 purchase no longer work for the firm. No evidence is adduced that those persons cannot now be located, that their memory is frail or that they are deceased.

58. Of more consequence is the fact that the defendants aver that oral advice given to the plaintiffs prior to the purchase in 1991 will exonerate them from the claim that they failed to advise as to the frailty in the title and the difficulty with enforcing the covenants to maintain the common areas. This is not, to that extent, a documentary case, albeit the legal issue in issues in play are resolvable by reference to the title documents themselves. Therefore, the defendants have shown an arguable case that the passage of time has made memories more frail, and that frailty of memory leads to moderate prejudice arising from the delay.

59. The plaintiffs on the other hand will suffer overwhelming prejudice should the proceedings be struck out and will be left with their action against the barristers which concern the conduct and advice surrounding the Cardiff Meats proceedings.

60. It is possible to fully deal with the question of prejudice to both parties, the prejudice to the defendants in seeking to now defend and offer oral evidence in regard to advice given 25 years ago, and the prejudice to the plaintiffs in having the matter struck out, by dealing with the present proceedings as comprising two separate causes of action, albeit pleaded together, I will deal more fully with that approach below.

Delay or acquiescence by the defendants
61. I consider that there was no delay in the one year period between the delivery of the statement of claim and the defence, and such a delay is not unusual in a case of such complexity. Both parties are to be commended for pleading specifically and in concrete terms. That particular factor was one which bore on the consideration of the Court of Appeal in *Farrell v. Arborlane & Ors*. where Sheehan J. expressed disquiet that the statement of claim was pleaded in a most general way against the seventh defendant, and that even at the point at which the motion was heard the proceedings were some way from being ready to set down. No such difficulty arises in the present case and the claims and defence are fully particularised. The statement of claim required careful and skilled drafting, and the defence is a careful, extensive and focused plea in response.

62. The defendants wrote to the plaintiffs on 22nd November, 2012 threatening a motion to dismiss for want of prosecution and indicating that their clients did not intend to become involved in issues regarding the action against counsel. This was a sufficient warning but the threatened motion did not issue until 30th March, 2016, three and a half years later. There is a surprising lack of correspondence between the sides, or at least none of that correspondence has been exhibited, and I must conclude therefore that while a defendant is entitled to "let sleeping dogs lie" as explained by Irvine J. in *Millerick v. Minister for Finance*, and may tactically not take a step albeit in not doing so be exposed to risk in due course, the delay of the defendants in instituting the present motion, and in replying to the notice for particulars arising from the defence served initially on 5th February, 2013, and repeated with some more detail on 31st July, 2015 might have given comfort to the plaintiffs that a motion would not issue.

A professional negligence claim
63. This was the focus of the judgment of the Court of Appeal in *Farrell v. Arborlane & Ors*. and the seventh defendant in that case, succeeded in having the claim against him struck out, having adduced evidence of difficulty in obtaining professional indemnity insurance, and the continuing impact on his professional reputation by the mere existence of the proceedings. The defendants in the present case have not made a concrete assertion that any difficulty has arisen in regard to its professional indemnity insurance, but do make the general point that the proceedings are a direct attack on their professional competence and reputation as an established firm of solicitors.

64. The concern of the defendants is well placed, but of itself the mere fact that proceedings exist against a professional person is not a matter which will add much to the balance of justice.

Conclusion
65. Taking the various factors which weigh in the balance of justice, I consider that the defendants are prejudiced by the continuation of the claim surrounding the 1991 purchase but that no prejudice exists with regard to the prosecution of the Cardiff Meats proceedings.

66. In *Burke & Anor. v. Beatty* [2016] IEHC 353, Noonan J. struck out part of a claim brought against a barrister on the grounds that it was bound to fail, but permitted the continuation of the balance of the claim. The jurisdiction invoked by the defendants in the present case is an inherent jurisdiction of the court to ensure that justice and fairness is achieved in the prosecution of claims and in

the administration of justice, and a court may in the exercise of that inherent jurisdiction fashion a remedy to achieve justice.

67. I do not consider that the interests of justice are served by permitting the continuation of the claim of the plaintiffs regarding the 1991 purchase for the following reasons:

> (a) It was not prosecuted with due expedition, and the explanation and justification relate entirely to that part of the claim which relates to the Cardiff Meats proceedings.
>
> (b) 25 years had elapsed at the date of the motion, and at least 27 years will have elapsed before the trial of this case comes on for hearing. The 1991 purchase will be defended by the defendants on the basis of oral evidence given by persons, including persons who no longer work for the firm. While some of the persons might well have refreshed their memory by the consideration of the files again between 2005 and 2007 for the purpose of the Cardiff Meats proceedings, those persons who have left the firm would be in a different situation. The delay is one likely to cause prejudice in the presentation of the evidence in defence.
>
> (c) A plaintiff may not delay the prosecution and preparation of a trial merely on account of one matter which might give rise to difficulty, or as in the present case, the need to commence further proceedings, or indeed join a defendant or defendants to an action. At the very least, the defendants ought to have been kept informed of the reason for the delay, whether the plaintiffs were satisfied not to plead to the defence, and that the case was being prepared in the light of that defence save for the question of the separate proceedings against the barristers.

68. I am satisfied that the delay in prosecuting that part of the action as relates to the Cardiff Meats proceedings has been sufficiently excused. I consider also that the balance of justice favours the continuation of that part of the action.

69. I propose, therefore, giving counsel an opportunity to address me further with regard to the form of the order I might make, with the intent of permitting the continuation by the plaintiffs of the claim against the defendants surrounding the advices given and actions taken relating to the Cardiff Meats proceedings.