THE HIGH COURT

[2021] IEHC 5

[2008 No. 3731P.]

BETWEEN

SOUTH DUBLIN COUNTY COUNCIL

PLAINTIFF

AND

C. F. STRUCTURES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 15th day of January, 2021

1. This is an application by the defendant for an order pursuant to O. 122, r. 11 of the Rules of the Superior Courts striking out the plaintiff's claim for want of prosecution, and/or for an order pursuant to the inherent jurisdiction of the court striking out the plaintiff's claim by reason of inordinate and inexcusable delay. The action has not progressed since 24th February, 2009. The defendant's motion, which was issued on 13th August, 2019 and was originally returnable for 4th November, 2019, was undefended until the last minute. On 7th December, 2020, ten days before the motion was listed for hearing, short written submissions were filed on behalf of the plaintiff. There has been no attempt to explain or excuse the long delay in the prosecution of the action, but it is argued that the defendant has not been prejudiced and that the court, in the exercise of its discretion, ought not to dismiss the action.

2. The plaintiff is the registered owner of a strip of land at Club Road, Fox and Geese, Clondalkin, County Dublin, being the lands comprised in Folios 112790F and 130635F, County Dublin.

3. By this action, commenced by plenary summons issued on 8th May, 2008, the plaintiff claims an injunction restraining the defendant from remaining on or continuing in occupation of the lands comprised in the two folios, an order requiring the defendant to restore the lands to their condition prior to trespass by the defendant, and damages. The statement of claim dated 21st May, 2008 was served with the summons. It is succinct. It asserts that the plaintiff is the owner and entitled to possession of the lands at Club Road, Fox and Geese, more particularly described in the folios, which, it is claimed, the defendant wrongfully entered and took possession of in or about August, 2001, since when the defendant has continued to trespass thereon.

4. An appearance was entered on behalf of the defendant on 4th June, 2008 and a notice for particulars served on 4th July, 2008. In its replies to particulars delivered on 29th September, 2008 the plaintiff – quite rightly, I think – declined to be drawn as to the circumstances in which it came to be the owner of the lands but provided a drawing showing the extent of the alleged trespass. That drawing was a copy ordnance survey map dated 2001 on which the Council's roads department had outlined the subject lands. The statement of claim had shown the particulars of loss and damage as "*unascertained*" and the replies to particulars indicated that particulars would be furnished when ascertained. No such particulars were ever delivered.

5. On 24th February, 2009 the defendant delivered its defence and counterclaim. Like the statement of claim, the defence and counterclaim is succinct. It is admitted that the plaintiff is the registered owner of the lands but denied that it is entitled to possession. The defendant, it is said, did not enter the lands in or about August, 2001 but on some other unspecified date, with the permission of one Anne McNulty who, it is said, had entered onto the lands in 1978 and by herself and her successors had been in sole and exclusive possession of that part of the lands shown coloured yellow on a map annexed, without acknowledging the right or title of anyone, including the plaintiff. The defence pleaded that the plaintiff's right of action had accrued upwards of twelve years prior to the commencement of the proceedings and was statute barred, and the counterclaim, by reference to the same pleaded facts, claimed a declaration to that effect. The counterclaim further claimed a declaration that the defendant is entitled to be registered as owner of the lands, if not with absolute title, then with possessory title. The map annexed to the defence and counterclaim showed a quadrilateral measuring 69.77 (presumably metres) in length on the Club Road side, 55.25 in length on the Robinhood Business Park side, and 23.47 in depth at one end and 22.46 at the other. The defendant's map was not drawn on an ordnance survey map, but it is clear from the shape of the quadrilateral that the defendant's claim of adverse possession does not extend to the entirety of the strip shown on the plaintiff's map.

6. The plaintiff did not deliver a reply and defence to counterclaim and by letter dated 2nd July, 2009 the defendant's solicitors threatened a motion for judgment if it was not delivered within 21 days. There was no response to that letter. Under cover of a letter dated 18th December, 2009 the defendant's solicitors sent to the plaintiff's solicitor a form of draft amended defence and counterclaim which proposed to substitute the plaintiff's map for the defendant's map and to claim adverse possession of all of the lands delineated on that map. The defendant's solicitors invited the plaintiff's solicitor to consent to the proposed amendment within ten days, but the plaintiff's solicitor never replied, nor did the defendant's solicitors issue the threatened motion for permission to amend.

7. There the matter rested for nearly ten years until 13th August, 2019 when the defendant's solicitors issued the motion now before the court.

8. The defendant's motion is grounded on the affidavit of Mr. Tim McNulty, director, who chronicles the progress, such as it has been, of the proceedings, and identifies the issue on the pleadings as whether the defendant can show that it has been in possession of the subject lands prior to 8th May, 1996, that is, upwards of twelve years prior to the issue of the summons. He deposes that when the summons was served three witnesses were identified who could give evidence as to the use of the land before 1996. Of these three, one has since died and the other two have left the defendant's employment. At the time of swearing his affidavit Mr. McNulty was investigating whether the documents and photographs which were available in 2008 were still available.

9. Mr. McNulty avers that the plaintiff has been guilty of inordinate and inexcusable delay. He emphasises that there had been no dialogue or discussion that might have given rise to any express or tacit understanding on the part of the plaintiff that the defendant was acquiescing in the delay.

10. Mr. McNulty suggests that the delay in this case has been of such significance that it can be assumed that the defendant will be prejudiced in meeting the plaintiff's case. Apart from the unavailability of the witness who has died, he points to the fact that the memories of the two who have left the defendant's employment – if they could be found – will have dimmed. He points to the fact that on the plaintiff's case the defendant has been using the lands since 2001 and that the plaintiff did not apply for an interlocutory injunction. To allow the action to proceed, says the defendant, would be to put at risk its admitted possession of the lands for eighteen years and its actual possession of the lands for more than 40 years. By contrast, he suggests that what is at stake for the plaintiff is a piece of land which it has not in fact used for more than 40 years and which it admits that it has not used for eighteen years.

11. Mr. McNulty has exhibited a slim bundle of correspondence from before and since the issue of the summons.

12. The plaintiff first wrote to the defendant on 23rd April, 2001. This was a letter from the planning department complaining of unauthorised development, specifically of the surfacing and use for storage of "*lands at Club Road/Naas Road Clondalkin*" which had been identified at a recent inspection. The defendant's solicitors replied on 9th May, 2011 asserting that the defendant and "*their licensor*" had been using the land for storage since 1978 but agreeing that the land had been cleaned up and surfaced so that it was "*brought back to the modern equivalent of its original state*".

13. On 8th January, 2002 the development department of the Council wrote to the defendant again complaining of unauthorised development but also asserting that the plaintiff was the owner of the land in Folio 112790F. The defendant was instructed to cease operations, vacate the site forthwith, and to restore it to its condition prior to trespass.

14. On 27th March, 2002 the Council's planning department replied to the defendant's solicitors' letter of 9th May, 2011. This suggested that aerial photographs of "*the lands*" showed that approximately one third of "*the lands*" were in use for storage and the remainder as a green field site. This, it was said, showed that intensification of the use of the lands had taken place which was a material change of use. Again there was a threat of enforcement proceedings. On 18th December, 2002 the council's planning department wrote again to the defendant's solicitors suggesting that a recent inspection had found continuing intensification and that a further area had been hard-surfaced with stone. These letters appear to have been ignored.

15. The next letter came on 12th July, 2005 from the development department of the Council to the defendant directly and was more or less the same as that department's letter of 8th January, 2002. After a holding letter from the defendant's solicitors on 16th July,

2005 and a reminder of 20th October, 2005 from the law department, the defendant's solicitors wrote on 26th October, 2005, to the law department, asserting that it was absolutely clear that the defendant had obtained possessory title and that the Council's correspondence concerning the use of the land was an acknowledgement that the defendant had acquired title.

16. The next letter came on 23rd August, 2007, not from the law department to the defendant's solicitors but from the development department to the defendant directly. The defendant was alleged to be in wrongful occupation of land owned by South Dublin County Council shown outlined and hatched blue on an enclosed drawing No. LA/39/07. This is the same drawing that resurfaced on 28th September, 2008 with the replies to particulars, although on that occasion the land was not hatched, and the version enclosed with the letter of 23rd August, 2007 has not been exhibited. The defendant was called upon to restore the land to its unspecified previous condition and to vacate it within 28 days, failing which proceedings would be issued and served without further notice. The 28 days came and went, and the summons and statement of claim were eventually served together, directly on the defendant, by registered post on 21st May, 2008.

17. In support of the defendant's motion Mr. Buttanshaw presented a careful and focussed and very helpful written and oral argument founded on *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 but laying particular emphasis on the judgment of Fennelly J. in *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510, as later adopted by the Court of Appeal in what counsel referred to as a trinity of cases. While the principles set out in the judgment of Hamilton C.J. in *Primor* have been consistently restated and applied, the authorities since, most recently *McNamee v. Boyce* [2017] IESC 24, show that there has been an increasing appreciation of the need to ensure expedition in the disposal of litigation. The particular nuance identified by counsel in the three Court of Appeal cases was a move from the assumption in some of the older cases that the onus was on the defendant to establish that the balance of justice favoured the dismissal of the action to a clear statement that where inordinate and inexcusable delay has been established by the defendant, the onus shifts to the plaintiff to establish that the balance of justice lies in favour of allowing the action to proceed.

18. Mr. John Doherty, for the plaintiff, did not contest that Mr. Buttanshaw's exposition of the law was correct.

19. The first of Mr. Buttanshaw's trinity is *Millerick v. Minister for Finance* [2016] IECA 206 in which the Court of Appeal dismissed an appeal against a decision of the High Court to dismiss a personal injuries action which had been commenced shortly before the limitation period would have expired and not been progressed for upwards of four years after the pleadings had closed. There was a fairly forlorn attempt to explain the plaintiff's delay, and the focus of the appellant's argument was on the balance of justice. The appellant argued that the Minister had not identified any actual prejudice, had not previously complained of the delay, and had not, as he was entitled to, served notice of trial and set the action down.

20. In the course of her judgment (in which Ryan P. and Peart J. concurred) Irvine J. (as she then was) said:-

> *"28. As was advised by Fennelly J. in Anglo Irish Beef Processors Limited v. Montgomery [2002] IESC 60, [2002] 3 I.R. 510, where delay has been found to be inordinate and inexcusable the author of that delay will not be absolved of fault unless they can point to some countervailing circumstances as may be considered sufficient to cancel out the effect of such behaviour. …*
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> *36. It is clear from the authorities that the conduct of both parties to proceedings has to be examined in considering an application of this kind. Having said that, the judgment of Fennelly J. in Anglo Irish Beef Processors Limited makes clear that it is the conduct of the litigation by the plaintiff that is the primary focus of attention. A defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant that constitutes acquiescence in the delay, his silence or inactivity is not material. It is obviously not a consideration on the first question as to whether the delay is inordinate and inexcusable. The only way it can arise therefore is in the balance of justice. The question at that point is whether the defendant caused or contributed to the plaintiff's delay or in some manner gave the plaintiff to understand or led him to believe that the defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the plaintiff. This understanding of the law is also consistent with the later authorities of the Supreme Court and the High Court."*

21. The second of the trinity is *Carroll v. Seamus Kerrigan Ltd*. [2017] IECA 66. That was in substance a professional negligence action against a solicitor for his failure to issue a personal injuries summons against the plaintiff's employer. The summons was issued on 1st April, 2008 and on 28th July, 2014, on an assurance that it would be progressed with all due expedition, the action had survived a motion to dismiss on the grounds of inordinate and inexcusable delay. Nothing, however, was done thereafter until notice of intention to proceed was served on 21st October, 2015, which the defendant's solicitors countered with a second motion to dismiss. Again there was a forlorn attempt to explain the delay and the substance of the argument was that the action was ready for hearing and that the defendant could not identify any particular prejudice so that, it was said, the balance of justice lay in favour of allowing the action to proceed.

22. Irvine J. (Sheehan and Hogan JJ. concurring) recalled the three step test set out by Hamilton C.J. in Primor and continued:-

> *"13. It is not in my view, necessary, in the context of the relatively straightforward facts of this case, to engage with the ever growing body of jurisprudence concerning the circumstances in which a court is justified in dismissing a claim in the exercise of its discretion, on the grounds of inordinate and inexcusable delay. It is, however, material to remember that when a court comes to consider whether the balance of*

justice favours allowing the action proceed in the light of its finding of inordinate and inexcusable delay, the author of that delay is not to be absolved of their fault, unless they can point to some countervailing circumstances which the court considers sufficient to negate the effect of such behaviour: see, e.g., the comments to this effect of Fennelly J. in Anglo Irish Beef Processors Limited v. Montgomery [2002] 3 I.R 510."

23. Later in her judgment, starting at para. 23, Irvine J. said:-

> *23. It is true to say, as was advised by Mr. Mulloy S.C. in his submission, that one of the factors often considered by the court when addressing the third leg of the Primor test is whether the defendant has likely suffered prejudice by reason of the delay sought to be relied upon by the defendant. However, delay [recte. prejudice?] is only one of the factors relevant to the court's consideration as to where the balance of justice lies. In many cases defendants rely heavily on prejudice, often times when the period of delay is not particularly great. Mostly this arises where witnesses die or evidence goes missing over a period of delay. However, in other cases a defendant may not need to rely upon establishing any specific prejudice in order to have the court conclude that the balance of justice would favour the dismissal of the proceedings. …*
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> *24. There is, in any event, a long line of authority to support the dismissal of actions in the presence of moderate prejudice where the court has found the plaintiff guilty of inordinate and inexcusable delay. In Stephens v. Paul Flynn Ltd [2008] 4 I.R. 31 Kearns J. concluded that a defendant need only establish moderate prejudice arising from delay as justification for dismissing the proceedings on the third leg of the Primor test. He summarised the findings that had been made by Clarke J. in the Court below in the following manner at p. 38:-*
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> > *'In considering where the balance of justice lay, he concluded that there had been a very significant delay. Not only had the plaintiff failed to render that delay excusable, he had failed to do so by a significant margin. He also concluded that the defendant, were he to be compelled to meet the case, would suffer prejudice, although he did not place that prejudice at a higher degree than moderate. He also held that there was no significant delay on the part of the defendant in exercising his right to apply for the dismissal of the action for want of prosecution.'"*

24. The third of the trinity of Court of Appeal decisions relied upon by the defendant *is Flynn v. Minister for Justice* [2017] IECA 178. That was a case in which the plaintiff claimed damages for personal injuries allegedly suffered in the course of an assault by members of An Garda Síochána. There was a significant delay in the issuing of the personal injuries summons and thereafter long periods of delay in progressing the action, which was dismissed by the High Court. There was no issue on the appeal as to the correctness of the trial judge's conclusion that the plaintiff had been guilty of inordinate and inexcusable delay and the argument focussed on the balance of justice.

25. At para. 19 of her judgment, Irvine J. (with whom Hedigan and Hogan JJ. concurred) adopted, with two important clarifications, a summary by the trial judge of the key principles to be applied by the court on the exercise of its discretion to dismiss an action on the grounds of inordinate and inexcusable delay.

26. The first clarification, at paras. 20 and 21, was of the manner in which the court, in applying domestic law, should properly take account of the implications of Article 6(1) of the European Convention on Human Rights. Irvine J. explained that because Article 6(1) is not directly effective it was not strictly correct to say that the court was obliged to ensure compliance by the State with its obligations under the convention, but that the courts must have proper regard for the implications of the convention in the application of national law.

    Unsurprisingly, the judgment in *Flynn*, which was delivered on 31st May, 2017, does not refer to *McNamee v. Boyce* [2017] IESC 24 in which judgment was delivered on 18th May, 2017, which must have been after *Flynn* was argued: but the analysis is the same.

27. The second clarification is more directly in point. At para. 19, Irvine J. returned to the judgment of Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* and added to the High Court judge's fifteen point summary a sixteenth factor which is that:-

    "(16) Where a plaintiff is found guilty of inordinate and inexcusable delay there is a weighty obligation on the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim proceed."

28. As Butler J. said in *Cunningham v. Bracken* [2020] IEHC 602, the judgment of Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* went somewhat further than the majority judgment in that case which was delivered by Keane C.J. but it has since been adopted by the Court of Appeal and as far as the High Court is concerned, it is binding precedent. Thus, if the defendant establishes that there has been inordinate and inexcusable delay in the prosecution of the action, the onus is squarely on the plaintiff to demonstrate that the balance of justice is in favour of allowing the action to proceed.

29. As I have indicated, Mr. Buttanshaw's submission as to the correct principles of law was accepted by Mr. Doherty as being correct.

30. Before analysing the arguments, it is useful to recall the chronology.

    23.04.2001 Council planning department alleges unauthorised development

    09.05.2001 Defendant alleges use of lands since 1978

    08.01.2002 Council development department alleges trespass on Folio 112790F

    27.03.2002 Council planning department alleges unauthorised use

16.12.2002	Council planning department threatens enforcement proceedings to restrain unauthorised use
12.07.2005	Council development department alleges encroachment on Folio 112790F and unauthorised development
16.07.2005	Defendant's solicitors send holding letter
20.10.2005	Council law department threatens proceedings for encroachment and unauthorised use
26.10.2005	Defendant asserts exclusive possession since 1978
26.10.2005	Law department holding letter
23.08.2007	Council's development department threatens proceedings for recovery of land shown on drawing LA/39/07
08.05.2008	Plenary summons
21.05.2008	Statement of claim
04.06.2008	Appearance
04.07.2008	Notice for particulars
28.07.2008	Reminder
01.09.2008	Threat of motion in default of replies to particulars
29.09.2008	Replies to particulars
13.01.2009	Threat of motion for judgment in default of defence
24.02.2009	Defence and counterclaim
02.07.2009	Threat of motion for judgment in default of reply and defence to counterclaim
18.12.2009	Proposed amended defence and counterclaim
13.08.2019	Notice of motion to dismiss
02.12.2020	Defendant's written submissions
07.12.2020	Plaintiff's written submissions

31. The motion, as I have said, is for an order pursuant to O. 122, r. 11 and/or the inherent jurisdiction of the court. While reference was made in argument to the difference noted by Butler J. in *Cunningham v. Bracken* [2020] IEHC 602 between the two – the focus of an application under O. 122, r. 11 being on post commencement delay – it was not suggested that the approach that ought to be taken to the application pursuant to the inherent jurisdiction was otherwise different. Nor did the parties argue that the court should consider the two applications – or the two bases of the application – separately or cumulatively. With the caveat that the point was not argued, it does seem to me that there may be a difference between the two. The jurisdiction under O. 122, r. 11 does not arise unless and until there has been no proceeding for two years from the last proceeding and is engaged by such a lapse of time, without any obligation on the part of the defendant to show that there has been inordinate and inexcusable delay. Moreover, O. 63, r. 1(8) allows such an application to be made to the Master which, to my mind, conveys that the jurisdiction may be largely administrative, directed to forcing on or weeding out cases which are not being progressed, rather than determining whether they ought in justice be allowed to proceed.

32. In *Lopes v. Minister for Justice* [2014] 2 I.R. 301, albeit in the quite different context of the inherent jurisdiction of the court to strike out or stay proceedings which are said to be frivolous or vexatious or bound to fail, Clarke J. (as he then was) said that the inherent jurisdiction of the court should not be used as a substitute for, or a means of getting around, legitimate provisions of procedural law and should not be invoked where there is a satisfactory regime available under procedural law for dealing with the issue. While the context, of course, was quite different, it seems to me that in principle the correct approach to an application made under the rules and/or the inherent jurisdiction is to ask first whether the issue can be dealt with under the rules.

33. This is a case in which, at the time the motion issued, there had been no proceeding from the last proceeding had for ten and a half years. By the time the motion was heard, the gap was nearly twelve years. From the time that the defence and counterclaim was delivered, the ball was in the plaintiff's court. While it is true that strictly speaking a counterclaim has the same effect as a cross action, in this case it was more or less the corollary to the defence.

34. The plaintiff's answer to the motion is fourfold. Firstly, it is said, the defendant, having indicated that it wished to amend its defence, never applied for permission to do so. Secondly, it is said, it would not be unfair to the defendant if the action were left in being as the defendant has remained in possession of the lands. Thirdly, or perhaps it is another way of putting the previous point, it is said that the defendant has not in any way been prejudiced by the delay. Fourthly, it is said, the lands are public property. In all the circumstances, it is submitted, the court ought not to make the order sought.

35. If the objective, or at least the initial objective, of an application pursuant to O. 122, r. 11 is to separate the wheat of actions which the plaintiff wishes to progress from the chaff of

those which have withered or have been abandoned, I do not see that even that has been accomplished. Leaving aside for the moment the absence of any explanation or excuse for the lack of progress, it is not even unequivocally said that the plaintiff wishes to proceed with its case. If it is to be inferred from the fact that the plaintiff asks that the action should not be dismissed that the plaintiff wishes to proceed, it is not said that the plaintiff is now ready to proceed, or when, if not yet, the plaintiff will be ready to proceed. Without attaching much weight to the fact, it is the fact that the plaintiff did not counter the motion to dismiss with a notice of intention to proceed. While any progress of the action would have been stalled pending the determination of the defendant's motion, a notice of intention to proceed would have at least indicated the plaintiff's wish to do so. The plaintiff has not asked for an extension of time within which to deliver its reply and defence to counterclaim or put before the court a draft that might be engrossed and served if the action were to survive the motion.

36. Plainly the jurisdiction under O. 122, r. 11 has been engaged. Under the rule the court may order the cause or matter to be dismissed or make such other order as may seem just. It would not be just that the defendant would continue to face the uncertain prospect that the plaintiff might at an indeterminate time in the future seek to revive an action which has been moribund for almost twelve years.

37. As to the application of the *Primor* test, which was the basis on which the motion was argued, the defendant's case that the plaintiff has been guilty of inordinate and inexcusable delay is uncontested. If the inexcusability of the delay is not evident from the period of the delay by itself, it is from the nature of the claim and the very net issue disclosed by the pleadings. The plaintiff's claim is for an injunction restraining trespass on lands of which it is the registered owner. If the plaintiff's ownership of the land had not been admitted, it could have been proved by simply producing the folios. As was the plaintiff's position when asked for particulars of the time at which and the circumstances in which it came to be the owner of the lands, these are irrelevant. On the case pleaded, the defendant is acknowledged to have been in possession of the lands since in or about August, 2001 – about six years and nine months before the summons issued – so that the issue is whether it was in possession for the five years and three months before then. From the time when the defence and counterclaim was delivered – in truth from no later than 26th October, 2005 when the defendant unambiguously set out its stall in correspondence – all that needed to be done by the plaintiff was to marshal such witnesses and documentary evidence as could be identified as to the use and occupation of the property during the relevant period.

38. The defendant having established that the plaintiff has been guilty of inordinate and inexcusable delay, the onus shifts to the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim to proceed. That onus is a weighty obligation.

39. On one view, perhaps, it is unsurprising that the plaintiff filed no affidavit in response to the motion. I have long ago ceased to be staggered or astonished by the failure of

plaintiffs to advance perfectly straightforward cases but on any analysis the delay in this case was at the upper end of what might sensibly be expected to survive a motion to dismiss. In principle, there is no reason why a plaintiff might not rely on the defendant's evidence as establishing sufficient countervailing circumstances but absent evidence of the cause of the delay, it seems to me that the failure to progress the action might just as well have been the result of a conscious decision as of oversight or neglect.

40. In my view, the plaintiff's argument that the defendant has been guilty of delay is misplaced. While it is true that the defendant pleaded a counterclaim, this was more or less the corollary of the defence – which was that the defendant was in adverse possession of so much of the land as was shown on the map annexed to the defence and counterclaim. The motion now before the court is directed to the claim and not the counterclaim. I take into account the fact that the defendant might have forced the plaintiff to get on, but the authorities are absolutely clear that the obligation to progress the action is on the plaintiff and that in the event of delay, the primary focus is on the plaintiff.

41. Mr. Doherty (without much else in his arsenal) points to the fact that the defendant did not follow through on its proposal to amend but I cannot see that that can avail him. All appearances may very well be that if the plaintiff had progressed the action the defendant might have sought leave to amend but I cannot see that the possibility that the defendant might have sought to make a different case to the case it had made was any impediment to the plaintiff meeting the case made.

42. The defence and counterclaim was delivered about eight months after the statement of claim and about five months after the replies to particulars. There was no map attached to the statement of claim and although the map furnished with the replies to particulars may have been provided earlier, I think that the defendant was entitled to formally tie down the extent of the alleged trespass. The defence was not a mere traverse but was focussed by reference to a map prepared for the purposes of the proceedings. It is not apparent when this map was drawn. I think that it was not unreasonable for the defendant to await the replies to particulars before delivering its defence. The time taken thereafter might have been longer than it ought to have been but pales into insignificance having regard to the delay thereafter.

43. It is a slightly unusual feature of this case that there is no indication as to what it was that prompted the defendant to move when it did. The usual trigger for a motion to dismiss a stale case is the service by the plaintiff of a notice of intention to proceed but I do not believe that it matters. In *Stephens v. Paul Flynn Ltd*. [2008] 4 I.R. 31 Kearns J. (as he then was) noted that there had been no significant delay on the part of the defendant in exercising its right to apply for a dismissal of the action for want of prosecution, but the trigger in that case was the delivery of a statement of claim long out of time and without leave or consent. While delay on the part of the defendant in moving for a dismissal may be a factor in a case which the plaintiff seeks to revive, I do not believe that in a case, such as this, in which nothing whatsoever has happened for

many years, it should count against the defendant that he might have moved sooner than he did.

44. I accept the defendant's submission that there has been no delay on its part. On the authorities, the defendant's mere silence did not amount to acquiescence. There is no suggestion that anything whatsoever has been done by the plaintiff since the delivery of the defence and counterclaim so there is no question that the plaintiff might since have incurred expenses pursuing the action.

45. I add, for completeness, that I do not attach any significance to the fact that the plaintiff did not seek an interlocutory injunction. In a case in which, on the plaintiff's case, the cause of action had arisen upwards of six years before the summons issued, there was an added onus on the plaintiff to progress the substantive action. It seems to me that an application for an interlocutory injunction would have been at best a distraction. In any event, I should have thought that the plaintiff's prospects of obtaining an interlocutory order restraining a trespass in which it had admittedly acquiesced for years, in relation to land for which it had no immediate plans, would have been fairly poor.

46. As to the argument that because the defendant has remained in possession of the land it can have suffered no prejudice, it seems to me that that misses the point. The defendant's case is that by reason of the plaintiff's delay in progressing the action it would not be in a position to mount as strong a defence as it could have if the action had been progressed as it should have been and heard and determined when it should have been. Specifically, Mr, McNulty has identified one witness who has died – although he does not say when – and two who have left the defendant's employment – although again he does not say when. The evidence is that as of the date of swearing of Mr. McNulty's affidavit on 9th August, 2019 there were two witnesses who might or might not be traceable and cooperative and an apprehension that some unidentified documentary evidence might or might not have gone missing. It is reasonable to infer that Mr. McNulty's evidence might very well have been updated in response to the replying affidavit that was probably expected from the plaintiff but at the same time, the absence of a replying affidavit was no bar to a supplemental affidavit from Mr. McNulty. Without evidence as to the dates between which the missing witnesses were employed or what other potential witnesses were or were not employed during that time, and without evidence that Mr. McNulty's fear at that time that documents or photographs might have gone missing has been realised, I do not believe that I would be justified in concluding that the defendant has established specific prejudice beyond the inevitable dimming of witnesses' memories. However, I am satisfied that if the action were to come to trial ten years and more after it ought to have the defendant would be prejudiced by the dimming of witnesses' memories. If the action were to come to trial, the plaintiff's case would be made out, if not on the admission in the defence, by the production of the folios. Thereafter the issue would be what the condition of the land was between May, 1996 and about August, 2001. There may or may not be aerial photographs and ordnance survey maps which would be of assistance, but the case would surely turn on oral evidence, perhaps as much on cross examination

as to the accuracy of recollections twenty five years and upwards after the event, as on examination in chief.

47. As to Mr. Doherty's argument that the land is public land, Mr. Buttanshaw counters that the Statute of Limitations distinguishes between State lands and other lands: that is between actions brought by State authorities – which do not include local authorities – and actions brought by persons other than State authorities – of whom the plaintiff is one. Counsel submits that to treat local authority land any differently to private land would be inconsistent with the clear legislative policy of the Oireachtas. There is a superficial attractiveness to that argument, but I am not persuaded that it is correct. It seems to me the different limitation periods prescribed by the Statute of Limitations for actions brought by State authorities and others could only be relevant if it was material to the approach the court should take in the event of inordinate and inexcusable delay in the prosecution of an action by one rather than the other, so that less might be expected of a State authority in the prosecution of an action commenced, say, after 29 years, than of any other plaintiff in the prosecution of an action commenced, say, eleven years after the cause of action accrued: or indeed of either in the prosecution of an action commenced promptly. I cannot see what justification there might be for such an approach. Whether the distinction made in the legislation is based on the status of the plaintiff, or the public interest in State lands, or on the supposed ability of State authorities to identify encroachment on State lands, I do not believe that the additional time allowed for the commencement of such an action should be supplemented by any indulgence of delay in the prosecution of an action eventually – or, indeed, promptly – commenced at the expense of the defendant's right to due expedition.

48. However, if the ownership of the land is not material, it does not necessarily follow that the nature of the land is not something which ought to be taken into account.

49. In *McNamee v. Boyce* [2017] IESC 24 Denham C.J. (in a judgment with which O'Donnell, Clarke, MacMenamin and Dunne JJ. agreed) recalled that in her judgment in *Comcast International Holdings Inc. v. Minister for Enterprise* [2012] IESC 50 she had found that the factors to be considered in Irish law – as stated in *Primor* – were not dissimilar to the criteria which had been laid down by the European Court of Human Rights in *Price and Lowe v. The United Kingdom* 43185/98, which criteria included the importance of what is at stake for the applicant in the litigation.

50. Mr. Buttanshaw urges that account should be taken of the fact that the land has been occupied by the defendant for very many years and used in conjunction with the business carried on by it on immediately adjacent land owned by Mr. McNulty, and I think that he is entitled to ask that that should be taken into account. Mr. Buttanshaw also urges that account should be taken of the fact that the defendant has not made any use of the lands over very many years, and I think that he is entitled to ask that that should be taken into account. For the reasons given, I do not think that the mere fact that the land is owned by a local authority and might for that reason alone be regarded as public land is relevant but the nature and use of the land is a factor in assessing the importance of what is at

stake. In that task, it is difficult to see how the court might be asked to attribute to the land any greater importance than that which the plaintiff attributes to it.

51. Although the time at which and the circumstances in which the plaintiff came to be the registered owner of the land were irrelevant to the substance of the action, they might have been in assessing the importance of the land to the plaintiff. There is no evidence as to when, or for what purpose, the land was acquired; or of any purpose for which it is planned or even contemplated that the land might be used. There is, I believe, evidence of the importance attached by the plaintiff to what is at stake in the litigation, or at least evidence from which that may confidently be inferred. The plaintiff, as the planning authority, was concerned with the use of the land to the extent that it wrote a couple of letters nearly twenty years ago complaining of unauthorised development, which it has since tolerated. The plaintiff, as the owner of the land, on its own case, was dispossessed nearly twenty years ago. On its own case, the plaintiff did little or nothing about the defendant's presence on the land for six years after which it was aware of its occupation and, for the past eleven years, nothing at all.

52. I take into account that the plaintiff is the registered owner of the land, but I do not believe that there is any evidential basis upon which account might be taken of the utility to the public or any public purpose of the land. I do not believe that the plaintiff has established that the nature or use of the land is a sufficient countervailing circumstance to the defendant's right to have had this action disposed of a very long time ago.

53. Insofar as the defendant moves under O. 122, r. 11, I am satisfied that there has been an abject failure to prosecute this action. No reason or excuse has been offered for the delay. The plaintiff has not unequivocally declared its readiness, willingness or ability to bring the case to trial, or offered any undertaking or assurance that, if permitted, it would do so. The plaintiff has not established that it would be just to make any other order under O. 122, r. 11 than the order sought by the defendant striking out the claim.

54. If I am right in the view I take by reference to *Lopes* of the invocation, and exercise of the inherent jurisdiction, the order sought should be made under the relevant rule. If I am wrong in that view, the defendant has made out its entitlement to an order pursuant to the inherent jurisdiction of the court.

55. I am satisfied that the defendant has established that the plaintiff has been guilty of inordinate and inexcusable delay, and that the defendant has failed to identify any sufficient countervailing circumstance sufficient to demonstrate that the balance of justice would favour allowing the claim to proceed. The defendant has not established that the delay has given rise to specific prejudice, but it is not obliged to do so. I am satisfied that the case is one which would always have depended to a large extent on the reliability and accuracy of oral evidence and that delay has given rise to a real risk of an unfair trial.

56. The defendant having been entirely successful on this application, it seems to me that it is entitled to the costs of the motion and action, but I will allow the parties fourteen days within which to file any submission they wish either as to costs or the form of order.