THE COURT OF APPEAL

Irvine J.
Sheehan J.
Baker J.

2015/418

H.C. 2007 No. 9550 P.

SACHA FARRELL

PLAINTIFF

AND

ARBORLANE LIMITED, McGILL CONSTRUCTION LIMITED,

THE NATIONAL HOUSE BUILDING GUARANTEE COMPANY LIMITED,

TIMOTHY ROWE AND MICHAEL McGILL PRACTISING UNDER THE TITLE AND STYLE OF ROWE McGILL ARCHITECTS,

TIMOTHY ROWE, MICHAEL McGILL,

ANTHONY LAWTON OPERATING UNDER THE STYLE AND TITLE OF LAWTON AND ASSOCIATES

DEFENDANTS

Judgment of Mr. Justice Sheehan delivered on the 26th day of July 2016

1. This is an appeal by the seventh named defendant (Anthony Lawton, practicing as Lawton and Associates) from the judgment and order of the High Court (Barrett J.) dated respectively the 9th July, 2015, [2015] IEHC 535, and the 28th July, 2015, whereby the High Court refused the appellant's motion of the 11th February, 2015, in which he sought an order striking out the proceedings against him on grounds of culpable delay by the plaintiff.

2. The plaintiff purchased an apartment from Arborlane in 2002 in a new development known as the Ramparts in Co. Dublin. Soon after taking possession of this apartment, significant defects began to emerge including cracked walls and water leakage. The plaintiff entered into negotiations with the developer and remedial work was attempted, but ultimately proved unsuccessful and these defects led to the institution of the proceedings before us, which were commenced on the 20th December, 2007. The proceedings were served on the appellant on the 15th October, 2008. In those proceedings the plaintiff placed reliance on a certificate of compliance issued by the seventh named defendant in 2000.

3. The statement of claim was delivered to the appellant on the 23rd May, 2014.

4. On the 29th May, 2014, the appellant's solicitors wrote making certain complaints about that statement of claim and pointing out certain matters which they believed to be of relevance to the alleged liability of their client.

5. On the 11th February, 2015, the appellant issued the present motion and the following day delivered his defence without prejudice to the motion.

6. The issues that arise in this appeal are the same ones as those faced by the trial judge namely:-

1. Is the plaintiff guilty of inordinate delay?

2. If she is so guilty is this delay excusable?

3. If the delay is inordinate and inexcusable does the balance of justice favour the plaintiff or the appellant?

7. The trial judge found that there was inordinate delay which was not entirely excusable and went on to hold that the balance of justice favoured the plaintiff and in so doing dismissed the appellant's motion. I agree with the trial judge's finding that the plaintiff was guilty of inordinate delay and I also hold that that delay was inexcusable. However I hold that the balance of justice favours the appellant for the reasons set out hereunder and accordingly I allow the appeal and direct that the proceedings against the appellant be struck out.

8. Evidence on the motion was given solely on affidavit. The appellant provided two affidavits and exhibited documents and the plaintiff's solicitor provided the replying affidavit which also exhibited relevant documentation.

9. The plaintiff is the owner of a single story apartment within a development known as the Ramparts, Loughlinstown, Co. Dublin. The first named defendant is the developer. The second named defendant was the main contractor. The fourth, fifth and sixth named defendants acted as architects and lead consultants on the project. The seventh named defendant (the appellant herein) was retained by the developer to act as structural and civil engineer on the project.

10. Sometime in 2002, the plaintiff purchased an apartment in this development and shortly thereafter observed leakage of water through the windows of her apartment. Over time there was evidence of significant water ingress and internal cracking of block work. The following dates are of significance when considering the positions of the plaintiff and the appellant.

2000: On the 14th November, 2000 the appellant issued Arborlane with a certificate of compliance of the structural design

with the requirements of Part A of the Building Regulations 1997.

2002: The plaintiff purchases her apartment. Defects emerged shortly thereafter.

2007: The plaintiff's solicitor puts the appellant on notice of proceedings in October and sends him an "O'Byrne" letter on the 17th December, 2007. On the 20th December, 2007, the plaintiff issues proceeding.

2008: On the 15th October, 2008, the proceedings were served on the appellant who filed a notice of appearance on the 4th November, 2008, and called for a statement of claim.

2010: In May 2010, a notice of intention to proceed was filed but not served on the appellant's solicitor.

2011: On the 24th June, 2011, the plaintiff's solicitors wrote to the appellant's solicitors threatening a motion for judgment in default of defence which was issued on the 11th August, 2011, but subsequently struck out when the appellant's solicitors pointed out that no statement of claim had yet been delivered.

2012: On the 10th February, 2012, the plaintiff's solicitors notified the appellant's solicitors that they were in the process of finalising the statement of claim which they said then would be delivered shortly. On the 25th May, 2012, the appellant's solicitors called on the plaintiff to discontinue the proceedings. This letter asserted that none of the expert reports furnished supported any claim against the appellant. There was no reply to this letter.

2013: On the 17th June, 2013, the appellant's solicitor requested the plaintiff to discontinue the proceedings against the appellant noting that a statement of claim had not yet been served and threatening a motion to strike out for want of prosecution. On the 2nd July, 2013, the plaintiff's solicitors replied that they were in the process of preparing a detailed statement of claim and that they would not discontinue the proceedings.

2014: The statement of claim was delivered on the 23rd May, 2014.

On the 29th May, 2014, the appellant's solicitors wrote making certain complaints about the statement of claim and pointing out certain matters that they believed to be relevant to the appellant's involvement.

2015: On the 11th February, 2015, the appellant issued the present motion and on the 12th February, 2015, delivered his defence expressly without prejudice to the motion.

The judgment of the High Court

11. In the course of his judgment Barrett J. identified the following three periods of impugned delay in the case. The first period of delay relates to the period of time between the date of purchase of the apartment by the plaintiff and the issuing of a summons by her on the 20th December, 2007. The second period of delay relates to a period of ten months between the issuing of the summons on the 20th December, 2007 and its service on the appellant on the 15th October, 2008. The third period of delay relates to the length of time between the service of the plenary summons on the appellant on the 15th October, 2008 and the delivery of the statement of claim on the 23rd May, 2014. While the trial judge determined that the third period of delay namely the period of five and a half years between the service of the plenary summons on the appellant and the delivery of the statement of claim to him was inordinate and inexcusable he nevertheless went on at para. 33 to say:-

> "During all periods of delay continuing and understandable efforts were, it seems, made by the plaintiff to get one or more of the defendants to do the remediation works that she needs to have done to her apartment and which, if done correctly, would presumably reduce, if not obviate, any need for her to come to court."

12. The trial judge then went on to consider the degree of prejudice allegedly suffered by the appellant and concluded as follows at para. 35 of his judgment:-

> "The court considers that the level of prejudice purportedly arising for Mr Lawton, the apparent nonchalance that he has manifested as to whether or not he does in fact have the papers necessary to defend these proceedings, and the slow pace with which he himself came to court with the within application, do not suggest him to be an individual whom the balance of justice favours when weighed against the wrongs that are alleged to have been done to Ms. Farrell. Having bought a brand-new apartment, Ms. Farrell has spent years 'running from Billy to Jack', trying to have all kinds of problems with her apartment fixed. She commenced litigation, continued trying to have matters fixed, yet continues today to find herself be-set with various serious difficulties of a kind that seem likely to affect the price of her apartment should she seek to sell it, and to be an ongoing source of stress and cost to her if she does not. That Ms. Farrell should get to continue the within proceedings against Mr Lawton is something that the court considers the balance of justice to require."

Submissions

13. The appellant filed lengthy submissions and in particular sought to argue that since the plaintiff was unlikely to succeed against him the court could take comfort from that fact. The appellant also submitted that the High Court judge had wrongly interpreted the opinion of 2000 as a general attestation of compliance with the building regulations. The appellant submitted that his opinion was far more limited than that and certified simply that the structural design was in compliance with Part A of the 1997 Building Regulations and that there was no evidence to suggest that the defects suffered by the plaintiff were as a result of any structural fault. The appellant also submitted that the trial judge in addressing the question of the balance of justice had asked himself the wrong question and had attached insufficient weight to the prejudice actually suffered by the appellant. The appellant further submitted that the trial judge had not dealt adequately with the court's need to control its own process namely to ensure that cases proceed promptly.

14. The plaintiff submitted that the court could not at this stage find that the appellant was not liable and that this was essentially a matter to be resolved at a full hearing. Counsel on behalf of the plaintiff submitted that the complex nature of the plaintiff's case necessitated a process of engagement with all the parties and stated that the plaintiff was involved in a drawn out process of engagement which effectively had amounted to a process of informal mediation prior to the issue of the legal proceedings.

15. In the course of written submissions counsel for the plaintiff stated that from on or about 2003 discussions had taken place

between the parties regarding evidence of problems with the development and that arising from those discussions the first named defendant Arborlane Limited had agreed to carry out remedial works to the development and to the plaintiff's apartment. The plaintiff was assured by the response of Arborlane Limited to the emerging problems with the development and relied on the prospect of remedial works and anticipated that such works would resolve all issues with the development. Counsel for the plaintiff further submitted that as evidence of defects continued to emerge it became apparent that the issues were complex. Counsel noted that further discussions then took place between the parties and that by their very nature these discussions were convoluted and involved written correspondence, on site meetings, compilation or reports and ultimately the preparation of a schedule of works. These discussions continued up to October 2009. By way of further explanation of the plaintiff's ongoing engagement with the developer counsel for the plaintiff relied on the following matters:-

> 1. The Ramparts Residents Association retained Frank V. Murray Engineer and Tony Mullen Architect to inspect the development and to advise on its condition.
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> 2. Mr. Murray carried out inspections on the 11th February, 2004 and on the 24th May, 2007. The later visit was also attended by Mr. Tony Mullen. Mr. Murray concluded that the quality of work failed to provide a building that was in compliance with Building Regulations. He recommended that major remedial works be carried out and he proposed an outline proposal of extensive work.
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> 3. In July 2007, Mr. Tony Mullen also prepared a report on the water ingress, cracking and associated issues. He noted that numerous attempts had been made to address the issues of water ingress and movement cracking. He found that all remedial works up to the date of his report had not been successful. Mr. Mullen concluded that there was evidence of deficiencies in design at the construction stage which resulted in defects in the development.
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> 4. A meeting took place on the development on the 2nd October, 2008, as a result of which a course of action was agreed. This was confirmed by letter dated the 16th October, 2008. It was further agreed that the first named defendant and his engineer would furnish details regarding the proposed insertion of a structural movement joint.
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> 5. Remedial works were carried out between late 2008 and early 2009. In August and September 2009, further inspections were carried out on a number of apartments in the development, including the plaintiff's apartment on foot of which Mr. Mullen prepared a further report dated the 2nd October, 2009, in which he noted the details regarding the proposed insertion of a structural movement joint had not been furnished.
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> 6. Mr. Mullen concluded that fundamental construction problems still existed in the development and that remedial works were unsuccessful and would not provide a long term solution to the defects and that more radical measures would be required.

16. The plaintiff maintains that the leaned High Court judge had exercised his discretion in accordance with established principles of law and submitted that the learned judge was correct to refuse the appellant's motion to dismiss the claim against him having regard to the particular facts of the case. The plaintiff further submitted that the trial judge was entitled to draw the inferences from the facts and hold that the balance of justice favoured the plaintiff.

Jurisdiction of the Court of Appeal

17. The proper approach to an appeal such as the present one has been the subject of a number of recent decisions of this Court.

18. In *Collins v. Minister for Justice Equality and Law Reform* [2015] IECA 27, the judgment of the court was delivered on the 19th February, 2015, by Irvine J. (Peart and Hogan JJ. concurring). The court in this judgment resolved conclusively the question of whether in the context of an appeal such as this, the appeal may be allowed only if the judgment of the High Court judge discloses an error of principle. The Court of Appeal held that this is not the law. Irvine J. stated at para. 78 of that judgment:-

> ". . . in cases of the present kind where the evidence is invariably set out on affidavit and where much generally turns on the documentary record, it is hard to suggest any reason why the merits of the High Court decision on this question should not be fully reconsidered on appeal, given that this Court (or, as the case may be, the Supreme Court) will be in as a good a position as the court of trial to arrive at the appropriate conclusion: see, for example, the comments of McCarthy J. in *Jack O'Toole Ltd*. [1986] I.R. 277, 288. It is of course, entirely accepted that the views of the trial judge will carry great weight. Yet if the interests of justice require that a different conclusion should be reached on appeal, it would be wrong and purely formalistic to suggest that that first instance (Decision) should remain invulnerable to appeal simply because no error of principle was disclosed."

19. The court went on to state at para. 79:-

> "For all of these reasons, therefore, we consider that the true position is that set out by MacMenamin J. in *Lismore Builders,* namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will give great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."

Legal principles

20. The leading case governing the type of delay that arises in this case is *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, which is authority for the proposition that in order to dismiss a case on grounds of culpable delay, the applicant must establish that (i) the delay was inordinate and (ii) the delay was inexcusable and (iii) the balance of justice favours the dismissal of the claim. These principles were fleshed out by the appellant in the course of his original submissions to the High Court. The learned trial judge enunciated fifteen propositions, the first thirteen of which are set our here on the basis that there seems to be no dispute between the parties in respect of these propositions. These propositions are as follows:-

> "(i) The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so: *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561; ("*Rainsford*") *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, ("*Primor*"); *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27, para.32.
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> (ii) The rationale behind the jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to the

hazard: *Allen v. Sir Alfred McAlpine& Sons Limited* [1968] 2 Q.B. 229 at 254; *Collins* para.35.

(iii) It must, in the first instance, be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable: *Primor, Collins* para.32.

(iv) In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. A plaintiff who waits until relatively close to the end of the limitation period prior to issuing proceedings is then under a special obligation to proceed with expedition once the proceedings have commenced: *Cahalane v. Revenue Commissioners* [2010] IEHC 95; *McBrearty v. North Western Health Board* [2010] IESC 27; *Collins* para.33.

(v) 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 case proceeding: *Primor, Collins* para.32.

(vi) Relevant to that decision is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay: *Primor, Collins* para. 32; *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510; *Granahan v. Mercury Engineering* [2015] IECCA 58 ("*Granahan*") para.24.

(vii) The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result: Collins para.37; *Cassidy v. Provincialate* [2015] IECA 74 ("*Cassidy*") para.35-36.

(viii) In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay: *Stephens v. Flynn* [2008] 4 I.R. 31; *Cassidy* para.36; *Gorman v. Minister for Justice, Equality and Law Reform* [2015] IECA 41 ("*Gorman*") para.59.

(ix) Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to defendant's reputation and business: *Primor* (point (d)(vii)); *Collins* para.32.

(x) Persons against whom serious allegations are made that affect their professional standing should not have to wait 12 or 13 years before being afforded opportunity to clear their good name: *Gorman* para.73.

(xi) The courts are obliged under Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms to ensure that all proceedings, including civil proceedings, are concluded within a reasonable time. Any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its consideration, not only its own constitutional obligations but the State's Convention obligations: *Granahan* para.11.

(xii) The courts must make it clear that there will not be an excessive indulgence of delay, because if they do not do so they encourage delay, leading to breach by the State of Convention obligations: *Stephens v. Paul Flynn Limited* [2005] IEHC 148; *Rodenhuis & Verloop B.V. v. HDS Energy Limited* [2011] 1.I.R. 611; *Collins* para.43.

(xiii) There is a constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures. There should be no culture of endless indulgence: *Quinn v. Faulkner t/a Faulkner's Garage* [2011] IEHC 103; *Collins* para.39; *Gorman* para.30.

21. Two further propositions were identified by the trial judge as emerging from the authorities, as follows:

(xiv) The courts can bring to their assessment of any (if any) culpability in delay the fact that the cost of litigation can act as a disincentive to prompt action: O'Donnell p. 318; *Forum Connemara Ltd. V Galway County Local Community Development Committee* 15 June 2015

(xv) As in every case, the courts must bring to their considerations a necessary sensitivity to the personal and social background of persons who present before them: *Comcast; Forum Connemara* Para 6; *Harington v EPA* 2014 IEHC 207, para 7.

Conclusion

22. The trial judge identifies legal costs as a possible disincentive to prompt action. In so doing he raises the question as to whether a litigant in financially straightened circumstances can get some protection from the court. In *Maximilian Schrems v. Data Protection Commissioner* (2013/765 J.R.) Hogan J. made a protected costs order on the 16th July, 2014, in favour of the applicant limiting his liability to costs to a maximum of €10,000. That was a judicial review application of exceptional public importance. It seems to me that the plaintiff in these proceedings does not fall into that category and therefore would almost certainly fail if she brought a motion such as that brought by Mr. Schrems seeking a protected costs order. If the plaintiff fails in her action, then she will be liable to a costs order pursuant to O. 99 of the Rules of the Superior Courts. Absent a successful constitutional challenge to O. 99 or legislative reform there is little a court can do to assist a litigant of modest means. In view of this I do not consider that the issue of costs can be factored into the situation when considering the issues that arise in this case.

23. While I accept that the courts must bring a sensitivity to the personal and social background of those who present before them, no particular matters were advanced on behalf of the plaintiff in this regard and I consider that proposition 15, outlined above, is not relevant to my consideration of where the balance of justice lies.

24. I consider that the approach of the High Court judge was erroneous with regard to these two propositions and that the key question asked by him at the commencement of his judgment does not fully identify the applicable test. While the court may take the personal circumstances of a litigant into account in its assessment of where the balance of justice lies it does not simply engage the process by testing the personal circumstances of the litigants, one against the other. Insofar as the trial judge appears to consider

that the plaintiff's personal circumstances as a private citizen and the inconvenience that she suffered were to be given greater weight than that suffered by a professional person in the course of his employment, he incorrectly applied the principles established in the authorities. The balance of justice is to be arrived at following consideration of all relevant factors including the length of the delay and the degree of actual prejudice shown to have been suffered by the parties. It is not to be confined to the weighing of personal circumstances, and prejudice suffered by one or other party is not to be considered as a stand alone factor, but as one that informs the court in the exercise it engages.

25. Further, the trial judge did not have before him evidence of the personal or financial circumstances of the plaintiff.

26. I note the jurisdiction of this Court as set out in *Collins* and I further note the principles to be applied by me in considering whether or not the appellant is entitled to have the proceedings against him dismissed.

27. In considering the question of delay, I agree with the trial judge that the five and a half year period between the service of the plenary summons on the appellant and the delivery of the statement of claim was both inordinate and inexcusable. However, that delay must also be looked at in the overall context of the case. While there was a six and a half year delay between the issuing of the plenary summons (as distinct from its service on the appellant) and the delivery of the statement of claim, there was also a substantial delay in issuing proceedings in the first place. The fact that the plaintiff was in negotiations with the developer who had agreed to undertake remedial works may provide the plaintiff with some explanation or justifying reason for part of the delay. However, it remains the fact that if this case were now to proceed in the normal way then there would be an eighteen year gap between the completion by the appellant of his certificate of compliance with the Building Regulations of 1997 and the actual hearing of this case. It goes without saying that memories fade, recollections become blurred and the older a case becomes, the more difficult it is to ensure a fair trial. I agree with the trial judge that the delay in this case is significant and even if the delay prior to the issuing of the plenary summons is excusable any delay thereafter is not. The developer went into liquidation in 2009 and up to that point it appears had engaged with the plaintiff and agreed to implement the necessary repairs. At that point it must have been clear to the plaintiff and her advisors that the claim against the other defendants required to be formulated and identified with expedition, as any award against the first defendant would not be satisfied.

28. It is relevant that on the 14th October, 2010, the plaintiff's solicitors wrote to solicitors for the developer and the contractor and said that the residents' experts were satisfied that the reports of 2004, 2007 and 2009 as already furnished outlined what then needed to be done. The appellant very properly notes that the 14th October, 2010, to the 23rd May, 2014, is a period of over three and a half years in which that delay remains completely unexplained.

29. In considering whether the balance of justice favours the appellant I hold that the question to be addressed is a wider one than that asked by the trial judge. In this regard the ultimate test was identified by McKechnie J. in the course of his judgment in Comcast *International Holdings Incorporate and Others v. Minister for Public Enterprise and Others* [2010] IESC 50, in which he stated as follows:-

> "What does justice, between the particular parties and in the particular circumstances, demand? Such is the end line of this type of analysis. The Supreme Court has made it clear that a decision will be made in the context of not merely the principles of justice *inter partes*, but the administration of justice in general. Thus the courts jealously guard their own procedures and to avoid the development or the perceived development of what Clarke J. called in *Comcast* a culture of delay."

30. The courts do not operate in a vacuum and while a court must consider the question before it in light of the facts before it, it must also have regard to the likely impact not merely of a decision of the court in an individual case, but also of the general approach that the court should take. Clarke J. made the observation, with which I agree, in Comcast that an unduly lax or indulgent approach by the court:-

> ". . . has the potential to create injustice by delay across a whole range of cases whose facts may never come to be considered by a judge, but whose progress is adversely affected by a culture of delay."

31. In the course of his oral submissions the appellant sought to make the case that in any event the plaintiff was highly unlikely to succeed against the appellant because the defects that were complained about were not structural and his certificate was confined to structural matters. That was the bones of his submission. While there may be cases where such a submission is appropriate, I do not consider it necessary in this case to address this submission, as there are sufficient other factors which balance the interests of justice.

32. One matter however, that is of relevance relates to the statement of claim itself. Despite the length of time that these proceedings have been ongoing, no attempt is made in the statement of claim to distinguish the liability of any of the defendant s from each other. The statement of claim delivered on the 23rd May, 2014 pleads generic particulars of the alleged negligence, breaches of duty and breach of contract concerning the failure of the defendants to exercise any or any reasonable care in an about the design and construction of the development and as has been noted ascribed to each of the defendant the same level of culpability and on the same pleaded grounds. I agree with the appellant's submission that this is a factor which can be taken into account when considering the balance of justice and that it weighs in favour of the appellant.

33. Another matter that arises is the level of prejudice suffered by the appellant. Like the trial judge I do not attach any weight to the suggestion by the appellant that he may suffer prejudice as a result of being unable to obtain the necessary documentation to defend these proceedings. With regard to prejudice I hold however, that prejudice is suffered by the appellant by having an allegation of professional negligence hanging over him for this length of time. I further hold that he has established additional prejudice as a result of the fact that he has encountered difficulties with his insurance company when renewing his professional indemnity insurance. I am satisfied that these two matters of themselves are sufficient in a case of this length of delay to establish the required prejudice. Accordingly I find the following:-

> 1. The overall delay in this case is significant.
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> 2. The delay following the institution of proceedings is inexcusable.
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> 3. There is undoubted prejudice resulting to the appellant arising from his having a professional negligence case hanging over him for so long and because the appellant has encountered difficulty with his insurance company concerning the renewal of his professional indemnity insurance.

4. The need to ensure the absence of a culture of delay means that the moving party in any case must proceed promptly or run the risk of losing his or her right to proceed.

5. The statement of claim served some nine years after the purchase by the plaintiff of her apartment is pleaded in general terms and fails to attribute to the appellant any particular failure that would distinguish his liability from that of any of the other defendants. This was done after the plaintiff had the benefit of at least three expert reports on the structural issues, and the generic nature of the pleas will inevitably lead to further delay in the particularisation of the claim and the seventh defendant is entitled to seek specificity with regard to the breaches alleged against him. I consider that it would fail to do justice to the seventh defendant were I to ignore this factor and that the pleadings of the plaintiff appear to be still some way off being complete.

34. In light of the above matters I conclude that the balance of justice in this case favours the appellant. Accordingly I allow the appeal and direct that the proceedings against the seventh named defendant be discontinued.