

THE HIGH COURT

[2009 No. 6498 P.]

BETWEEN

MARS CAPITAL IRELAND DAC

PLAINTIFF

AND

EDWARD PAUL NUGENT LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 23rd day of August, 2017

1. This matter comes before the Court by way of motion on notice brought by the defendant for an order pursuant to the inherent and/or equitable jurisdiction of the court dismissing the within proceedings for want of prosecution by reason of the inordinate and/or inexcusable delay of the plaintiff, and/or alternatively for want of prosecution pursuant to the provisions of O. 122, r. 11 of the Rules of the Superior Courts 1986, as amended.

2. Order 122, rule 11, provides:-

"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 proceeding 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. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule."

3. It is acknowledged by both sides that when the court is considering an application to dismiss proceedings for want of prosecution in accordance with the interests of justice whether brought invoking the inherent jurisdiction of the court or upon the jurisdiction conferred under O. 122, the underlying jurisdiction is the same (see *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459).

4. The within proceedings were originally commenced in the name of Irish Nationwide Building Society (INBS), this being the institution which retained the defendant in 2000 and in respect of which the defendant provided the valuation of the property in 2006. The circumstances in which Mars Capital Ireland Limited (Mars) came to be substituted as plaintiff in the within proceedings is dealt with hereunder.

The background to the within application

5. The pleadings in this case commenced by way of plenary summons issued on 16th July, 2009. Following the entry of an appearance dated 14th September, 2009, a statement of claim was delivered on 30th September, 2009. As appears from the statement of claim, the plaintiff alleges that in or around the year 2000, the defendant was retained by the plaintiff for the purpose of providing property valuations in order to assist the plaintiff in ascertaining whether the properties that were being offered as security for proposed loans had sufficient value to stand as security for those loans. The statement of claim charges that on or about 29th November, 2006, the plaintiff engaged the defendant to provide a valuation on a property at Cappog, Ballinode, Co. Monaghan, ("the property") and that on foot of these instructions, the defendant provided a valuation report which stated that the value of the property was €800,000. The plaintiff alleges that this valuation grossly overstated the true value of the property as of November 2006. At para. 8 of the statement of claim, the plaintiff states that it advanced a loan of €220,000 to named borrowers on foot of the defendant's valuation and that this loan was in addition to a previous loan of €400,000 which had been advanced on 17th August, 2004 and was secured on the property. It is alleged, at para. 9, that:-

"Negligently and in breach of duty and in breach of contract, the report and valuation prepared by the Defendant its servants or agents for the Plaintiff was incorrect in relation to the valuation of the property in question. Further, the Defendant its servants or agents negligently misrepresented to the Plaintiff the value of the property."

6. Essentially, it is alleged that as a result of the representations of the defendant as to the value of the property, the plaintiff loaned the sum of €220,000 to the borrowers which sum was to be secured against the property for which the defendant, its servants or agents had provided a valuation. It is alleged in the statement of claim that the borrowers defaulted on or about 10th June, 2007 in the repayment of the loan to the plaintiff and that the loss and damage to the plaintiff continues to accrue with interest accruing thereon in accordance with the terms of the agreement between the plaintiff and the borrowers. The plaintiff thus claims against the defendant damages for negligence including professional negligence and breach of duty, damages for negligent misstatement and damages for breach of contract.

7. Following the delivery of the statement of claim, on 29th October, 2009, the defendant raised a notice for particulars and the plaintiff delivered its replies to particulars on 17th May, 2010, following which the defendant raised a notice for further and better particulars on 21st May, 2010. The plaintiff delivered its replies to the notice for further and better particulars on 14th July, 2010. The defendant delivered its defence on 1st November, 2010, in which the defendant raised, inter alia, positive pleas against the plaintiff. In particular, the defence identifies that the defendant was retained in or about 1996 and accepts that it furnished a report in respect of the property on or about 29th November, 2006. The defendant pleads that its principal, Edward Nugent, was directed by a Mr. Brendan Beggan, who was at all material times the manager of INBS's Monaghan branch, to provide a valuation based upon the development potential of the property and that Mr. Nugent was instructed that the owners/borrowers would secure permission for eight houses. At para. 6 of the Defence, the defendant pleads that the plaintiff knew that the valuation of €800,000 was based on the valuation approach which the defendant had been instructed by the plaintiff to take, viz, based on a development value.

8. According to the affidavit of the plaintiff's solicitor Mr. Ciaran Leavy, partner in Lavelle Solicitors, sworn in response to the within application, in February 2011 the then junior counsel dealing with the case on behalf of INBS remitted a draft reply to defence and a draft letter to be sent to the defendant seeking voluntary discovery. However, it would appear that these were not formally delivered or sent to the defendant. This is said to be due to the transfer of INBS's functions to Irish Bank Resolution Corporation (IBRC) in July 2011, of which more hereunder.

9. On 21st April, 2011, the defendant's solicitors ("Matheson") delivered a request for voluntary discovery, addressed to Ms. Maura Madden Solicitor in INBS. No response was received to this request. A further letter issued on 13th May, 2011, seeking a response within fourteen days to the request for voluntary discovery dated 21st April, 2011. Matheson sent a further letter to INBS on 1st June, 2011, allowing a further fourteen days in which to reply. Again no response was received. According to the affidavit of Ms. Sharon O'Connor of Matheson which grounds this application, the defendant's request for voluntary discovery has still not been replied to.

10. In his replying affidavit, Mr. Leavy avers as follows with regard to events which occurred between July 2011 and October 2016:-

"[By] a Transfer Order dated 1st July, 2011 made by this Honourable Court and pursuant to the provisions of section 34 of the Credit Institutions (Stabilisation) Act 2010, the assets and liabilities which included the Mortgage Loans of [INBS] were transferred to Anglo Irish Bank Corporation Limited. Then on 14th October, 2011 Anglo Irish Bank Corporation Limited changed its name to [IBRC] which thereafter on 31st March, 2014, agreed to sell to Mars Capital Ireland Limited all the rights, title, interest, benefit and obligations under a number of assets as identified in the Loan Sale Deed as a consequence of which Mars Capital Ireland Limited purchased a Debt Portfolio and related choses-in-action, which include these proceedings. For the sake of completeness, I confirm that Mars Capital Ireland Limited converted to Mars Capital Ireland Designated Activity Company ('Mars Capital Ireland DAC') on 17th September, 2016.... [W]ith further regard to the substitution of Mars Capital Ireland DAC for [INBS]...on 24th October, 2016 Mr. Justice McDermott made an order substituting Mars Capital Ireland DAC as plaintiff to the proceedings."

11. On 6th August, 2015, Matheson, on behalf of the defendant, wrote to Ciaran Wallace and Eamon Richardson, the Joint Special Liquidators for IBRC, noting that on 1st July, 2011, the High Court approved a transfer of the functions of INBS to IBRC and noting that IBRC had since been placed in special liquidation. Matheson requested the Joint Liquidators to confirm, within 21 days, whether or not they were proceeding with the within proceedings failing which Matheson were instructed to make an application in accordance with O. 122, r. 11 to have the matter dismissed for want of prosecution.

12. This correspondence was replied to by IBRC on 26th August, 2015, in which they confirmed that they were looking into the matter and asking the defendant to refrain from taking any steps in the proceedings.

13. On 14th September, 2015, IBRC advised the defendant that its rights in the proceedings had been transferred to an entity known as Crux Mortgages Limited pursuant to a loan sale deed dated 12th December, 2014. IBRC also stated that it had passed Matheson's correspondence "to the Purchaser's legal advisors (also Matheson Solicitors), to ascertain the Purchaser's intention in relation to the proceedings" and that they would revert in due course.

14. On 16th October, 2015, IBRC advised the defendant that the information provided in their letter of 14th September, 2015, was incorrect and that, in fact, IBRC's rights in the proceedings had transferred to Sandalphon Mortgages Limited pursuant to a loan sale deed dated 6th June, 2014. IBRC further advised that it had passed Matheson's correspondence to Sandalphon Mortgage Limited's legal advisors, who were Matheson, to ascertain Sandalphon's intention in relation to the proceedings and that IBRC would revert in due course.

15. On 3rd November, 2015, IBRC again advised Matheson that they had passed its correspondence in respect of the within proceedings to the legal advisors for Sandalphon Mortgages Limited, who were Matheson, but that IBRC had not yet received a response. IBRC's letter also noted, following a telephone call with an individual in Matheson's office, that Matheson "intended contacting Sandalphon's legal advisors (also Matheson) directly".

16. Sandalphon Mortgages Limited duly changed its name to Mars Capital Ireland Limited. As solicitors for the defendant, Matheson were advised by IBRC of this change of name at some point prior to November, 2015.

17. On 6th November, 2015, Matheson wrote to Mars Capital Ireland Limited stating that they had been advised by IBRC that further to a loan sale deed dated 6 June 2014, Mars Capital Ireland Limited, formerly Sandalphon Mortgages Limited, had acquired IBRC's rights in the within proceedings. The letter advised that it had been more than four years since any step had been taken in the proceedings and requested Mars to confirm, within 21 days, whether or not they intended to proceed with the claim, failing which Matheson would bring an application seeking to have the proceedings dismissed for want of prosecution.

18. On 17th November, 2015, Lavelle Solicitors confirmed that they had been instructed by Mars Capital Ireland Limited and they sought time to review the file and advise their client.

19. Matheson sent a further letter to Lavelle Solicitors on 30th November, 2015, in which they extended the deadline for response by fourteen days. On 14th December, 2015, Lavelle Solicitors replied stating that they intended to bring an application to substitute Mars as plaintiff in the proceedings.

20. The next step in the within proceedings was the issuing of the within motion. As already set out, on 24th October, 2016, and prior to the hearing of the within application, McDermott J. made an order substituting Mars Capital Ireland DAC as plaintiff to the proceedings.

21. The basis for the within application is deposed to at para. 14 of Ms. O'Connor the affidavit. She avers as follows:-

"I say that these proceedings have been in existence for 7 years during which time the Plaintiff has taken little action to advance its claim and no action whatsoever has been taken in the last 5 years. It is therefore unanswerable that the Plaintiff has breached the provisions of Order 122, Rule 11 RSC in that it has failed to take any proceeding in this action in the last two years. Moreover, the Plaintiff's delay in this action has been inordinate and inexcusable."

22. At para. 15 she states:-

"Moreover [INBS] no longer exists as a separate legal entity and the entity into which it has been subsumed, IBRC, is in liquidation. More fundamentally, IBRC has apparently transferred all rights to prosecute this action to a third party, Sandalphon, which had no factual involvement in the events the subject of this action. Thus, the entity from which the Defendant has sought discovery no longer exists, the Plaintiff's rights in the proceedings have apparently been sold to a third party and that third party is not in a position to deal with the Defendant's outstanding Request for Voluntary Discovery. For these reasons, it is respectfully submitted that the balance of justice requires the case to be dismissed. In addition, the continuing existence of these proceedings where no active step has been taken to prosecute them is

causing prejudice to the court system itself.”

23. At this juncture, it is apposite to set out the principles to which the Court must have regard in applications such as the present.

24. In *Primor*, Hamilton C.J., at pp.475-476 stated as follows:

“The principles of law relevant to the consideration of the issues raised on this appeal may be summarised as follows: -

(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 judgement 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 defendant’s reputation and business.”

Inordinate delay

25. On behalf of the defendant, it is submitted that the history of the within proceedings compels an order for dismissal for want of prosecution. The defendant asserts that the plaintiff’s delay is inordinate in that since the delivery of the defendant’s defence in November 2010, the plaintiff has failed to engage with the proceedings, in particular with the defendant’s request for voluntary discovery which has been outstanding since April 2011. Counsel submits that the now plaintiff (Mars) cannot distance itself from the inactivity of its predecessor in title, IBRC, particularly in circumstances where Mars has had its rights over the proceedings since in or about June, 2014.

26. It is not really disputed by the plaintiff that there has been inordinate delay in the prosecution of the proceedings but it is submitted that the delay is entirely excusable given all the circumstances.

Was the delay excusable?

27. Counsel for the defendant submits that the plaintiff has not advanced any reasonable countervailing circumstances which could absolve it of its fault in causing the delay. It is submitted that the entities in question are or were substantial enterprises with access to substantial resources and that they have offered no persuasive reason for why they failed in their duty to prosecute the proceedings, particularly a claim which makes damaging allegations of professional negligence against the defendant. Furthermore, the defendant asserts that critical to the present application, the defendant neither acquiesced nor contributed to the delay. It is submitted that the factual background shows the defendant took active and timely steps in seeking to progress matters. Moreover, insofar as the plaintiff asserts that their proceedings for professional negligence against the defendant commenced early in the six year time limit for the commencement of such proceedings, that is not an answer to the plaintiff’s tardiness thereafter. Furthermore, it is submitted that no blame can be laid at the feet of the defendant’s solicitor, Matheson.

28. It is also submitted that it is no proper excuse that INBS, IBRC and/or Mars did not devote resources or manpower to the prosecution of cases such as the present during and following the various transfers of INBS’s borrowers’ facilities as outlined in Mr. Leavy’s affidavit. The defendant contends that the plaintiff has not explained on affidavit why INBS did not respond to the defendant’s letter seeking voluntary discovery of April 2011. It is further submitted that the plaintiff has proffered no excuse for the subsequent delay, save to state that Mars did not receive the file in the within proceedings from Matheson until November 2015. However, in mid 2015, Matheson on behalf of the defendant wrote to the Special Liquidators, whom Matheson then believed had the relevant file. It was they who apprised Matheson that Mars had taken over the file. It is also contended that the fact that Mars’ legal advisers have taken over a thousand files is not a reasonable basis to seek to be excused for the delay in this case.

29. On behalf of the plaintiff, it is acknowledged, in the first instance, that in 2011, the proceedings reached a hiatus. This is accounted for by the plaintiff by the fact that INBS was subsumed into IBRC in mid 2011 as a consequence of the collapse of the banking system, which, it is submitted, led to the unique situation which pertained in the banking system in Ireland in 2011 where firstly INBS was subsumed by IBRC and where thereafter, IBRC was put into special liquidation in February 2013, followed by the disposal/sale by the Joint Special Liquidators of various loans, including the loan the subject matter of the within proceedings, to

Sandalphon/Mars in June 2014. It is submitted that the foregoing constitutes a cogent excuse for the delay in progressing the proceedings. This was followed by the liquidation of IBRC.

30. The plaintiff also contends that a feature of the present case is that when the thousand or so loan files were acquired by Sandalphon/Mars in June 2014 from the Joint Special Liquidators, Matheson were the solicitors who acted as legal advisors for Mars in that acquisition. However, the loan file which is the subject of the within proceedings was not, in fact, received by Mars from Matheson until 5th November, 2015. Accordingly, counsel for the plaintiff submits that the fact of the financial maelstrom and its ensuing consequences, must have been acknowledged by the defendant itself given that in the period June 2014 to November 2015, the arm of Matheson which was handling the defendant's defence did not raise any delay issue in that time. This included a time period (June 2014 to November 2015) when the plaintiff's file relevant to the within proceedings was within Matheson itself following the transfer from IBRC to Sandalphon/Mars. It is thus submitted that while it for the Court to determine the delay in the present case is inordinate, the delay is entirely excusable.

31. It is well established that the onus of establishing that the delay has been inexcusable rests with the party so alleging. As to how the onus is to be discharged, in *O'Connor v. John Player and Sons Limited* [2004] 2 I.L.R.M. 321, Quirke J. put it as follows:

"the onus may be discharged by way of evidence and argument demonstrating that no reasonable or credible explanation has been offered, or can reasonably be said to exist, which would account for, or excuse, the delay."

32. By and large, the reason proffered for the delay is that the proceedings were caught up in the financial maelstrom of the banking collapse, described by counsel for the plaintiff as a unique occurrence in the history of the State. Counsel for the defendant asserts that the transfer of INBS's functions to IBRC and the subsequent sale of various loans to Mars are not referable to the conduct of the proceedings but rather instead to extraneous matters to which the court should accordingly only give limited consideration.

33. As set out by Barton J. in *Louis J. O'Regan Limited & Anor v. Clare County Council & Anor* [2015] IEHC 344 (wherein he affirmed the decision of the High Court in *Truck and Machinery Sales Ltd v. General Accident Fire and Life Assurance Corporation plc* [1999] IEHC 201):

"the question of whether ...delay is excusable must depend on the circumstances of the particular case...any explanation offered must be referable to the conduct of the proceedings and not to extraneous matters."

34. In *Truck and Machinery Sales Ltd v General Accident Fire and Life Assurance plc*, Geoghegan J. addressed the question of the extent to which a party could rely on extraneous factors in the following terms:

"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."

35. Adopting the approach of Geoghegan J. in the above case, I do not accept that the collapse of the banking system per se can be relied on by the plaintiff as a satisfactory excuse for the delay in this case, although I accept that what transpired regarding the transfer of INBS's functions to IBRC and the subsequent sale of INBS's loan portfolios by the Joint Special Liquidators has to be taken into account and weighed in the balance in this case.

36. Returning to the plaintiff's explanation for the delay, to my mind, the transfer of INBS's functions cannot explain the lack of engagement by INBS between 21st April 2011 and 1st July, 2011, in particular in relation to the defendant's request for voluntary discovery in as communicated in April 2011. Furthermore, no reason has been furnished why IBRC took no step in the proceedings between 1st July, 2011 and the ultimate disposal of the loan file in issue in this case to Sandalphon/Mars by deed of sale dated 6th June, 2014, given that IBRC had taken over INBS's functions during that timeframe. Despite the difficulties facing INBS and later IBRC, it behaved them to protect their litigation especially where the file had been transferred to IBRC and, thereafter, to Joint Special Liquidators under the supervision of the High Court.

37. Counsel for the defendant also contends that no real reason has been furnished as to why Mars took no concrete steps in the proceedings (even to have itself substituted as plaintiff) from June, 2014 until October 2016 despite it having acquired the file relating to the within proceedings in June 2014, and having been corresponded with by the defendant in November, 2015. However, I find this submission, as advanced by the defendant, to be a more problematic issue in the context of whether the delay which pertained from in or about June 2014 can be said to be inexcusable.

38. Before addressing this issue, it is of note that as regards the four years immediately preceding the acquisition by Sandalphon/Mars of the loan file to which the present proceedings relate, the chronology put before the Court shows that there was no activity on the part of either party in these proceedings between 1st June, 2011 (being the date on which Matheson allowed INBS a further fourteen days to make the voluntary discovery sought by the defendant on 21st April, 2011) and 6th August, 2015 when Matheson wrote to the Joint Special Liquidators requesting that they confirm as to whether the within claim was being proceeded with. Thereafter, following the correspondence from IBRC on 26th August, 2015, 14th September, 2015, and 16th October, 2015, already referred to, Matheson wrote to Mars on 6th November, 2015 seeking confirmation as to whether the claim was proceeding. The aforementioned reactivation of the matter, on 6th August, 2015, took place against the backdrop whereby by June, 2014, IBRC had sold the rights, title and obligations under a number of assets and related *choses-in action*, including the within proceedings, to Sandalphon/Mars.

39. It is common case that a different arm of Matheson acted for Sandalphon/Mars in the acquisition of the aforesaid assets. In this capacity, the file relevant to the within proceedings was furnished to Mars by Matheson on 5th November, 2015. Accordingly, it would appear that Matheson, as the legal advisors for Mars in the acquisition of the IBRS assets, held the relevant file in its custody between June 2014 and 5th November, 2015. According to counsel for the defendant, this was unbeknownst to the defendant's legal advisors, also Matheson. I have no reason to doubt that this was the case. Indeed, in his affidavit, the plaintiff's solicitor acknowledges that in all likelihood the part of Matheson dealing with the interests were unaware of INBS's files being held, after IBRC's sale to Sandalphon/Mars, by another part of Matheson.

40. After Mars received the legal file on 5th November, 2015 from Matheson, Lavelle Solicitors were instructed by Mars in relation to the within proceedings and, it appears, in relation to a number of other matters, cited by Mr. Leavy of Lavelles to exceed a thousand files. Upon receipt of the thousand or so loan files from Mars, in their capacity as Mars' legal adviser for the within proceedings, Lavelle Solicitors wrote to the defendant on 17th November, 2015, with regard to the present proceedings, as already outlined .

Matheson responded on 30th November, 2015, in which they extended the deadline for response as to whether the plaintiff was proceeding with the claim by fourteen days, failing which they advised that they would issue a motion to strike out the proceedings.

41. On 14th December, 2015, Lavelle advised the defendant that it intended to bring an application for substitution of Mars as plaintiff in the proceedings. Following this letter there was no further response from Matheson with reference to the previous request for discovery in 2011. The within motion was issued on 16th July, 2016. More particularly, following its 14th December, 2015 letter, there was no immediate action taken by Lavelle Solicitors to have Mars substituted as plaintiff and an *ex parte* application in this regard was only brought on 19th October, 2016, some three months or so after the defendant issued the within motion. It is difficult to comprehend why the substitution application could not have been made at least by early 2016 or why some effort was not made in early 2016 to deal, in some regard, with the defendant's request for voluntary discovery outstanding since 2011.

42. Overall, the Court finds that there are periods of delay in this case which are inexcusable on the part of the plaintiff. However, the matter does not rest there. As set out by O'Higgins C.J. in *Primor*, even if the delay is inordinate and inexcusable the court must consider 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.

Where does the balance of justice lie?

43. Counsel for the defendant submits that the defendant has satisfied the third element of the *Primor* test, namely that the balance of justice favours the dismissal of the proceedings. Of particular concern to the defendant is the fact that: (i) Mars' predecessor in title (INBS) no longer exists; (ii) the entity (IBRC) into which INBS was originally subsumed is in liquidation and; (iii) the entity (Sandalphon/Mars) to which IBRC transferred the right to prosecute the within action has had no factual involvement in the events, the subject of the within action. Accordingly, the defendant contends that a real prejudice will be caused to the defendant in circumstances where Mars is not in a position to deal with the defendant's outstanding request for discovery. The defendant submits that given the positive averments in the defence, the key issue in the case is that a named individual within INBS (Mr. Beggan) requested the defendant to provide a valuation of the development potential of the lands in question. Counsel for the defendant contends that the plaintiff's replying affidavit does not aver that the files which the defendant has sought by way of voluntary discovery exist or are procurable by the plaintiff. It is submitted that critical to the defence advanced by the defendant are the instructions actually given by Mr. Beggan to Mr. Nugent and what INBS (including Mr. Beggan) actually knew or thought about the valuation ultimately given by the defendant and the basis on which it was made. It is submitted that Mr. Beggan (if put up by the plaintiff as a witness) could only be fairly cross-examined if the defendant had available to it discovery of matters set out in categories 2 to 5 of its April 2011 letter. Counsel also contends that the plaintiff's replying affidavit does not state that Mars is in a position to deal with the Defendant's outstanding request for voluntary discovery. The defendant thus asserts that while Mars now state they have a litigation file, there is nothing in the replying affidavit to suggest that the files which the defendant wants discovery of have been extracted. Moreover, it is submitted that the plaintiff's solicitor does not state what documentation has been received in the file to which he refers in his affidavit. It is also submitted that the replying affidavit does not say that any inquiries have been made of IBRC as to whether INBS files from 2006 exist in relation to the valuation the subject of the within proceedings.

44. It is further submitted that defendant is not saying that it cannot provide its own evidence. The argument made is that the critical issue is the credibility of Mr. Beggan. It is argued that the defendant's ability to probe the plaintiff's evidence (including that of Mr. Beggan) is diminished significantly by the fact that INBS is no longer in existence. This, counsel for the defendant asserts, undermines the defendant's right to a fair trial and it is submitted that this concern has not been assuaged by anything in the plaintiff's replying affidavit. Accordingly, counsel submits that the prejudice caused by the delay (and the intervening transfers of INBS's file) to the defendant's ability to meet the claim and to substantiate its defence is immediate and severe and that it far exceeds the "moderate" prejudice that justifies a strike out of the proceedings, as confirmed by the Court of Appeal, most recently in *Mannion v. Brennan* [2016] IECA 163.

45. Counsel for the plaintiff argues that the balance of justice does not weigh in dismissing the plaintiff's proceedings. With regard to the *Primor* principles and the obligation of the court to take into account 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*", it is submitted that the only prejudice that is asserted on behalf of the defendant is that Mars will be unable to make discovery. However, it is contended the plaintiff is in a position to make discovery as it is in possession of the relevant file.

46. The plaintiff also points to the defendant's acknowledgment, in the defence, that the €800,000 valuation of the land in question came about on the basis that it was instructed by the plaintiff to give an evaluation on the development potential of the lands. It is also argued that if it transpires to be the case that the plaintiff cannot make the specific discovery requested by defendant, far from being prejudicial, such a scenario would be a "godsend" for the defendant as the plaintiff may not be able to gainsay Mr. Nugent's assertion that he received specific instructions from the plaintiff with regard to the manner of the valuation of the lands.

47. Overall, having taken account of the principle to which the Court must have regard when considering where the balance of justice lies, I am not persuaded that the balance of justice lies in striking out the within proceedings. I accept that a crucial issue in this case is the discovery the defendant is seeking from the plaintiff. However, while Ms. O'Connor, on behalf of the defendant, apprehends that the plaintiff will not be in a position to make discovery, she does so solely on the basis that INBS has been in the first instance subsumed into IBRC and that its assets have now been sold to Mars. There is no suggestion from her affidavit that she apprehends that INBS's files in relation to the retention of the defendant in November 2006 are no longer in existence. While I note that Mr. Leavy's affidavit does not specifically deal with this issue, I accept the plaintiff's argument that the Court should not be invited, at this juncture, to speculate that the plaintiff cannot make discovery.

48. I am also satisfied, on balance, that there is no substantive risk that there cannot be a fair trial in this case. There is no suggestion on affidavit that Mr. Nugent is not in a position to give evidence on behalf of the defendant, or that he is no longer in possession or unable to access his own file in the matter. Presumably he will be able to refresh his memory from his own files.

49. As averred to by Mr. Leavy in the replying affidavit:

"[T]he issue to be determined in these proceedings is a relatively net one... whether or not the Defendant can establish the valuation it provided was based on specific express instructions and was a fully independent and realistic valuation... [A]s can be seen from the Replies to Particulars delivered on behalf of the Plaintiff, the representative of the Defendant at all times was Arthur Conell Nugent who...is still available to give evidence on behalf of the Defendant and who presumably still retains the file with regard to the property, the subject of these proceedings and its valuation and which documents in due course will be sought by the Plaintiff on discovery."

50. I am also not persuaded that the issue of prejudice to the defendant, if the proceedings were to be allowed to proceed, has been

testified to with the force which counsel for the defendant has impressed on the court. With regard to para. 15 of Ms. O'Connor's affidavit, I accept the point raised by counsel for the plaintiff, namely that Ms O'Connor does not there assert specific prejudice to the defendant, rather she queries the ability of the plaintiff to comply with the defendant's discovery request, which counsel for the plaintiff assures the Court the plaintiff is in a position to deal with. As I have already stated, it is not for the Court to second-guess the quality of the discovery to be made in circumstances where counsel for the plaintiff assures the Court that the plaintiff is ready and willing to make discovery.

51. In finding that the balance of justice weighs in favour of not striking out the proceedings, the Court, as it intimated it would, has taken some account of the extraneous events which commenced in July 2011 with the takeover of INBS by IBRC and the subsequent transfers of INBS's assets. The Court does so in the context that in the lead up to these events which commenced on 1 July, 2011, the chronology of these proceedings demonstrates that, other than the failure of INBS to respond to the requests for voluntary discovery between April and June 2011, there was relatively little delay in the progress of the proceedings up to mid 2011.

52. The Court also weighs in the balance the fact that albeit that the ball was firmly in the plaintiff's court as of 1st June 2011 for the purpose of responding to the request for voluntary discovery, no motion was issued by the defendant for discovery, as had been advised in the letter of 1st June, 2011 would happen if INBS failed to make the requested discovery. As already referred to, the chronology put before the Court shows that the next communication from the defendant was on 6th August, 2015 to the Joint Special Liquidators wherein reference is made, *inter alia*, to the defendant's request for voluntary discovery resting with its letter of 1st June, 2011 to INBS. The 6th August, 2015 letter also noted that on 1st July, 2011, the High Court had approved the transfer of INBS's functions to IBRC, and that that IBRC had since been put into special liquidation. By dint of the absence of any queries raised by the defendant, or action taken by it with regard to discovery, or otherwise, between 1st June, 2011 and 6th August, 2015, the Court is constrained to find that there was on the part of the defendant some tacit acknowledgement of the events on which the plaintiff relied in seeking to excuse the delay in the progressing of the within proceedings.

53. In all the circumstances of this case, the approach the Court proposes to take is to direct that the reply to the defence, which it is averred has been drafted, should be filed forthwith. The Court proposes to treat the defendant's request for voluntary discovery, as set out in the letter of 21st April, 2011, as a motion for discovery. Accordingly, the Court directs the plaintiff to make discovery within six weeks from today's date. Furthermore, any request for voluntary discovery which the plaintiff is seeking from the defendant should be made to the defendant within one week from today.