[2018] IEHC 688

THE HIGH COURT

[2010 No. 1770 P]

BETWEEN

PATRICK POWER AND JACQUELINE POWER

PLAINTIFFS

AND

JOHN CREED PRACTISING AS JOHN CREED AND ASSOCIATES

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 6th day of December 2018

1. This judgment deals with the motion brought on 27 September 2017 for an order that the claim of the plaintiffs be struck out pursuant to the inherent jurisdiction of the court on the grounds of inordinate and inexcusable delay, or, in the alternative, for an order pursuant to O. 36 r. 12(b) of the Rules of the Superior Courts ("RSC") dismissing the proceedings for want of prosecution.

2. The claim is a professional negligence action arising from the retainer by the plaintiffs of the defendant, a chartered engineer, in connection with the construction of their dwelling house in June 2005. The dwelling was practically complete by August 2007 and the plaintiffs moved into their new home in March 2008.

3. The proceedings were commenced by plenary summons on 23 February 2010, and a statement of claim delivered only days later. After replies to a notice for particulars, a defence was delivered on 7 April 2011. The pleadings have, at least for present purposes, closed, and no complaint can be made regarding the efficiency with which both sides dealt with their pleading obligations.

4. The claim alleges negligence against the defendant in regard to a number of separate aspects of the retainer which may be summarised as follows:

(a) Negligence in recommending a builder who did not have adequate insurance;

(b) Failure to advise the plaintiffs of alleged defects in structural support, damp proofing, and inadequate insulation;

(c) Failure to return to site to address defects after these were notified;

(d) Failure to provide a snag list to the builder and/or to advise the plaintiffs that a snag list should be prepared; and

(e) Certifying stages of completion without advising the plaintiffs of problems at those stages.

5. Following the closing of the pleadings, the plaintiffs set the case down for trial in February 2012, but, at that stage, the defendant's solicitors indicated in correspondence that, because discovery was not complete, they did not consider the matter to be ready for trial. In that context further particulars of special damages and remedial works were raised, and these were furnished in March 2013. Because the defendant was not satisfied with the form in which the breakdown of costs was furnished, the plaintiffs' solicitor suggested that a formal notice for particulars of those costs and remedial works be served. This did not happen.

6. The last open letter sent from the plaintiffs' solicitor to the defendant's solicitor was on 1 May 2013. The last 'without prejudice' letter was sent on 28 June 2013.

7. The other intervening event of relevance is that an application granting leave to serve a late tender offer was made on 3 September 2013 and the tender was served on 20 September 2013. The defendant complains that the plaintiffs did not reply to the tender within the time specified in the order, or at any time thereafter.

8. The notice of trial was struck out when the case was listed in an uncertified call over in October 2013.

9. The defendant's main factual argument is that no formal steps have been taken since the case was set down for trial in February 2012, five and a half years before the motion to dismiss issued. The plaintiffs did serve a notice of intention to proceed on 20 September 2017 and the focus of the defendant was on the period of delay between mid-2013 and September 2017, and the fact that the construction work and matters in respect of which the defendant was engaged happened more than ten years ago.

10. The plaintiffs separately pursued a claim against the building contractor and a compromise between them was reached on 7 October 2009, in the context of an arbitration. The contractor has been in liquidation since April 2013, although the compromise figure was paid to the plaintiffs some years before the liquidation. The defendants say, however, that the liquidation will cause problems with the defence of the claim and is likely to have an effect on matters such as discovery and the availability of witnesses.

11. The defendant points to the fact that ten years have elapsed since the completion of the construction of the dwelling and that the last engineering inspection pursuant to his retainer was carried out in 2007.

The legal principles

12. Before dealing with the arguments of the parties, it is useful to set out the principles upon which the present application is to be determined and I propose to do so in summary form only, as the principles are well established.

13. The defendant relies on post-commencement delay and while counsel does point to the fact that the proceedings were commenced some five years after the retainer, and three years after the last formal certification by the defendant of the works at a date in August 2007, the principles are relied upon are those from the judgment of Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, as later approved and elaborated by Hamilton C.J. giving his judgment for the Supreme Court in *Primor Plc. (Under Administration) v. Stokes Kennedy Crowley* [1996] 2 IR 459.

14. The first test, whether the delay was inordinate, is relatively easily satisfied in the present case having regard to the simple fact that the notice of trial was struck out some five years before the motion was brought, and no engagement or meaningful engagement

with formal court processes has occurred since that time.

15. This leads to a consideration of the second question expressed in *Rainsford v. Limerick Corporation*, namely whether the plaintiffs provide a satisfactory excuse for the delay.

16. The plaintiffs argue that, although the defendant complained after the case was set down for trail that the plaintiffs had not provided discovery or sufficient particulars, the defendant did not thereafter avail of any of the established remedies for obtaining these. The case law would suggest that the conduct of a defendant for the purposes of a motion to strike out proceedings for want of prosecution is to be considered in the context of the balance of justice, and that whether the delay of a plaintiff is or is not excusable is a matter concerned solely with the plaintiff's conduct: See, for example, the judgment of Fennelly J. in *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] IESC 60. For these reasons, a defendant's failure to engage with available remedies is not a factor that would generally excuse the delay of a plaintiff.

17. The excuse offered for the delay between the setting down of the case in early 2012 and the service of a notice of intention to proceed in September 2017 concerns difficulties in the office of the plaintiffs' solicitors, Messrs. O'Doherty Warren. Between April 2014 and October 2015, as a result of a change in personnel in the office, no solicitor had taken charge of the plaintiffs' file. It is also admitted that there was in general a lack of proper "oversight" of the file on the part of the firm. Brendan Curran started working in the firm in October 2015 and took over the file at that time and he accepts, in his replying affidavit, that he did not pursue the claim with "sufficient diligence". An advice on proofs had already been requested of counsel as early as March 2014, and a reminder sent to counsel in December 2014 and again almost a year later in October 2015 which resulted in the furnishing of an advice on proofs in December 2015.

18. Delay on the part of the solicitors firm dealing with the prosecution of proceedings, or, indeed, a delay of counsel in providing advice on proofs, could not offer an excusing reason for the delay, although it does explain the delay to an extent. I adopt in that regard the statement of MacMenamin J. in *McBrearty v. North Western Health Board* [2007] IEHC 431, at para. 33, where he said:

> "I consider that even (as here) in the circumstances of an absence of culpability on the part of the plaintiff, culpability may nonetheless be imputed to the plaintiff by virtue of delay on the part of his solicitors in the determination as to whether or not the delay was inexcusable. Different considerations apply, however, in the third aspect of the test, that of 'balance of justice'."

19. That observation was quoted with approval by Ní Raifeartaigh J. in *McAndrew v. Egan* [2017] IEHC 345, at para. 27.

20. The plaintiffs cannot excuse the delay by the apparent difficulties in the office of their solicitors.

21. After an advice on proofs was received from senior counsel in December 2015, it became apparent that further expert reports were required and the delay in obtaining these arose from the fact that Mr. and Mrs. Power were required to contribute to the fees for the preparation of the relevant reports, and while no affidavit evidence is available from them, I accept in general that those costs might have taken them some time to put together as the evidence would not suggest that they are persons of anything other than average financial means. This factor must be weighed against the admitted fact that the plaintiffs received a reasonably significant settlement against the contractor to whom monies were still owed. In the absence of affidavit evidence, I take no account of any possible difficulty in funding the expert reports.

22. The plaintiffs say that the delay was not "entirely inexcusable" in that the matter was not left entirely idle and an expert report was received in July 2017, and following clarifications from the expert received on 25 August 2017 and 7 September 2017, a notice of intention to proceed was served on 19 September 2017. That time frame still leaves unexplained the delay between 2012 and the receipt of an advice on proofs from senior counsel in December 2015 which itself was furnished in a more than leisurely manner. By then, the plaintiffs' solicitors must have been well aware of the increasing intolerance on the part of the courts of litigation delay and inactivity. They had waited more than a year and half to hear from counsel and did not move with expedition in meeting the proofs. No excuse is tendered for the delay of the expert in furnishing the report for trial. No explanation is given either for the failure to take action after the notice of trial was struck out in October 2013.

23. A curious coincidence arose in that the notice of intention to proceed was served by the plaintiffs on 20 September 2017, on a date when no threat had issued from the solicitors for the defendant regarding the present motion, and without knowledge that the solicitors for the defendant had already received instructions to bring the motion and, presumably, had already prepared, or were in the process of preparing, the motion papers, as the affidavit grounding the motion was sworn the following day, on 21 September 2017.

24. In those circumstances, the relevant delay must be seen as that between mid or late 2013 and September 2017, a period of approximately four years, of which some may readily be explained and excused by the complexity of the case and the fact that senior counsel advised further engineering and expert advice before proceeding to trial. But no excusing reason is given for the delay in taking the necessary pre-trial steps with expedition and the delay in seeking an advice on proofs and an expert report is not excusable.

25. What is also not excusable, and is relevant to the delay, is that a notice of tender was served on 29 September 2013 and no reply at all was received to that.

26. The authorities require that the delay not merely be explained but that the explanation be one that excuses the delay. In *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J. considered the explanations given for delay and made it clear that the explanation must be scrutinised and must be supported by evidence. As she said, the explanation must "legitimately excuse" the delay in pursuing the claim.

27. I regard as mere assertion, and not sufficiently concrete to excuse the delay, the proposition that Messrs. O'Doherty Warren and the other professionals involved in the case were unable, due to pressure of work, to deal with the matter in what must be regarded as an egregious delay of four years. A professional negligence action of the present type must, of its nature, involve engineering evidence and evidence from a quantity surveyor and some delays are inherent in obtaining reports from those professional persons, both because of the nature of the task they engage and also because they may, in an individual case, be under some pressure of work. But some concrete and specific identifying cause of a delay, and not a general proposition that the individuals were "busy", would be required in order to offer an excuse, and none has been adduced.

28. I conclude on the evidence, therefore, that no excusing reason has been given for the delay, and that the matter now falls to be

considered on the balance of justice.

Balance of justice
29. 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, as stated in *Primor v. Stokes*.

30. The exercise was explained by the Court of Appeal in *Collins v. Minister for Justice Equality and Law Reform* [2015] IECA 27, at para. 32:

> "The principles which govern the circumstances in which proceedings may be struck out for delay were laid in some detail by Finlay P. in *Rainsford* and were approved of by the Supreme Court in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 499 where they were expanded upon by Hamilton C.J. in the following manner:
>
> 'The principles of law relevant to the consideration of the issues raised on this appeal may be summarised as follows:
>
> (a) […];
>
> (b) […];
>
> (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 I 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 way to be attached to such conduct depending upon all the circumstances of the particular case,
>
> (vi) whether the delay gives rise to 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."

31. In *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50, at para. 27, McKechnie J. said:

> "[a]ll will depend on specific circumstances. However, what must be emphasised is that, at the level of principle, the position of both parties must be appraised and evaluated. All relevant material must be looked at, with no single or individual matter being conclusive save that as mandated by the particular case."

32. McKechnie J. then identified the ultimate test:

> "What does justice, between the particular parties and in the particular circumstances, demand? Such is the end line of this type of analysis."

33. It is in this context that the conduct of the defendant must be examined. The plaintiffs submit that the court should have some regard to the fact that, although the defendant complained that the particulars were inadequate and the plaintiffs suggested that the defendant serve a formal notice for particulars of the costs of remedial works, the defendant took no procedural steps to remedy the alleged deficit. In *Rogers v. Michelin Tyre Plc (No. 2)* [2005] IEHC 294, Clarke J. considered that "there is anything in the conduct of the defendant which can be regarded as being of any great weight in the balance save to the minor extent that it can properly be said that the defendants remained passive" (at p. 9 of his judgment).

34. The plaintiffs in the present case could be forgiven, in my view, for thinking that the defendant would issue a motion. This must bear some, although minor, weight in the exercise. But, as observed by Irvine J. in *Leech v. Independent Newspapers (Ireland) Ltd.* [2017] IECA 8, at para. 62, a defendant is not to be penalised for failing to take steps "to resurrect an action which, by reason of delay, it considers the plaintiff may never take to trial." As she said in *Millerick v. Minister for Finance*, a defendant cannot be blamed for inactivity unless this was culpable in causing part or all of the delay, or amounts to "positive acquiescence" (at para. 39). I am not satisfied that the behaviour of the defendant can be described as acquiescence.

35. The main factor to which counsel for the defendant points is, however, the alleged prejudice to the defendant. I agree with him that this is a primary focus in the balance of justice in the present case, although it is not the only factor I have to consider. As observed by Irvine J. in *Millerick v. Minister for Finance*, at para. 32, whilst even marginal prejudice may justify the dismissal of the proceedings:

> "is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The Court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. which are conveniently summarised in the head note of the *Primor* decision".

36. The principles do not require a defendant to show actual prejudice and it is sufficient that prejudice be likely or probable, but if it is shown that there is actual or likely prejudice, significant weight will be given in the exercise of the discretion of the court to dismiss proceedings. Even "moderate" prejudice to a defendant might tip the balance of justice towards dismissal. This was the view of Clarke J. in the High Court, in *Stephens v. Paul Flynn Ltd.* [2005] IEHC 148, at pp. 14-15 of his judgment:

> "I am therefore satisfied that the Defendant has suffered prejudice by virtue of the delay, but that same cannot be placed at too high a level. Finally in that regard I have considered the prejudice on the basis of the delay from the time of the incidents giving rise to the proceedings rather than solely in respect of the period from the commencement of the proceedings to date. While I agree that the court is confined, in determining whether a delay has been inordinate, to the period subsequent to the commencement of proceedings I am of the view that in assessing the balance of justice the court has a wider discretion and can take into account prejudice which may be cumulatively attributable to a delay both prior to and subsequent to the commencement of proceedings.
>
> In all of the above circumstances I am satisfied that the weight to be attributed to both the delay and its excusability coupled with the moderate degree of prejudice and the minor weighting attributable to the limited inaction on the part of the Defendant is such that the balance of justice favours the dismissal of the proceedings. I will therefore affirm the order of the Master but vary same by deleting the reference to "commencement"."

37. The *dictum* of Clarke J. seems to have been accepted by Kearns J. giving his judgment in the appeal to the Supreme Court, *Stephens v. Paul Flynn Ltd*. [2008] IESC 4, [2008] 4 IR 31 at paras. 22-23. Irvine J., in her judgment for the Court of Appeal in *Millerick v. Minister for Finance*, at para. 32, went even further:

> "It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. (See *Cassidy v. The Provincialate* [2015] IECA 74).

Ascertainment of damage to fabric of building

38. The primary argument regarding prejudice made by the defendants concerning the core claim that the building is defective and does not meet necessary standards in regard to damp proofing and insulation relates to the fact that the claim is now, on any reading, a stale claim, and the building was completed by, at the latest, March 2008, when the plaintiffs accept that they took up residence there. The defendant says that the passage of time will inevitably have an effect on the fabric of the plaintiffs' house and the direct link between any alleged failures in construction or materials may be less easily ascertainable. By way of example, it is argued that it may now be difficult to say whether any problems with the stone cladding which are alleged to exist are attributable to the original construction, to weathering, or to other deterioration over time. A similar argument is made with regard to the damp proofing.

39. The plaintiffs respond to this contention that the house has been subjected to surveys by experts and point to the fact that the defendant had a structural engineer inspect the property on 18 January 2011, seven years before the motion, and when the pleadings had identified the alleged defects.

40. The difficulty I have with the argument of the defendant is that it is based on facts contained in the affidavit of his solicitor, and, whilst I accept the general proposition that the passage of time and general wear and tear may have impacted on the fabric of the building, this does not provide an answer to the argument advanced on behalf of the plaintiffs that the claim is one based on the construction and materials used, that claim crystallised at the date of final certification, and that it is alleged inherent defects that form the primary basis of the claim which was particularised, and an inspection by an independent exert took place thereafter.

41. In my view, this is what counsel for the plaintiffs called a "standard" building claim against an engineer arising from the carrying out of seven-stage engineering inspections in the course of construction and the issue of a final certification of substantial compliance. Because the claim pleads that the premises was not built in compliance with the then Building Regulations, the case is primarily one which depends on expert evidence and is one that must fairly be said to concern the state of the building at the time it was certified, and not the state of the building at the date of trial.

42. Counsel for the plaintiffs argues that no prejudice has, in fact, been suffered by the defendant as a result of the delay. He argues that this is primarily a documents case, or a case where there is ample engineering evidence available to the defendants to defend the case, and any argument that the fabric of the plaintiffs' house will have deteriorated on account of the passage of time is an argument as to matters of causation for trial and might also be relevant to an argument that the plaintiffs have failed to mitigate their loss. It is argued that that fact alone does not prejudice the defendant in the defence of the claim.

43. Further, while I accept the argument on the part of the defendant that the passage of time might make it difficult for a court or, indeed, an expert witness, to isolate those elements of defects in the building which may be attributed to initial building construction failures which ought to have led the defendant to refuse to certify, there is no expert evidence before me that would suggest that the effect of the passage of time and normal weathering cannot be understood and isolated from the inherent defects alleged in the construction and materials.

44. It seems to me that on that basis the case may fairly proceed, but if the action is maintained as one for alleged negligent certification and/or alleged negligent inspections and/or the certification of a building.

Conversations and alleged assurances

45. The statement of claim pleads the cause of action as arising in negligence and breach of contract in particular in regard to the certifying and inspection of the stages of construction of the dwelling house, materials used and the level of skill engaged by the builder. The defects identified are insufficient damp proofing and insulation, a lack of sufficient support to the stone cladding to the exterior, and cracking inside and out. The builder was not insured for the claim arising from the defects and the claim originally pleaded in the statement of claim was that the defendant negligently and in breach of contract recommended a builder to carry out the work who did not have any or any adequate insurance.

46. In replies to particulars, the claim is much more broadly framed. There are, throughout the replies to particulars, specific allegations of express or implied terms arising from the contention that the defendant "verbally assured the plaintiffs on numerous

occasions […] that he would communicate to the builders any concerns that the plaintiffs might have in relation to the works". There is also a claim that the defendant said that the chosen builder was satisfactory. At para. 6(e), an assertion is made that the defendant made a "suggestion" regarding an appropriate approach to the builder concerning the insulation and construction of the retaining wall which the plaintiffs say led them to take an approach which had an unsatisfactory result for them.

47. The defendant argues that the balance of justice must favour the dismissal of the proceedings because the defendant could not, at this late stage, and so many years after the building was completed and the certification process concluded, recall conversations at which it is alleged operative representations or assurances were made. I accept that argument and I consider that there will almost inevitably be prejudice if these aspects of the claim were to be advanced, the defence of which would require recall of conversations between the plaintiffs and the defendant which are alleged to have occurred ten years ago, and which importantly were not the original basis of the claim. The pleas that further express or implied terms were incorporated into the contract, or of actionable representations on which the plaintiffs claim to have relied, cannot now fairly be defended and the balance of justice requires that they not be permitted to be pursued.

48. I consider, in those circumstances, that, insofar as the claim is one which relies on oral assurances or conversations which alter or add to the express terms of the contract, the claim should not be permitted to continue. Any implied term which might arise as a matter of law would, of course, be different but the plaintiffs' claim, as articulated in the replies to particulars, relies on a series of alleged implications derived from conversations and not merely from the general law, and that part of the claim must be dismissed.

Defendant is a professional person
49. It is also contended, on behalf of the defendant, that prejudice has been caused to him by having allegations of professional negligence hanging over him for so many years and as a result of which he has to specifically notify his insurers of that fact on renewal. The circumstances regarding insurance are not of the type identified by the Court of Appeal in *Farrell v. Arborlane* [2016] IECA 224, where Peart J. considered that the claim against the architect, the seventh defendant, should be struck out, and one factor that influenced the court was the fact that there was evidence that he had encountered difficulties in renewing his professional indemnity insurance. At para. 33, the Court accepted that prejudice was suffered by the relevant defendant on account of having an allegation of professional negligence hanging over him for this length of time, but also on account of the specific difficulties he had encountered in renewing his insurance. Peart J. expressed himself satisfied that those two matters, of themselves, were sufficient to establish the required prejudice.

50. The defendant relies, therefore, on the judgment of the Court of Appeal in *Farrell v. Arborlane* as a strong authority, supportive of the application to strike out, but I consider that he has not shown by evidence that he had difficulty obtaining professional indemnity insurance, the second of the two factors identified by Peart J., and therefore the judgment in *Farrell v. Arborlane* does not provide a full answer to the question in the present case.

Procedural difficulties
51. In my view, the contention by the defendant that the delay is likely to have an effect on matters such as discovery, having regard in particular to the fact that the builders are now in liquidation, does not fully support an argument of prejudice, as the defendant failed to pursue the remedy of seeking an order for discovery or to compel the furnishing of further particulars, notwithstanding the threat to do so as long ago as 2013. It is also argued on behalf of the plaintiffs that any prejudice deriving from a possible loss of access to documents is, at best, speculative, and I agree. No positive assertion is made that the defendant has not retained his file. The pleadings were processed with expedition at the early stages and it is to be expected that the files and primary documentation have been retained in that context.

52. I also consider, as argued by counsel for the plaintiffs, that the contention that the defendant has lost the option of pursuing the builder through third party proceedings under the Civil Liability Act 1961 is not merely speculative but not founded in reality as the builder was a limited liability company which went into insolvent liquidation in 2013, before the happening of the delay in respect of which this motion is brought. No causal connection can be found between the delay and the loss of an ability to pursue a joint tortfeasor.

Claim regarding insurance cover
53. The question regarding the alleged failure on the part of the defendant to advise the plaintiffs that the builder they had chosen did not have adequate insurance is complex, and whilst the claim is pleaded in the statement of claim as one deriving from an express or implied term of the contract, the additional flavour added to that element of the claim by the replies to particulars and the alleged assurances and reliance on conversations regarding the quality and suitability of the builder, are now of such vintage that the defendant cannot fairly be asked to defend that aspect of the claim.

54. However, certain other factual matters relied on by the plaintiffs are accepted by the defendant, including that the defendant did tell the plaintiffs that he had successfully worked with the builder in the past and it is also accepted that a list of builders was furnished to the plaintiffs. The matter is said not to be as clear as the plaintiffs assert, as the uncontroverted evidence is that the plaintiffs had been in negotiations with the builder they ultimately selected before they approached the defendant.

55. The builder named on the list provided by the defendant was a builder trading in his personal capacity, but the building contract was entered into with a limited company which went into liquidation some years after the builder works were completed. It may also be relevant to the question concerning the alleged failure on the part of the defendant to check the level and type of insurance held by the builder, that the building contract did not contain any obligation on the contractor to carry insurance against poor workmanship except and insofar as they were covered under the HomeBond Scheme (general conditions 7 and 8 of the contract). These factors lead me to the conclusion that no injustice would be done to the plaintiffs if that aspect of the claim were to be struck out and the balance of justice favours the defendant in that regard in the light of the added complexity identified.

General and conclusion
56. I consider that the present proceedings can be distinguished from the Court of Appeal decision in *Farrell v. Arborlane* in a number of respects. Distinguishing material facts are that the statement of claim in that case was served some nine years after the purchase by the plaintiff of her apartment and the claim was there pleaded in very general terms and not in a way which would enable the relevant defendant "to distinguish his liability from that of any of the other defendants". The court also took the view that the proceedings were "still some way off being complete".

57. The balance of justice would, in my view, be unfairly tipped against the plaintiffs if the claim in its entirety were to be dismissed. The plaintiffs' solicitor has done work and engaged experts, and has assembled evidence to get the case ready for trial. He prudently did not serve a notice of intention to proceed until that was done. It would, in my view visit an injustice on the plaintiff to dismiss a claim which is ready for trial, although there are aspects of the claim which cannot be maintained if fairness is to be done to the

defendant, having regard to the considerations discussed above. The evidence in *Millerick v. Minister for Finance* was that nothing was done by the plaintiff to advance the proceedings for over four years before the motion was issued. In the present case, the solicitor for the plaintiffs has explained the extensive work done in getting the case ready for trial and assembling the evidence between December 2015, when the advance on proofs was received, and September 2017, when the notice of intention to proceed was served.

58. The present case is ready for trial and the action may fairly be continued against the defendant provided that the claim is confined to one for breach of the contract of retainer, and that part of the claim which is founded in conversations and assurances alleged to have been made must fall on account of the fact that, in my view, the defendant will be likely to suffer prejudice as a result of the delay in bringing the action on for hearing, and even moderate loss of memory of the conversations is likely to be highly prejudicial to the defendant.

59. Accordingly, I will exercise the discretion identified by judgment of the Court of Appeal in *McDonagh v O'Shea* [2018] IECA 298, by Noonan J. in *Burke v. Beatty* [2016] IEHC 353, and my judgment in *McGrath v. Reddy Charlton McKnight* [2017] IEHC 210, and I will dismiss those parts of the claim as are identified in this judgement, viz. that claim based on assurances and representations and the claim regarding the alleged recommendation of a builder.