THE HIGH COURT

[2005 No. 736 P]

BETWEEN

OLIVER HUGHES AND FABOLA LIMITED

Plaintiffs/Respondents

AND

MICHAEL CUSACK

practising under the title and style of Michael E Cusack And Co.

Defendant/Applicant

JUDGMENT of Ms. Justice Murphy delivered the 25th day of January, 2016.

1. The case at the core of this application arises from a claim of professional negligence and breach of contract made by the respondents against the applicant, in his capacity as solicitor, arising from the investigation of title in relation to a premises acquired by the respondents, at Crossguns Bridge, Prospect Road, Dublin. The proceedings were issued by way of a plenary summons dated 25th February, 2005. The applicant, Mr. Michael Cusack, now seeks an order pursuant to Order 122 Rule 11 striking out or dismissing the proceedings for want of prosecution or an order pursuant to the inherent jurisdiction of the Court dismissing the proceedings on the grounds of inordinate and/or inexcusable delay on the part of the respondents.

Background

2. In or about February 2001, the respondents purchased a premises at Crossguns Bridge for the purpose of developing a licensed premises on the site. The respondents retained the applicant in his capacity as solicitor. The applicant was tasked, as per the retainer, with investigating the title to the property in order to ensure that good title thereto was acquired. According to the respondents' Statement of Claim, acting on the faith of an express and/or an implied representation of the defendant that the title to the lands was good and marketable, the respondents completed the purchase of the site in 2001 and began their development.

3. By letter dated 4th March, 2003, C.I.E. wrote to the second named respondent, informing it that a portion of the land measuring approximately 250m2 was held by the respondents under a yearly tenancy agreement dated 23rd January, 1930 and that "*same can be determined if again required by CIE for operating purposes*". Thus, it transpired that the respondents had apparently only acquired a possessory title to that portion of the property in question.

4. The property in issue was the old Glasnevin Station House. The applicant avers that Replies to Particulars furnished by the respondents on 26th September, 2011 stated that the old station house had been integrated into the pub in the course of the development and subsequent to the notification from C.I.E..

5. . The total cost of the project, exclusive of VAT was €7,041,515.83. This included the purchase price of the lands in the sum of €1,587,172.50, expenditure totalling some €5,218,569.98, exclusive of VAT, and additional costs of €235,773.35, according to the respondents' Statement of Claim.

6. On 25th February, 2005 the respondents issued a plenary summons against the applicant, claiming breach of contract and professional negligence in respect of the latter's failure to uncover the existence of C.I.E.'s interests in the land in question in the course of his investigation as to the title.

7. The applicant contends that the respondents have delayed in prosecuting their claim; that that delay has been both inordinate and inexcusable and that, therefore, the Court should exercise its inherent discretion to dismiss the respondent's claim for an abuse of process or, alternatively, strike out the claim for want of prosecution as per the powers provided by Order 122, Rule 11 of the Rules of the Superior Courts.

Chronology of the Proceedings

8. The plenary summons issued on 25th February, 2005 and an appearance was entered on behalf of the applicant on 12th April, 2005. The respondents' Statement of claim was delivered on 14th April 2005, followed by the applicant's defence on 22nd May, 2006.

9. An exchange of open correspondence between the solicitors for the parties occurred between 22nd May, 2006 and 19th February, 2007. This correspondence related to the duty on a plaintiff to mitigate loss and suggestions from the defendant as to how best this might be achieved. There was no meeting of minds between the parties on the proposed solutions and, according to the applicant, the correspondence ended with the plaintiff/respondent's solicitor indicating his intention to seek counsel's advices on the last proposal of the defendant/applicant. There was no further communication between the parties until the respondents served a notice of intention to proceed on 14th May, 2010, some three and a quarter years following the last correspondence. On 21st February, 2011 the respondents delivered a Reply to the Defence and, on the 28th February, 2011, they raised a Notice for Particulars and made a request for voluntary discovery.

10. The respondents' Notice for Particulars was initially responded to by letter from the applicant's solicitors, Vincent & Beatty, dated 11th March, 2011 which stated:-

> *"On the 27th February 2007 you wrote to us acknowledging our letter of the 19th February 2007 and you informed us that you had referred the matter to Counsel.*
>
> *We did not hear back from you in relation to Counsel's opinion on our letter of the 15th February 2007, so this letter remains unanswered.*

For ease of reference we enclose a copy of our letter of the 19th February 2007 and will await hearing from you in relation to it.

In the meantime we believe that you should take certain steps in relation to this action to comply with the High Court Rules in view of the fact that it has been dormant for over four years".

11. A Notice for Particulars was raised by the applicant on 6th September, 2011, to which the respondents replied on 26th September, 2011 and having clarified a number of matters, supplied further replies on 3rd October, 2011.

12. On 1st February, 2012, the applicant's solicitors sent a notice for Further and Better Particulars relating to the issue of damages and to perceived discrepancies between the respondent's replies to particulars of 26th September, 2011 and those of 3rd October, 2011. This Notice went unanswered for two years and replies were eventually furnished on 19th March, 2014, at a time when the applicant had sworn his grounding affidavit for the purpose of this application.

13. On 3rd February, 2012 the respondents sought further details pertaining to the discovery documents furnished to them. On that same date, the respondents sent a notice to admit facts, which the applicant admitted on 23rd July, 2012.

14. As regards the request for discovery, an exchange of correspondence; namely, the respondents' letter of 3rd February, 2012, the applicant's response on 21st May, 2012, a further letter from the respondents dated 30th July, and the applicant's response thereto dated 13th August, 2012, necessitated the swearing of a supplemental affidavit of discovery.

15. By letter dated 26th July, 2013, the applicant's solicitors sought a Reply to the Notice for Particulars of 1st February, 2012. In a letter dated 2nd August 2013, the respondent's solicitors issued a third Notice of Intention to Proceed, affixed to which was a cover later which stated:-"*We will deliver the Plaintiffs' Replies at the expiration of one month from the date of this Notice"*.

16. The letter of 2nd August, 2013 also noted that that the applicant's solicitors:-

"had not yet provided us with the [Applicant's] Supplemental Affidavit of Discovery taking account of the additional documentation furnished by you to us under cover of your letters dated the 21st May, 2012 and the 13th August, 2012."

17. The applicant's supplemental affidavit of discovery was sworn on 23rd September, 2013, according to the affidavit of the respondent.

18. A further request for replies to the applicant's particulars was made via letter dated 25th November, 2013, to which the respondents' solicitors replied by letter dated 20th December, 2013. This letter stated that they would be meeting with their client after the holiday period, and confirmed that the respondents' solicitors would "*furnish [the Applicant] with the outstanding replies thereafter"*.

19. The applicant's solicitor again sought replies to particulars via email dated 16th January, 2014. No replies were forthcoming and the applicant served his motion to strike out the proceedings on the respondents' solicitors on 6th March, 2014. Replies to the requests for particulars were subsequently delivered by the respondents on 19th March, 2014.

Submissions - Delay

20. The applicant contends that there has been an inordinate and inexcusable delay on the part of the respondents in prosecuting the proceedings in question. In support of his contention, the applicant draws the Court's attention to a number of time periods in the chronology of the proceedings.

21. The applicant states that the date on which the respondent's cause of action accrued is either 3rd August, 2001 – the date on which the purchase of the premises was completed – or 4th March, 2003 – the date on which C.I.E. sent the letter notifying the respondents of its interests in the land and seeking information as to what works were being carried out by the respondents thereon.

22. The respondent's plenary summons was not issued until 25th February, 2005; after they had expended €5,454,343.33 on the development of the property. The statement of claim was not delivered until 14th April, 2005. The applicant contends that this delay is inordinate and that there is no evidence which explains the delay. Therefore, it is the applicant's position that the delay is inexcusable.

23. The applicant also notes that the respondents carried on with, and ultimately completed, the development of the public house, notwithstanding their receipt of the letter from C.I.E. dated 4th March, 2003. As evidenced in the respondents' reply to a request for particulars dated 3rd October, 2011, the total costs expended by the respondents due or up to March 2003 are confirmed to be €2,523,788.23. The applicants therefore note that the costs expended after March 2003 amount to almost €3 million.

24. A defence was delivered by the applicant on 22nd May, 2006. Although there was some correspondence between the parties between that date and early 2007 and a Notice of Intention to Proceed issued on 14th May, 2010, the applicant notes that nothing was done to prosecute the respondents' claim between the applicant's delivery of the defence on 22nd May, 2006 and the respondents' reply to the defence delivered on 21st February, 2011 – a period of almost five years. The applicant contends that the delay here is again inordinate. He further contends, that the delay is accompanied by no financial or other disadvantages that might explain the delay and is thus, inexcusable.

25. Although the applicant concedes that a Notice of Intention to Proceed was served by the respondents during this five year period, on 14th May, 2010, he submits that his contention that nothing has been done by the respondent to prosecute his case over the five-year period specified remains valid, since such a notice does not constitute a "*proceedings*" within the meaning of Order 122, Rule 11 of the Rules of the Superior Court.

26. The applicant further notes that following further replies to the applicant's request for particulars dated 6th September, 2011, which were made by the respondents on 3rd October, 2011, the respondents again delayed in prosecuting their case until 3rd February, 2012 when they sought additional information pertaining to their own request for particulars as well voluntary discovery, which had been made on 28th February 2011. He contends that this amounts to a further inordinate and inexcusable delay on the part of the applicant.

27. Finally, the applicant drew the Court's attention to the period between the applicant's Notice for Particulars on 1st February, 2012 and the respondents' reply to same on 19th March, 2014. The applicant submits that this delay, in excess of two years, must amount

to an inordinate delay and, as it is unexplained by the respondents, is also inexcusable. The applicant also submits that these replies were only delivered as a reaction to the issuing of the motion herein on 6th March, 2014.

Applicant's Submissions – The Law

28. The applicant notes that the power of the Court to strike out proceedings for want of prosecution on the grounds of delay, results both from an inherent jurisdiction to do so where that delay has been inordinate and inexcusable, and from Order 122, Rule 11 of the Rules of the Superior Court which provides as follows:-

> *"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceedings for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just…"*

29. In outlining the law in this area, the applicant cites the general principles to be applied by the Court as laid down by Hamilton CJ in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459:-

> *"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
>
> *(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
>
> *(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
>
> *(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."*

30. The Primor principles were affirmed by Denham CJ in the Supreme Court in *Comcast International Holdings Incorporated v. Minister for Public Enterprises & Anor* [2012] IESC 50:-

> *"The nature of an inordinate and inexcusable delay requires to be considered in all the circumstances of the case. Thus, the factors of each case require to be analysed.*
>
> *In addition, in recent times there has been an acknowledgement that cases may not be let lie, in a laissez faire attitude, for the parties to move. There is a requirement to ensure that cases are progressed reasonably. This approach has been the subject of litigation in Ireland and has also been addressed by the European Court on Human Rights. For example, in Price and Lowe v. The United Kingdom, 43185/98, there was an application alleging a violation of Article 6 of the Convention in connection with the length of the proceedings at issue. Article 6 provides:-*
>
> > *"In the determination of his civil rights and obligations…everyone is entitled to a…hearing within a reasonable time…"*
>
> *The ECtHR reiterated that the reasonableness of the length of the proceedings must be addressed in the light of the circumstances of the case, and having regard to the criteria laid down in the Court's case law, in particular:*
>
> *-The complexity of the case,*
>
> *-The conduct of the applicant,*
>
> *-The conduct of the relevant authorities, and*
>
> *-The importance of what is at stake for the applicant in the litigation.*
>
> *The Court held that the manner in which a State provides for mechanisms to comply with this requirement – whether by*

way of increasing the number of judges, or by automatic time-limits and directions, or by some other method – is for the State to decide. In this case the domestic law is that stated in Primor, where the factors identified by Hamilton CJ, as set out previously, are not dissimilar to the criteria set out in Price."

31. The view of the Supreme Court in *Comcast* was that the delay was, in the circumstances, an excusable one. However, the applicant contends that *Comcast* can be distinguished since it was an unusual case which involved delay arising from the plaintiff's decision to await the outcome of an Oireachtas enquiry into the granting of a mobile licence before taking action in furtherance of the proceedings. The unique circumstances of the case were described by Denham C.J. at paragraphs 40 and 42 of that judgment.

32. In *Comcast*, questions also arose as to whether or not the *Primor* principles would have to be recalibrated in light of the coming into effect of the European Convention on Human Rights Act 2003. However, the applicant points out that this argument did not find favour with the Supreme Court in *Comcast* and draws the Court's attention to the judgment of McKechnie J. in which he considered, *inter alia*, the judgments of Geoghegan J. and Macken J. *in Desmond v MGN Ltd* [2009] 1 IR 737, and of Geoghegan J. in *McBrearty and Others v North Western Health Board and Others* [2010] IESC 27. Both judges were of the view that the *Primor* principles had stood the test of time and that there was no justification for any major departure from these established and well-tried principles. McKechnie J. in *Comcast* stated as follows:-

"I have looked closely at this issue in the instant case, only because the absence of comment may otherwise be taken, as representing a view which I do not hold. My views coincide with those referred to in the previous paragraph [ie the views of Geoghegan J. and Macken J.]. I therefore see no reason, at least at this stage, for any formal reassessment of how Primor should be applied. No-one, so far as I am aware, has suggested that the three limb approach established in such cases should be substantially altered or that any matter or factor heretofore relevant should be omitted from future consideration. In fact it should immediately be said that Clarke J in Rogers acknowledged that this suggested shift of emphasis did not envisage any change in the matters to be considered but rather involved an adjustment within the existing practice. Even so, in my view, when both inordinate and inexcusable delay is being considered and when the balance of justice is being looked at, the court always has a discretion in its evaluation of the presenting circumstances, from which the ultimate decision is made. That discretion is, and in my opinion should, remain sufficiently flexible to deal with any situation or event: in its application to date I know of no case where it could be legitimately argued or suggested that the result arrived at was the wrong one or was an unjust one."

33. In addition, the applicant cites the judgment of O'Malley J. in *O'Carroll v EBS* [2013] IEHC 30, in which the judgments of McKechnie J. and Clarke J. in *Comcast* were considered, in support of the view that the *Primor* test has been unaltered by the European Convention on Human Rights Act 2003.

34. The applicant also draws the court to the judgment of Clarke J. in Comcast in which he considered the third limb of the *Primor* test – the issue of the balance of justice. Clarke J. cited his own decision in *Stephens v. Paul Flynn Limited* [2005] IESC 148 where he stated as follows:-

"He [the moving party] has not, however, been able to point to any specific witness who is no longer available. It must also be taken into account that there are, apparently, statements of the relevant witnesses to the events of the 5th December, 1995 taken by the Gardaí on the occasion in question. That being said an issue as to the credibility of witnesses (which will almost certainly arise) will be all the more difficult of resolution where those witnesses are being asked to recollect matters that occurred so long ago. While the prejudice may not be quite as great as the Defendant contends for, I am satisfied that it will nonetheless be of some significance."

35. The applicant further cites the decision of McMenamin J in *Lismore Builders Ltd (In Receivership) v. Bank of Ireland Finance Ltd & Anor* [2013] IESC 6, in which the judge held that the *Primor* principles must be applied sequentially: the Court must first enquire as to whether there has been inordinate delay and then as to whether such delay is inexcusable; before applying the balance of justice test as to whether it is proper for the Court to dismiss the claim.

36. The case of *Biss v. Lambeth Health Authority* [1978] 1 WLR 382 is referred to briefly by the applicant in support of his contention that prejudice comes in many guises and that, as per Geoffrey Lane L.J., "*there are many ways in which defendants may be prejudiced by continual delay".*

37. Finally, the applicant submits that, independently of any recalibration, the Court retains the jurisdiction to strike out a claim, even without prejudice, if the delay is inordinate and inexcusable, if the Court finds that in allowing the case to proceed to trial is not in the public interest. Such a jurisdiction was endorsed by Hogan J. in the case of *John Donnellan v. Westport Textiles Ltd (In Voluntary Liquidation) and Minister for Defence* [2011] IEHC 11, in which he cited with approval the judgment of Peart J in *Byrne v. Minister for Defence* [2005] IEHC 147.

Applicant's Submissions – Balance Of Justice

41. Insofar as the balance of justice is concerned the applicant contends that there is a risk of prejudice in allowing the case to proceed fifteen years after the conveyance.

42. The applicant firstly points to the replies to particulars of October 2011, which, he contends, emphasise the level of evidence that may need to be adduced at trial regarding quantum and the building project relating to the premises. He contends that this is an issue in the case due to the respondents' decision to press ahead with their development notwithstanding the letter from C.I.E. in March 2003. The applicant submits therefore that he will need to examine the respondents' witnesses regarding the state of play of the build in March 2003 and the decision to spend almost a further €3 million subsequently. He notes that the issue of the build spend and the question of whether the pub might have been built around the material C.I.E. land will all be issues at trial. Therefore, the design team, construction company, subcontractors and all decision-makers will need to be cross-examined at a trial some thirteen years after the event.

43. The applicant also submits that the Court should note that there is no evidence that CIE will ever need to use the land such that the loss is only perceived or contingent.

44. The applicant also alleged potential prejudice arising from the fact that since the specialised counsel retained by him commenced practice in 1972, it was not known whether she would be in practice or retired when this matter comes to trial.

45. The applicant also contends that the continuation of the action has caused and continues to cause damage to his reputation. He has informed the Court that he practiced as a solicitor until recently and is now retired with his good name intact. He claims that the

"*reputational disaster"*, he considers to have been caused by the proceedings, has been hanging over him since February 2005.

Respondents' Submissions – Synopsis
46. It is the respondents' contention that, although the delay on their part has been somewhat lengthy, as per the *Primor* principles it is not inexcusable. The respondents proffer an explanation for their delay, whilst also emphasising that at all times their clear intention was to proceed with the litigation, an intention exemplified by the various Notices of Intention to Proceed that have been served on the applicant, in spite of the admitted tardiness on the part of the respondent.

47. The respondents further submit that even if the Court is of the opinion that their delay has been inordinate and/or inexcusable, the balance of justice lies in favour of allowing them to proceed with their case.

48. Furthermore, the respondents draw the Court's attention to conduct on the part of the applicant which makes him also guilty of delay, and point out that delay on the part of the defendant is a factor which the courts must take into account in considering where the balance of justice lies.

Respondents' Submissions – Explanation For The Delay
49. The respondents concede that there has been delay in the prosecution of their claim, but deny that the delay is inordinate and/or inexcusable.

50. In this regard, the respondents point to the case of *Lismore Builders Ltd (In Receivership) v Bank of Ireland & Ors* [2013] IESC 6 in which McMenamin J. held that:-

> *"[E]ven ascribing blame where it lies, the fundamental question remains as to whether the appellants have been guilty of inordinate and inexcusable delay. It is not sufficient to point to the very substantial period of the time in question."*

51. The respondents' explanation for the delay on their part was that the first named respondent was involved in a protracted dispute with one of the directors of the second named respondent, a Mr. Frank Ennis. Mr. Ennis served as an architect and project manager, in relation to the property which is the subject matter of these proceedings. The respondent contends that Mr. Ennis was an integral figure to the project, as he applied for all planning permission and undertook the day to day management of the site until completion.

52. A Settlement Agreement was reached between the first named respondent and Mr. Ennis on 23rd January, 2013 whereby Mr. Ennis agreed *inter alia* to provide all necessary help and information in order to expedite the within proceedings. However, despite this Settlement Agreement, it became necessary to issue legal proceedings in order to enforce it. The matter was due for trial before Kelly J. on 22nd July, 2014 but, due to the length of the case, the matter was put back to 28th January, 2015.

53. The respondents contend that this dispute has been time consuming and involved issues which affected matters in the present proceedings, the net effect of which is that they have been unable to diligently prosecute their claim. Accordingly, the respondents argue that the delay on their part is excusable.

54. In support of the view that a party's involvement in other litigation may be taken into account as a possible mitigating factor in respect of a delay, the respondents cite the decision of Laffoy J. in *Corcoran v McArdle* [2009] IEHC 265. Although in that particular case the defendant's preoccupation with other proceedings involving the plaintiff was not held to be sufficient to excuse his delay, the Court did consider that the existence of a professional and business relationship between the plaintiff and defendant was a factor to be taken into account in determining where the balance of justice lies. In response to a similar argument in *Truck and Machinery Sales Limited v. General Accident and Anor*. (Unreported, High Court, 12th November, 1999) Geoghegan J. held as follows:

> *"Strictly speaking it would seem to me that the excuses relied on should relate in some way to the actual proceedings in hand because an opposing party can hardly be expected to stand aside and wait while the other party resolves its problems which have nothing to do with the litigation.*
>
> *Nevertheless I am satisfied that all the surrounding circumstances including so called excuses based on extraneous activities must to some extent be taken into account and weighed in the balance in finally considering whether justice requires that the action be struck out or allowed to proceed".*

Respondents' Submissions – Delay On The Part Of The Applicant
55. The respondents point out that the applicant, himself, was guilty of delay. They note that a Defence was not filed on behalf of the applicant until 22nd May, 2006 – some thirteen months after the respondents issued their Statement of Claim on 14th April, 2005. They also note that the applicant did not raise a Notice for Particulars until 6th September, 2011 – some six and a half years after delivery of the Statement of Claim. The respondents also point out that they incurred further expense in furnishing replies thereto.

56. Furthermore, the respondents point to the fact that the applicant's affidavit of discovery was not sworn until 9th September, 2011, some seven months after the respondents sought discovery in a letter dated 28th February, 2011. The applicant's supplemental affidavit of discovery was not sworn until 23rd September 2013, some two years after his first affidavit was sworn and two and a half years after the initial request. Again, the respondents note that they incurred further expenses in dealing therewith.

57. As regards the relevant law in this area, the respondents cite the *Primor* principles as laid down by Hamilton C.J. and set out at paragraph 30 above. The respondents also point to the decision *in O'Connor v. John Player and Sons Ltd* [2004] 2 ILRM 321 in which Quirke J. elaborated upon the *Primor* principles and stated that the following issues are to be considered in assessing where the balance of justice lies in cases of this nature:-

> *"A. The conduct of the defendants since the commencement of the proceedings for the purpose of establishing (a) whether any delay or conduct on the part of the defendant amounted to acquiescence in the plaintiff's delay and (b) whether the defendants were guilty of conduct which induced the plaintiff to incur further expense in pursuing the action;*
>
> *B. Whether the delay was likely to cause or has caused serious prejudice to the defendants (a) of a kind that made the provision of a fair trial impossible or (b) of a kind that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action, and;*

C. Whether having regard to the implied constitutional principle of basic fairness of procedures, the plaintiff's claim against the defendants should be allowed to proceed or should be dismissed."

58. Thus, the respondents submit that it is clear from both the Primor principles and Quirke J.'s elaboration thereon, that delay on the part of the defendant is also a relevant factor to be taken into account.

59. Such a view finds further expression in *Dowd v Kerry County Council* [1970] IR 27, in which O Dalaigh J. stated that:-

> *"[I]n weighing the extent of one party's delay, the court should not leave out of account the inactivity of the other party…"*

and that:-

> *"[L]itigation is a two party operation and the conduct of both parties should be looked at."*

60. Similarly, McMenamin J. in Lismore Builders, held that:-

> *"The onus to progress proceedings does not only lie on one side. I consider that these [the defendants' delay in delivering their respective defences] are countervailing factors which, albeit not, strictly speaking, acquiescence, cannot be ignored."*

61. Fennelly J. in *Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510 distinguished between culpable delay in taking any step in the action and mere failure to apply to have the plaintiff's claim dismissed. In the present case, the respondents submit that the applicant must be guilty of culpable delay in that it took him almost three years to make discovery and six and a half years to raise a Notice for Particulars on the respondents' Statement of Claim.

62. The respondents further cite the decision of *Muchwood Management Ltd v McGuiness* [2010] IEHC 185 in this regard. In that case, Dunne J held that, although there had been delay causing prejudice to the defendants, the defendants' own delay amounted to an acquiescence:-

> *"Having regard to the Primor principles to which I have referred already, I would have to say that this is a case in which it is impossible to ignore the delay on the part of the defendants. I would go further and say that there has been acquiescence by the defendants in the delay in this case. They initiated, participated in and delayed the process of discovery to an extent that it is difficult to understand even taking into account that the events at issue go back as far as 1990, relate to a tour in 1995 and deal with events on both sides of the Atlantic. Given that position, I am reluctant at this point in time to make an order dismissing these proceedings for want of prosecution."*

63. It is the respondents' contention that the total delay on the part of the defendant is of such a degree as to amount to an acquiescence, as per the findings of Dunne J in *Muchwood*.

Respondents' Submissions – Balance Of Justice/Prejudice

64. The respondents submit that, as per the *Primor* principles and the relevant subsequent case law, the conduct of the parties to the proceedings is a valid consideration for the Court in assessing where the balance of justice lies. Thus, for the reasons outlined already, the delay on the part of the applicant in these proceedings is a factor that should draw the Court to the conclusion that the balance of justice lies in favour of allowing the litigation to proceed.

65. The respondents further submit that such a conclusion must be balanced against a consideration as to the degree of prejudice that may befall the other party in the event of an inordinate delay.

66. In that respect, the respondents reject the applicant's contention that he has been prejudiced by the delay in this case. Although the applicant has suggested that a great deal of the evidence for the hearing will depend on the time-weathered ability of various witnesses to recall particular events, the respondents are of the view that the oral testimony will centre around what they call the "*paper title*" to the property in question. The respondents note that the documents in question have been in existence since at least 1930. According to the respondents, there is no suggestion of loss or damage that is incapable of identification, there are no witnesses contended to be unavailable and no articulation of any specific issues insofar as the impact of the passage of time on witnesses' memory may be concerned. Indeed, in *Manning v National House Building Guarantee Company Ltd & Ors* [2011] IEHC 98 the Court was of the view that no prejudice had been suffered by the defendants because the relevant evidence which would decide the case would be in the form of easily replicated evidence rather than the testimony of any one specific witness.

67. Moreover, the applicant has intimated that various key personnel, such as architects and builders, may not be available to give evidence. The respondents, however, point out that the applicant cannot confirm whether or not this will actually be the case and that, on that basis, he cannot point to any real prejudice against him.

68. The respondent advances the same argument in respect of the specialist counsel to whom the applicant referred in his affidavit dated 6th March. 2014. This counsel, who commenced practice in 1972, was engaged by the applicant for the purposes of advising in relation to the investigation into title, including the possessory title which is the subject matter of these proceedings. While the respondent accepts that the counsel in question has been in practice for a significant period, they note that the applicant cannot confirm that she will not now be available for hearing.

69. The respondents further cite the judgment of Dunne J. in *Jackson v. MJELR* [2010] IEHC 194 in which she noted that the delay itself must be causative of the prejudice. They contend, in that respect, that the supposed prejudice suffered by the applicant is no more than an "*apprehended prejudice"*.

70. The respondents also point to the fact that proceedings have progressed to the stage where pleadings are closed and discovery has been made by the parties, which, they say, is further indicative of an absence of prejudice. The matter, they say, can be set down for hearing immediately. The current state of the proceedings can thus be distinguished from cases where, for instance, a Statement of Claim has not been served or some other procedural step is required to be taken.

71. Ultimately, it is submitted by the respondents that, taking all of the foregoing points into account, to have their claim struck out at this juncture would constitute, in the words of McMenamin J in *Lismore Builders, "…too draconian a remedy*".

Decision of the Court
72. The purpose of the Court's discretion to dismiss for want of prosecution is to safeguard a defendant's right to a fair trial. Delay can defeat that right. Delay can hamper or inhibit a defendant in his defence. Witnesses who might have been available at an earlier time might no longer be available. Even if available, their memory of the events, may be compromised. Evidence previously available may now be irretrievably lost. These are some instances of the many ways in which delay may adversely impact on fair trial rights.

73. The principles to be applied by a court in considering whether to exercise its discretion to strike out proceedings are well settled and are as set out in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 as recently endorsed by the Supreme Court in *Comcast International Holdings Incorporated v. Minister for Public Enterprises & Anor* [2012] IESC 50.

Delay
74. Applying the primor principles to the facts of this case, the Court must first determine whether there has been inordinate delay by the plaintiffs in prosecuting their claim. The Applicant submits that the respondent's delay in issuing proceedings until the 25th February 2005 in circumstances where its alleged cause of action arose either on the completion of the purchase of the property in August 2001 or at the latest on the notification to it of the claim of C.I.E in March 2003, amounts to 'inordinate delay'. The Court does not accept that submission. These proceedings were issued within the statutory time limit for such a claim. The legislature has seen fit to provide a time limit of six years within which to bring a claim for loss and damage arising from negligence and/or breach of contract. A claim brought within the statutory period provided cannot therefore in the Court's view give rise to a finding of 'inordinate delay'. Delay in issuing proceedings can however, come into the equation if the Court is carrying out the balancing exercise envisaged by the last part of the *Primor* test.

75. Secondly, the applicant maintains that the delay from 22nd May, 2006 being the date on which it filed its Defence, to the 21 February, 2011 when the respondent filed a Reply to the Defence is inordinate, even allowing for the fact that there was correspondence between the parties on the question of mitigation of loss up to the 19th February, 2007. The Court accepts the applicant's submission in this regard and finds that the respondents' delay in prosecuting their claim was inordinate. That finding is not mitigated in any way by the respondent's service of a Notice of Intention to Proceed dated14th May, 2010, particularly when they did not in fact proceed one month after the service of that Notice. The fact is that the issues in the case were in effect joined by May 2006, when the applicant filed his Defence. While the Court does not criticise either party for engaging in attempts to mitigate potential loss, which efforts took place between the date of filing of the Defence in May 2006 and February 2007, thereafter, having at least by inference rejected the applicants suggestions, the onus was on the respondents to get on with the claim. They did not do so. Four years elapsed before the Reply to Defence was filed on the 21st February, 2011. By any yardstick such delay is inordinate.

76. The applicant has further submitted that the respondents' delay of two years in replying to the applicants Notice for Further and Better Particulars in the context of the earlier delays also amounts to inordinate and inexcusable delay. The Court does not agree. Once the proceedings were reactivated in February 2011, matters proceeded at a slow pace on both sides. The issue of the particulars sought by the applicant overlapped to some extent with the issue of discovery sought by the respondents. Neither party appears to the Court to have brought any sense of urgency to the proceedings during this period, so that while there was a delay of two years in filing the replies to the applicant's Notice for Particulars, the Court does not consider that to be 'inordinate' delay in the overall context of the conduct of the proceedings from 2011 to 2014.

77. The Court having found the respondents' delay in prosecuting its claim between 2007 and 2011 to be inordinate, must next consider whether that delay was excusable. The excuse proffered for the delay is that during this period the first respondent was involved in a protracted dispute with a co-director of the second respondent, a Mr. Frank Ennis. Mr. Ennis had been the architect and project manager for the development of the property the subject matter of the proceedings. It was he who had had day to day management of the site and it was he who had applied for all necessary permissions. The dispute *inter se* was, according to the evidence, settled in January 2013 and one of the terms was that Mr. Ennis would render all appropriate assistance in prosecuting this claim. Again, according to the evidence, it became necessary to issue proceedings to enforce that settlement. While this disagreement between the plaintiffs/respondents explains the reason for the delay, it does not in the Court's view excuse it. The plaintiffs/ respondents chose to issue these proceedings. Having done so, it is for them to prosecute their claim with appropriate dispatch. There are procedural mechanisms for ensuring that the evidence of a recalcitrant witness is available to a Court of trial. Much of the evidence in the possession of Mr Ennis appears to be documentary in nature and is likely to be capable of being proved by parties other than Mr. Ennis. In any event the Court has no evidence that any steps were taken or even proposed by the respondents to address the difficulties posed by the alleged non-co-operation of Mr Ennis. In these circumstances, as matters stand, the Court is satisfied that the period of delay between 2007 and 2011, is both inordinate and inexcusable.

Balance of Justice
78. Where, as in this case, the Court has found that the respondent's delay was both inordinate and inexcusable the Court must further proceed to *exercise a judgment on whether in its discretion on the facts of the case, the balance of justice lies in favour of, or against, the proceeding of the case.* In the *Primor* test at (d) (page 9 above) the Supreme Court set out a number of factors to be considered in weighing the balance of justice. This list is not exhaustive and different considerations may apply on the facts of any particular case. What does not change however, is the overarching requirement that a trial be fair, as guaranteed by the Constitution. Thus, if by reason of the inordinate and inexcusable delay, a defendant cannot get a fair trial then the Court should exercise its discretion to dismiss.

79. On the particular facts of this case the Court is satisfied that the applicant's right to a fair trial has not been impaired by the inordinate and inexcusable delay of the respondents. The core of the case relates to title to property. All of the documents upon which that title is based, dating back to the 1930s, and upon which the applicant allegedly advised the respondents, are available. Thus liability in the case will depend largely on expert testimony and legal argument as to the effect of those documents and whether or not there was proper investigation of that title.

80. In this regard, as an example of potential prejudice, the applicant expressed ignorance of whether the specialist counsel who advised on the title would be available to give evidence at the trial. This averment borders on the disingenuous, in that at the time of swearing of the grounding affidavit, said counsel was recorded as being a member of the Law Library. Indeed the counsel concerned is still so registered for 2015/16. Even if that counsel were unfortunately to 'shuffle off this mortal coil' before trial, the work done and advices furnished would still be available for consideration by a Court of trial.

81. The applicant may be on somewhat firmer ground in asserting some prejudice on the issue of damages. The evidence suggests that following notification to the respondents of a third party claim to an interest in the property in March 2003 the respondents without apparently notifying the applicant, continued with the development and expended a further sum of in excess of €3 million thereon. The applicant complains that at this remove it will be difficult to assess what was spent in the development of the property and when and what if anything the applicant should be potentially liable for. It appears to the Court that this potential problem is

more perceived than real, but if the Court is wrong on this aspect and the applicant is genuinely prejudiced on the issue of damages, then the Court is satisfied that any Court of trial in assessing damages would take that factor into account, and would not penalise the applicant for the respondent's delay.

82. Somewhat ironically, in respect of the issue of damages, it seems to the Court that the delay which has occurred, may in fact have inured to the benefit of the applicant. It is now almost thirteen years since C.I.E. asserted that the respondents were merely yearly tenants. Since then the respondents have unequivocally asserted ownership by building on the property and incorporating it into their overall development, without it appears any complaint or action by CIE. This will be a matter for the Court of trial to assess in due course and the Court is not making any determination in that respect, but is merely noting the irony that sometimes delay can be beneficial to the person complaining of it.

83. Another factor in the Court's decision is the fact that over the nine years that these proceedings have been trundling along, there has never once been even a suggestion that the delays which were occurring were prejudicial to the applicant, up to the time this Motion to dismiss was issued. When the proceedings were reactivated by the respondents in February 2011, having lain dormant for four years, the solicitors for the applicant expressed surprise but only because the last position in the case had been that the respondents' solicitor was to discuss their suggestion re mitigation of loss with his counsel. There was no complaint about the delay *per se* or any suggestion of prejudice. In fact in the last line of their letter, of 11th March, 2011, the applicant's solicitors remind the respondents' solicitor of the need to comply with the High Court rules in view of the fact that the case had been dormant for over four years. Similarly, when the solicitors for the applicants were looking for the respondent's replies to his Notice for Particulars of 1st February, 2012, they did so in a rather desultory fashion and never once suggested that their client was being in anyway prejudiced by the respondents' failure to progress matters. The applicants solicitors sent three short letters over two years, seeking the replies, the first dated 26th July, 2013, eighteen months after the Notice was served; the second dated 25th November, 2013 threatening a motion to compel replies and the third by email dated 16th January, 2014 affording a further 14 days in which to reply and threatening a motion in default. While the respondents were clearly not being diligent in prosecuting their claim there was no intimation that such want of diligence was affecting or prejudicing the applicant's ability to defend the claim.

84. Finally, the applicant, relying on clause (d) vii of the Primor test which states;

> *"(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."*

has asserted that the continuation of the action has caused and continues to cause damage to his reputation. This asserted 'reputational disaster' has he says been hanging over him since 2005. The Court is not persuaded by this submission. Firstly, it was made for the first time in the current application. At no stage was it asserted on the applicant's behalf that his reputation or his business was being damaged by the respondent's claim. Furthermore, the Court notes that there is no counterclaim in respect of any such damage.

85. The applicant is now retired with, as he says, his good name intact. The Court does not accept that a finding against him on this claim would amount to 'reputational damage'. There is no doubt in the Court's mind, that thirty or forty years ago in this state, a claim of negligence or breach of contract against any professional would have been viewed as personally damaging. But the world has moved on and there is now an appreciation that even the best and most competent professionals can on occasions make mistakes. That is why most competent professionals carry professional indemnity insurance so as to ensure that if a mistake is made, that insofar as money can rectify a mistake, that money will be available. The Court does of course appreciate that the applicant would prefer not to be in this position and that there is stress involved in being the subject of litigation. For that reason the Court is willing to recommend that as this matter is now ready for hearing, it should be given such priority as may be available.