



**THE COURT OF APPEAL**  
**CIVIL**

**Appeal Number: 2021/100**  
**Neutral Citation Number: [2022] IECA 112**

**Faherty J.**  
**Ní Raifeartaigh J.**  
**Barniville J.**

**BETWEEN**

**EDDIE GIBBONS**

**PLAINTIFF/  
APPELLANT**

**- AND -**

**N6 (CONSTRUCTION) LIMITED**

**FIRST NAMED DEFENDANT/  
RESPONDENT**

**- AND -**

**GALWAY COUNTY COUNCIL**

**SECOND NAMED DEFENDANT**

**JUDGMENT of Mr. Justice David Barniville delivered on the 16th day of May 2022**

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### **1. Introduction**

1. This is an appeal by the plaintiff/appellant (the “plaintiff”) from the judgment of Butler J. in the High Court delivered on 1 March 2021 and from the order made by the High Court on 24 May 2021 on foot of that judgment in which it was ordered that the plaintiff’s claim against the first named defendant/respondent, N6 (Construction) Limited (“N6”) be struck out pursuant to the inherent jurisdiction of the court on the grounds of inordinate and inexcusable delay on the part of the plaintiff in the prosecution of his claim against N6.

2. It was conceded in the High Court that the plaintiff was responsible for a period of inordinate and inexcusable delay of over five and a half years in the prosecution of his claim against N6. The High Court concluded that the delay for which the plaintiff was responsible was more in the order of seven or eight years. Having so concluded, the High Court went on to find that the balance of justice lay in favour of striking out his claim against N6 rather than permitting the case to proceed. The High Court proceeded, therefore, to strike out the plaintiff’s claim against N6 under its inherent jurisdiction. While nothing turns on it, it seems to me that the more appropriate order for N6 to have

sought, and for the High Court to have granted, was an order dismissing the plaintiff's claim against N6 under its inherent jurisdiction rather than striking out that claim.

3. The plaintiff has appealed from the judgment and order of the High Court. Before this court, it was again conceded that there was inordinate and inexcusable delay on the part of the plaintiff and the prosecution of his claim against N6. The extent of the delay which was considered to be inordinate and inexcusable was not entirely clear but the concession appeared to go further than that made in the High Court and appeared to amount to a concession of inordinate and inexcusable delay of the magnitude found by the High Court. The central point in the plaintiff's appeal was that the High Court erred in concluding that the balance of justice favoured the striking out or dismissal of the plaintiff's claim against N6. The appeal, therefore, requires the court to consider again the application of the well-established principles governing the dismissal of a claim for want of prosecution under the inherent jurisdiction of the court in accordance with the principles set out by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 (*"Primor"*).

4. It is important to stress that, while there are two defendants in the proceedings, N6 and Galway County Council (the "Council"), the only application to dismiss was brought by N6. No application was brought by the Council. While the High Court found it necessary to refer to the progress, or lack of progress, by the plaintiff of his claim against the Council, as do I, the High Court was rightly cautious in how it dealt with the conduct of the plaintiff's claim against the Council in circumstances where the Council was not a party to the application brought by N6 and had not brought its own application. The findings and conclusions expressed in this judgment relate to the plaintiff's claim against N6 only and not to his claim against the Council. It is a matter for the Council to decide

whether to bring its own application and for the High Court to determine that application on the basis of the facts relevant to the plaintiff's claim against it.

## **2. The Plaintiff's Claim**

5. Before turning to the chronology of relevant events in the proceedings, I should briefly describe the nature of the plaintiff's claim against N6 and the Council.

6. The plaintiff is the owner of a property in which he resides near Athenry, County Galway and which he purchased in 1994. He claims that during the construction of the M6 Ballinasloe to Galway motorway and associated works by N6 and the Council, the pre-existing groundwater and surface water regime was altered leading to flooding of the plaintiff's property whenever there is heavy rain. The flooding is alleged first to have occurred in November 2009 and has continued to occur whenever there is heavy rain. It is claimed that the plaintiff was forced to move into alternative accommodation for about twelve months between October 2011 and October 2012.

7. N6 is a joint venture company incorporated in the State involving a Spanish registered multi-national infrastructure company (as its main shareholder) and a national contractor. It was incorporated specifically for the purpose of constructing the M6 motorway. The motorway works were started in 2006 and were completed in 2009. It is alleged that N6 and the Council are responsible for the alterations in the groundwater and surface water regime which caused the flooding. The plaintiff alleges that N6 and the Council, or either of them, were negligent, in breach of duty, in breach of statutory duty and guilty of nuisance in or about the construction, management and maintenance of the M6 motorway and associated works. Among the particulars of wrongdoing alleged against N6 and the Council in the statement of claim are that N6 and the Council carried out construction and associated works in a manner which altered the existing groundwater and

surface water regime in the vicinity of the plaintiff's property, allowed water to flow into an existing French drain which was not appropriate for the amount of water flowing into it, failed to carry out suitable tests and a proper assessment of the drainage system associated with the works, failed to carry out any adequate pre-construction assessment of the effects of the works on the existing groundwater regime and creating or maintaining a public nuisance. The plaintiff's case was described by his counsel in the course of the appeal as being a simple one which the plaintiff can establish on the basis of expert evidence in the form of an expert engineer's report which was provided at an early stage by way of replies to particulars by N6.

8. N6 has delivered a defence denying liability and pleading contributory negligence on the part of the plaintiff. Although the proceedings were commenced more than ten years ago, no defence has yet been delivered by the Council. As of the date of the hearing of this appeal in January 2022, no motion for judgment in default of defence had yet been brought by the plaintiff against the Council.

### **3. Chronology of Relevant Events**

9. In a careful and considered written judgment, the High Court judge set out in some detail the relevant chronology of events. In ease of the reader of this judgment, it is appropriate that I highlight the relevant events in that chronology. Construction of the relevant motorway and associated works took place between 2006 and 2009. The flooding of the plaintiff's property first occurred in November 2009. The proceedings were commenced against N6 and the Council by plenary summons which was issued on 14 March 2012. It is not clear from the papers when the plenary summons was served on N6. The plaintiff served a notice of intention to proceed on 4 December 2013. An appearance was entered on behalf of N6 on 6 January 2014. An appearance was also entered on behalf of the Council. Its appearance is undated. The plaintiff delivered a statement of claim on

7 February 2014 (almost two years after the proceedings were commenced). N6 sought particulars arising from the statement of claim on 14 February 2014. The plaintiff failed to provide those particulars and a motion was issued by N6 seeking to compel replies on 6 June 2014. An order was made by the High Court on consent on 14 July 2014 directing the plaintiff to furnish replies to particulars within two weeks. A consent order for costs was made against the plaintiff. The plaintiff's replies to particulars were provided the following day, 15 July 2014. With the replies to particulars, the plaintiff furnished a copy of two reports: a report of Denis Maher of HCL O'Connor & Company, Consulting Engineers, the plaintiff's then engineer, and a report of Cleary's Loss Assessing and Insurance Services.

**10.** N6's solicitors wrote at least three letters to the plaintiff's solicitors seeking inspection facilities for a consulting engineer retained on its behalf. Those letters were dated 22 July 2014, 2 September 2014 and 22 January 2015. There was no reply from the plaintiff's solicitors to any of those letters. On 14 March 2015, N6 issued a motion seeking an order compelling the plaintiff to provide such inspection facilities and, in the alternative, an order dismissing the plaintiff's claim for want of prosecution by reason of his failure to provide the requested inspection facilities. That motion was returnable before the Master on 14 April 2015. It was ultimately dealt with by a consent order made by the Master on 15 July 2015. On consent it was ordered that the plaintiff provide inspection facilities for N6's engineer no later than 15 October 2015. The plaintiff also consented to pay the costs of that motion. N6's engineer carried out an inspection of the plaintiff's property on 14 September 2015.

**11.** There were without prejudice discussions between the plaintiff and the defendants in the course of 2016. They did not lead to a resolution of the case. The plaintiff instructed a new consulting engineer in July 2016, Pat Hayes of Brendan Foy & Co. Engineers Limited

in place of his previous engineer, Mr. Denis Maher of HGL O'Connor & Co., Consulting Engineers, whose report was furnished to N6 with the plaintiff's replies to particulars in July 2014.

**12.** N6's solicitors then sought to press the plaintiff to bring the case on for hearing. On 11 October 2016, they wrote to the plaintiff's solicitors stating that they had written to them on "*numerous occasions without reply*" and that the case "*appears to be going fallow*". They stated that they wanted to get the case on and disposed of and proposed serving a notice of trial if they did not hear back from the plaintiff within fourteen days. The plaintiff's solicitors replied on 13 November 2016 stating that they were proceeding to issue a notice of trial. In the absence of a notice of trial, N6's solicitors wrote again on 20 January 2017 pointing out that no notice of trial had been served and requesting that they provide a copy of the defence delivered on behalf of the Council and immediately arranged to serve a notice of trial. The papers contain a copy of a notice of trial dated 15 February 2017 which contains an endorsement by the plaintiff's solicitors that it was served on N6's solicitors on 30 January 2017. However, it appears from subsequent correspondence that no notice of trial was served at that time. Indeed, it could not have been served in the absence of a defence from either N6 or the Council.

**13.** N6's solicitors wrote again to the plaintiff's solicitors on 24 March 2017. In that letter they pointed again to the absence of a notice of trial from the plaintiff's solicitors and referred to the "*inordinate delay*" on the part of the plaintiff in progressing his claim. They requested sight of the defence delivered on behalf of the Council in order that they could set the case down for trial. They requested a copy of that defence within twenty-one days and that the plaintiff's solicitors set the case down for trial, failing which they would do so themselves. The plaintiff's solicitors replied on 3 April 2017. They indicated that

they had not received a defence from the Council and had requested a copy. N6's solicitors replied on 18 April 2017. In that letter they stated:

*"We delivered our defence years ago. Can you explain why the [Council] has been given such extraordinary latitude? Surely you are issuing a motion at this juncture, as this matter is in desperate need of progress?"*

**14.** N6 had not, however, delivered a defence by that stage. The High Court accepted that N6's solicitor genuinely but erroneously thought that a defence had been filed some years before April 2017. However, N6 did not in fact deliver its defence until 15 February 2019. Most surprisingly, the plaintiff's solicitors did not respond to N6's solicitors' letter of 18 April 2017 correcting the error and pointing out that no defence had by that stage been delivered by N6.

**15.** The plaintiff's solicitors served a further notice of intention to proceed on 8 June 2017. The Council's solicitors served a notice of intention to proceed on 23 May 2017.

**16.** Nothing appears to have happened as between the plaintiff and N6 in the period between then and 15 February 2019 when N6 delivered its defence. It is unclear from the papers when it came to the attention of N6's solicitors that it had not yet delivered a defence. It does not appear from the papers that the delivery of that defence was in response to any correspondence or threatened motion from the plaintiff's solicitors. There is no cover letter in the papers enclosing the defence which might have provided an explanation for why it was delivered at that point and not earlier, as N6's solicitors appear to have understood to have been the case.

**17.** Following the delivery of that defence, N6's solicitors wrote a number of further letters to the plaintiff's solicitors seeking to progress the case. Many of those letters went unanswered by the plaintiff's solicitors. On 12 July 2019, N6's solicitors again requested a copy of the defence delivered on behalf of the Council within three weeks failing which a



motion would be issued. There was no reply to that letter. They wrote again on 27 January 2018. In that letter they stated:

*“It is simply outrageous that we are compelled to send endless reminders in this case, which is making no progress.”*

**18.** N6’s solicitors wrote that if they did not receive a copy of the Council’s defence or confirmation that the plaintiff’s solicitors were taking appropriate steps to bring a motion for judgment against the Council or otherwise deal with the matter, they intended to bring a motion to dismiss the claim for want of prosecution. They concluded the letter by stating:

*“This case is devoid of merit and has reached old age. Our client is not prepared to allow it to drift endlessly and therefore it must be brought to a prompt conclusion.”*

**19.** There was again no reply to that letter. In a replying affidavit in response to the N6’s motion to dismiss, it was stated that the solicitor dealing with case was on paternity leave and the letter was not passed on to him.

**20.** N6’s solicitors wrote again on 9 April 2020 and 20 May 2020 calling on the plaintiff to bring the proceedings on. The plaintiff’s solicitors replied to the letter of 9 April 2020 on 28 April 2020 stating that the solicitor dealing with the matter was *“on leave due to the Covid 19 crisis”* and that the letter would be dealt with immediately on the solicitor’s return. In his replying affidavit in response to N6’s motion to dismiss, the plaintiff’s solicitor, James McGuinness, explained the failure to reply to correspondence had been due to *“staff shortages and administrative oversights”* within the office. Further correspondence was exchanged in May 2020. The plaintiff’s solicitors wrote on 18 May 2020. A copy of that letter was not contained in the papers. N6’s solicitors replied on 20 May 2020 suggesting that the letter of 18 May 2020 made no sense. They noted that the plaintiff’s solicitors were only at that stage requesting the Council’s defence some eight years after the proceedings had issued and more than eleven years after the events the

subject of the proceedings had occurred. They pointed out that the plaintiff could not serve a notice of trial or set the matter down for hearing if the pleadings were not closed. They indicated that they would be proceeding with a motion to dismiss. The plaintiff's solicitors responded on 29 May 2020, requesting N6's solicitors not to issue a motion to dismiss, stating that they were *"liaising with the other side in relation to a defence and will revert to you in due course."*

**21.** N6's motion to strike out the plaintiff's claim against N6 for want of prosecution of issued on 10 June 2020 with a return date of 13 July 2020. The plaintiff served a further notice of intention to proceed on 15 June 2020. That was his third such notice. Contrary to the plaintiff's suggestion at the hearing of the appeal, N6's motion was not brought in response to the notice of intention to proceed but pre-dated it.

**22.** Affidavits were exchanged in respect of N6's application. In his replying affidavit sworn on behalf of the plaintiff on 7 July 2020, Mr. McGuinness, the plaintiff's solicitor, relied on certain events in the conduct of the plaintiff's claim against the Council, including the Council's failure to deliver a defence, to explain part of the delay in the prosecution of the plaintiff's claim against N6. It is necessary, therefore, to refer to the relevant steps in the plaintiff's claim against the Council, while recognising that the Council was not a party to the application before the High Court and is not a party to this appeal.

**23.** Following service of the proceedings on the Council, the Council's solicitor requested engineering inspection facilities on 6 May 2014. The plaintiff's solicitors threatened a motion for judgment in default of defence against the Council in a letter dated 16 June 2014. The Council's solicitor responded on 20 June 2014 referring to their request for inspection facilities and requesting a clear map identifying the plaintiff's lands. On 21 July 2014, the Council sent a Notice for Particulars to the plaintiff's solicitors. In their

covering letter they stated that it was not possible for the Council to file a meaningful defence given the manner in which the statement of claim had been pleaded and the “poor quality” of the map attached to the plenary summons and in the absence of inspection facilities. That notice for particulars was not replied to by the plaintiff’s solicitors until 10 October 2017, almost three years and three months later.

**24.** On 27 April 2015, the Council solicitor’s sought contact details for the plaintiff’s engineer (then Mr. Maher) and the engineer retained on behalf of N6 (Mr. Mooney) in order for the Council’s engineers to liaise directly with them to arrange for an inspection of the property. The papers contain some e-mails from June 2015 from the plaintiff to his solicitors referring to his attempts to set up a joint engineering inspection directly with the Council. No representative of the Council attended the engineering inspection conducted on behalf of N6 on 14 September 2015.

**25.** It appears that there were no developments in the plaintiff’s case against the Council between June 2015 and 3 May 2017. On that date, the plaintiff’s solicitors wrote to the Council calling for the delivery of the Council’s defence within twenty-one days failing which a motion for judgment in default of defence would be issued. The Council’s solicitor replied on 19 May 2017 noting that the plaintiff had not yet furnished replies to the Council’s notice for particulars dated 21 July 2014 and requesting replies to particulars within one month, failing which a motion would be issued. The letter further stated that the Council had not yet carried out an inspection of the property and requested the plaintiff’s solicitors to have the plaintiff’s engineer make immediate contact with the Council’s engineer to arrange an inspection. The plaintiff’s solicitors replied on 2 June 2015 enclosing a notice of intention to proceed and stating that they were currently preparing replies to the Council’s notice for particulars.

**26.** There appears to have been telephone contact between the plaintiff's solicitors and the Council's solicitor in the period between July 2017 and early October 2017. The Council's solicitor wrote to the plaintiff's solicitors on 3 October 2017 referring to a telephone conversation that day and noting that the plaintiff's solicitors were to provide replies to particulars and confirmation of inspection facilities. The letter stated that it would be difficult for the Council to finalise its defence until replies to particulars were provided and the Council had had the opportunity of inspecting the lands. Replies to particulars were furnished by the plaintiff on 10 October 2017.

**27.** In a letter of that date enclosing the replies to particulars, the plaintiff's solicitors requested the Council's defence and stated that they would then serve a notice of trial. The Council's solicitors replied on 17 October 2017 seeking confirmation that the plaintiff's engineer had been in contact with the Council's engineer to arrange a mutually convenient time for an inspection of the property. There appears to have been no reply to that letter. In his replying affidavit on behalf of the plaintiff, Mr. McGuinness stated that the plaintiff was at that stage required to engage a new engineer and that that caused a delay in arranging an inspection with the Council's engineer. However, that does not appear to be quite correct in that the plaintiff engaged a new engineer in 2016 and not 2017.

**28.** The Council's solicitor wrote again to the plaintiff's solicitors on 7 February 2018. In that letter she noted that the plaintiff's engineer had not yet been in contact with the Council's engineers to arrange an inspection and requested that be done urgently. She also raised further queries arising from the replies to particulars. Those further particulars were not furnished by the plaintiff's solicitors until 6 July 2020, a further two years and five months later.

**29.** In the meantime, the Council's solicitor wrote to the plaintiff's solicitors on 7 October 2019 noting that an inspection had since been arranged between the respective

engineers for the plaintiff and the Council. It appears that an inspection did not take place at that stage. In his replying affidavit, Mr. McGuinness states that this was due to “*staffing changes*” within the Council. On 29 June 2020, the plaintiff’s solicitors wrote to the Council stating that the plaintiff’s engineer was intending to carry out an inspection of the plaintiff’s property on 13 July 2020 and enquiring whether the Council’s engineer was available to attend on that date. It appears from Mr. McGuinness’s affidavit that the Council’s engineer was unable to attend on that date. In a further affidavit on behalf of the plaintiff sworn by another solicitor acting for the plaintiff, Daniel O’Connell, on 3 February 2021, it was stated that a joint engineering inspection of the property was carried out by the plaintiff’s engineer and engineers on behalf of the Council on 17 December 2020. It appears that that inspection was to have been carried out in October 2020 but due to COVID-19 related restrictions and “*subsequent rescheduling issues*”, the inspection was postponed to 17 December 2020.

**30.** On 1 February 2021, the plaintiff’s solicitors again requested delivery of the Council’s defence and threatened a motion within twenty-one days. As of the hearing of the appeal in January 2022, no defence had been delivered by the Council and no motion for judgment in default of defence had been issued on behalf of the plaintiff. It was explained on behalf of the plaintiff at the hearing that the Council was awaiting the outcome of the appeal and might bring a similar application to dismiss.

**31.** It can be seen from the above chronology that as of the date of the hearing of this appeal in January 2022, it was more than fifteen years since the motorway construction and associated works which are alleged to have caused flooding to the plaintiff’s property started. It was more than twelve years since the first alleged flooding event in November 2009 and more than twelve years since the works were completed. It was almost ten years since the plenary summons was issued (14 March 2012) and almost eight years since the

statement of claim was delivered (February 2014). It was almost three years since N6 delivered its defence (albeit it that its solicitors were under the misapprehension that the defence had been delivered some years previously). No defence has yet been delivered by the Council. Discovery has not yet been sought by any party. The plaintiff's counsel informed the court at the hearing of the appeal that the plaintiff did not intend to seek discovery. N6's counsel made it clear that his client would be seeking discovery, including discovery from the Council.

**32.** It is in the context of that timeline and the events referred to that N6 brought its application to dismiss the plaintiff's claim for want of prosecution.

#### **4. N6's Application to Dismiss**

**33.** N6 issued its application to dismiss the plaintiff's claim against it on 10 June 2020. The application was made pursuant to O.122, r.11 or, alternatively, pursuant to the inherent jurisdiction of the court. The High Court decided the application on the basis of the court's inherent jurisdiction. It was, therefore, unnecessary to consider the application under O.122, r.11. There is no appeal or cross-appeal from that aspect of the judgment.

**34.** N6's application was grounded on an affidavit sworn by Shane McSweeney, N6's solicitor, on 9 June 2020. Having referred to some of the relevant dates and to the delays on the part of the plaintiff in progressing the proceedings, Mr. McSweeney noted that the passage of almost twelve years since the occurrence of the alleged flooding in 2009 would make the claim increasingly difficult to defend and would create "*very significant prejudice*" for N6 in the defence of the proceedings. He explained that N6 was a joint venture company involving a Spanish registered multi-national infrastructure company (as the main shareholder) and an Irish contractor, which was incorporated specifically and solely for the purpose of constructing the M6 motorway for which works were completed back in 2009. He further explained that N6 has no role in maintaining or operating the

motorway and that it has no employees, offices or other facilities. He explained that N6 has no “*active ongoing purpose*”, is no longer trading and has not traded for several years. As a result, Mr. McSweeney stated that N6 would be prejudiced in the defence of its claim at this stage and referred, in particular, to the non-availability of employee witnesses, none of whom remain in the employment of N6 and the majority of whom, he stated, are no longer within the jurisdiction. In many instances, he stated, those employees are not traceable. He further stated that N6 is anxious to wind up its affairs since completion of the M6 motorway took place more than a decade ago and that the outstanding litigation prejudices N6 in that regard.

**35.** A replying affidavit was sworn by Mr. McGuinness on behalf of the plaintiff on 7 July 2020. Mr. McGuinness sought to explain aspects of the delay and referred to the delay on the part of N6 in delivering its defence. He asserted that N6 itself was guilty of inordinate and inexcusable delay in progressing the proceedings. Mr. McGuinness also sought to attribute responsibility for the delay in progressing the proceedings to the Council’s failure to deliver a defence and referred in that context to the various interactions between the plaintiff’s solicitors and the Council’s solicitors concerning the joint engineering inspection and the delivery of a defence which I have referred to earlier. At the time he swore his affidavit, the inspection was due to take in July 2020. However, it did not ultimately take place until December 2020, as is explained in a subsequent affidavit sworn on behalf of the plaintiff by Mr. O’Connell on 3 February 2021. Mr. McGuinness disputed the contention that the delay was inordinate and inexcusable and contended that the balance of justice lay in favour of permitting the proceedings to continue against N6. He referred to the fact that N6 was in a position to deliver an extensive defence which made a number of express and positive pleas, including pleas of contributory negligence against the plaintiff, to the fact that N6 has been on notice of the claim since 2012, has had

particulars of the claim since 2014 and has had the benefit of an engineering inspection in September 2015. He asserted that this was a case where expert engineering evidence would be “*extremely relevant if not decisive*” (para. 23). Mr. McGuinness further stated that the plaintiff is a driver and resides with his young family in a house on the property and is not a man of significant means. There has been extensive damage to his property which the plaintiff claims is due to the negligence of N6 and/or the Council. Mr. McGuinness contended that as against this, any inconvenience to N6 in defending the proceedings could not outweigh the damage to the plaintiff to his enjoyment of the family home and garden.

**36.** That is the extent of the affidavit evidence which was before the High Court. As noted earlier, it was conceded on behalf of the plaintiff in the High Court that he was responsible for delay of about five and a half years from March 2012 to October 2017 and that that delay was inordinate and inexcusable. The High Court had to determine whether the plaintiff was responsible for the further and ongoing delay from October 2017 up to the date of the hearing of N6’s application in February 2021 and whether that further delay was always inordinate and inexcusable. It also had to consider whether the balance of justice lay in favour of permitting the plaintiff to continue his claim against N6 or in dismissing that claim.

### **5. The High Court Judgment**

**37.** In a carefully reasoned and detailed judgment, the High Court (Butler J.) set out the relevant legal principles applicable to the application, noting that the parties were agreed that N6’s application fell to be determined in accordance with the principles set out by Hamilton C.J. in the Supreme Court in *Primor*. The High Court, therefore, considered the application by reference to the three stages or limbs of the test in *Primor*, namely, whether the delay in question was inordinate, whether that delay was inexcusable and whether on the facts the balance of justice was in favour of or against permitting the case against N6 to



proceed. The judge noted that the factors set out by Hamilton C.J. in terms of the balance of justice were not intended to be exhaustive and that each case had to be determined by reference to its particular facts. She observed:

*“However, the fundamental principle remains that the court is trying to ascertain where the balance of justice lies as between the parties and that procedural justice and the possibility of ultimately having a fair trial are central in this regard.”* (Para. 10)

**38.** The judge referred to the observations of Hardiman J. in the Supreme Court in *Gilroy v. Flynn* [2005] ILRM 290 (“*Gilroy*”) on the obligation on the State under Article 6 of the European Convention on Human Rights (the “Convention”) to ensure that civil rights and liabilities are determined within a reasonable time and to the fact that those observations led to a somewhat stricter approach been taken by the courts to delay on the part of parties in proceedings. The judge also referred to a number of authorities which described the “constitutional imperative” on the court “to protect the public interest by ensuring the timely and effective administration of justice” (para. 11). She referred to the “general consensus” that while the fundamental principles have not changed since *Primor*, the weight to be attached to the various factors relevant to the balance of justice has been “recalibrated to take account of the court’s obligation to ensure that litigation is progressed to a conclusion with reasonable expedition.” (para. 11).

**39.** The judge then helpfully set out the arguments of the parties at paras. 12-15. She referred in that context to a number of authorities which were relied on by N6, including the judgments of Irvine J. in the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74 (“*Cassidy*”) and *McNamee v. Boyce* [2016] IECA 19 (“*McNamee*”), to the effect that where it is established that the plaintiff has been guilty of inordinate and inexcusable delay in the prosecution of its claim, the relevant defendant only has to prove “moderate”

prejudice arising from that delay in order to secure a dismissal of the proceedings under the *Primor* principles.

**40.** The judge noted that the plaintiff resisted the application on two main grounds. The first was that the plaintiff was not responsible for all of the delay since October 2017 and that responsibility for at least part of the delay since then rested with N6 as it had not delivered its defence until February 2019 and also with the Council as it had not delivered a defence or attended some scheduled inspections of the property. The second main ground of objection advanced by the plaintiff was that, in considering the balance of justice, the court had to have regard to the fact that the case was likely to be decided on the basis of expert and technical evidence regarding the impact that the construction works had on the pre-existing ground and surface water flows in the area adjacent to the plaintiff's property. The plaintiff relied on the evidence put forward on behalf of N6 in its application to secure engineering facilities concerning the necessity to appoint an engineer to survey and inspect the property and the significance of the engineering evidence to the case. The plaintiff relied on two authorities to the effect that where a case turned on expert evidence rather than on the credibility or recollection of lay witnesses, the balance of justice should favour permitting the case to proceed: *Manning v. National House Building Guarantee Co. Ltd.* [2011] IEHC 98 ("*Manning*") and *Nolan v. Chadwicks Ltd.* [2014] IEHC 542 ("*Nolan*").

**41.** In her decision on the application, the judge rejected the plaintiff's contention that some blame should be attributed to N6 for the delay which occurred. While noting that N6 did not file its defence until February 2019, she accepted that its solicitor "*genuinely but erroneously thought that a defence had been filed some years before April 2017*" (para. 17). She noted that prior to October 2017, the plaintiff did not actively seek a defence from N6 and that even when N6's solicitor incorrectly asserted (in his letter of 18 April

2017) that N6 had delivered its defence “*years ago*”, the plaintiff’s solicitors did not point out that “*obvious error*” (para. 17). The judge also referred to the failure by the plaintiff to reply to the Council’s notice for particulars or to take steps to facilitate the inspection on behalf of the Council and concluded that the delay by N6 in filing its defence did not impact on the plaintiff’s ability to progress the proceedings. She further concluded that until faced with the motion to strike out, the plaintiff’s solicitors had been “*singularly unresponsive to almost all correspondence emanating from*” N6’s solicitors and that there was no evidence before the court from which she could conclude that the plaintiff would have actually progressed the litigation had N6’s defence been filed any earlier than it was.

**42.** With respect to the plaintiff’s allegations of delay against the Council, the judge expressed some difficulty in dealing with those allegations in circumstances where the Council was not a party to the application. However, she held that even taking the facts presented by the plaintiff at their height, it was “*far from clear*” that the Council was guilty of any culpable delay, referring, by way of example, to the fact that the plaintiff took three years and three months to reply to the Council’s first notice for particulars and a further two years and five months to reply to its notice for further and better particulars. She further pointed to the fact that it took the plaintiff nearly five years from the time inspection facilities were first requested by the Council to get to the point where the plaintiff’s engineer contacted the Council’s engineer for the purpose of organising that inspection. In light of those facts, the judge found it impossible to conclude that any delay on the part of the Council frustrated the plaintiff in the expeditious prosecution of his claim against N6. The judge was, however, appropriately careful to make no finding as to whether that Council was actually responsible for any delay, in circumstances where it was not a party to the application.

43. The judge stated that in exercising her discretion in terms of the balance of justice, the court had to look at any delay on the part of N6. She was satisfied that the only delay by N6 that the plaintiff had identified was not material. She further concluded that nothing in N6's conduct could be said to amount to acquiescence in the plaintiff's delay. On the contrary, the judge held that there was a "*persistent effort*" on the part of N6's solicitors to get the plaintiff to progress the proceedings. She held that there was no conduct on the part of N6 which caused the plaintiff to incur further or unnecessary expense.

44. The judge then considered whether the delay was such as to cause N6 prejudice in the defence of the proceedings "*or more generally*" (para. 21). She stated that while the onus lay on the moving party to establish inordinate and inexcusable delay, once that was done, the onus then shifted to the plaintiff to establish that there were countervailing circumstances which were sufficient to demonstrate the balance of justice favoured allowing the claim to proceed and that that was a "*weighty obligation*". The judge referred to *Flynn v. Minister for Justice* [2017] IECA 178 ("*Flynn*") and *Myrmidon CMBS (Propco) Ltd. v. Joy Clothing Ltd.* [2020] IEHC 246 ("*Myrmidon*").

45. The judge noted that while the plaintiff argued that there was no substantial risk that the trial would be unfair and that N6 had not shown "*serious*" prejudice, N6 contended that where inordinate and inexcusable delay was established, it was only required to show "*moderate*" prejudice and did not have to establish that the trial, whenever it occurred, would necessarily be unfair (para. 22).

46. The judge held that the true position lay somewhere between those two extremes. She accepted that a defendant was not required to show categorically that the trial risked being unfair in order to have the proceedings struck out after a lengthy delay. She also held that the prejudice which could be relied on by a defendant in those circumstances was not limited to prejudice in the defence of the proceedings (para. 23).

47. Having referred to the delay which had already occurred in the progress of the plaintiff's case against N6, the judge noted that the proceedings were still at a relatively early stage in that the Council had not yet delivered its defence. She stated that the court was also entitled to take into account the further time which would be required before a trial could actually take place, citing with approval the comments of MacGrath J. in *Myrmidon* (para. 25). The judge noted that the plaintiff anticipated that discovery would be required, and it was asking the court to make directions for the exchange of discovery requests, for the bringing of motions and for the making of discovery within a ten-week period. She felt that those proposals were "*completely unrealistic*", even if it was realistic to suppose that they would be complied with (para. 26). In fact, having informed the High Court that discovery would be required, the position adopted by the plaintiff on the appeal was that the plaintiff would not be seeking discovery. N6 made it clear that it would be seeking discovery not only from the plaintiff but also from the Council. The judge observed that discovery would be a complex exercise, particularly for N6 which she stated "*exists only as a legal entity with no staff or premises and no contact with the work force which was responsible for carrying out the works on its behalf some twelve or fifteen years ago.*" (para. 26). She felt that in all the circumstances, the best case scenario was that the proceedings would come to trial in early 2023, seventeen years after the works began and almost fifteen years after the flooding first occurred and that that was a very long delay which was likely to create problems not just for the parties but also for the court (para. 26). That estimate was, of course, before the question of any appeal arose. By reason of the appeal, it is difficult to imagine a trial taking place before early 2024, at best.

48. The judge then dealt with the plaintiff's argument that much of the prejudice relied on by N6 was not relevant to the issue as to whether there could be a fair trial. She stated that was "*correct as far as it goes*" but failed to appreciate that N6 was not obliged to

establish that it would be unable to receive a fair trial. Since N6 had established inordinate and inexcusable delay on the part of the plaintiff, “*moderate*” prejudice could justify striking out the proceedings. If a defendant could not receive a fair trial, then the court had to strike out the proceedings. However, the judge held that that was not the threshold which N6 had to meet in order to succeed in its application. She further held that the prejudice on which a defendant was entitled to rely was not limited to prejudice in the defence of the proceedings. It could include, for example, reputational damage, stress and inconvenience caused by being subject to ongoing litigation over an extended period. She stated that while N6, as a special purpose vehicle which was no longer trading, could not complain of reputational damage or stress, matters on which it relied arising from its “*de facto*” non-existence did create “*real difficulties for it*”. The judge accepted that there was a “*particular prejudice*” caused to an entity such as N6 (which has had no ongoing involvement to the operation or management of the motorway and no facilities, premises or staff) by having to defend proceedings twelve to fifteen years (or more) after the relevant events. While those matters would not necessarily result in an unfair trial (but, of course, they might do), the judge held that they were “*weighty concerns*” which had to be considered as part of the required balancing exercise (para. 27).

**49.** The judge then considered the argument advanced by the plaintiff that since the case was likely to depend on expert evidence, it falls into a discrete sub-category of cases in which the balance of justice will almost invariably favour permitting the case to proceed. The plaintiff’s argument was that where a case would be based “*primarily on documentary evidence or on technical evidence to be given by expert witnesses*”, the effects of the delay would be significantly reduced. The judge accepted that was so “*but only up to a point*” (para. 28). The judge then referred to the two cases on which the plaintiff relied, *Manning* and *Nolan*, and noted that while the timelines in *Nolan* were similar to those involved in

the present case, the facts in *Manning* were quite different and “*probably sui generis*” (para. 28). In *Manning* the relevant tests on which the plaintiff was relying had taken place more than thirty years earlier but were already twenty years old at the time of the events giving rise to the proceedings and could be replicated. The judge held that the judgments in *Manning* and *Nolan* were given in 2011 and 2014 and did not, and could not, take into account subsequent developments arising from a number of relevant judgments of the Court of Appeal including *Cassidy* and *McNamee*. She stated that those judgments applied the *Primor* test in its recalibrated form which is less indulgent of culpable delay and more cognisant of the court’s obligation to ensure efficient litigation (para. 29). The judge stated that it was not necessarily the case that either *Manning* or *Nolan* would be decided differently today but rather the starting point for the analysis would probably be different and would not proceed on the basis of a presumption that there is a category of case in which prejudice would be unlikely to be caused to a defendant (para. 29).

**50.** In any event, the judge concluded that the plaintiff had not established that this case would “*necessarily proceed solely on the basis of expert evidence*”. She pointed out that it was difficult for the court to reach any definitive conclusions as to what witnesses might be required by the parties since the case had not been progressed by the plaintiff. The judge noted that the plaintiff was proceeding on the basis that the evidence would “*relate largely, if not solely*” to the engineering inspections which had been carried out. She stated, however, that the fact that such evidence would be “*important*” does not mean that it is the “*only evidence*” which the defendants might wish to call. She accepted that there might well be issues relating to the design of the works and work processes involved or the ground conditions before and during the works which might depend on the recollection of witnesses and on an understanding of the work which took place some fifteen years previously. The judge concluded that in circumstances where the onus was on the plaintiff

to establish countervailing circumstances to establish that the balance of justice favoured allowing the case to proceed, she was not satisfied that the plaintiff had established that this was a case which could or would proceed “*only*” on the basis of evidence to be called from experts instructed after the proceedings were commenced (para. 30).

**51.** Finally, the judge briefly considered the possible implications of a dismissal of the plaintiff’s claim against N6 for his claim against the Council. The parties were agreed that if the claim were dismissed against N6 but were to proceed against the Council, it would be open to the Council to invoke the provisions of the Civil Liability Act 1961 to limit or reduce its liability to the plaintiff by reference to the potential liability of N6 to the plaintiff. The judge stated that while this was a factor which had to be taken into account in the exercise by the court of its discretion, she felt that the plaintiff might still have an alternative remedy available to him outside these proceedings (para. 31).

**52.** The judge decided, therefore, to strike out the plaintiff’s proceedings against N6 on the grounds of inordinate and inexcusable delay in circumstances where the balance of justice favoured taking that course. She did so in the exercise of the court’s inherent jurisdiction and not under O.122, r.11.

## **6. The Appeal**

### **(a) The Plaintiff’s Position**

**53.** The plaintiff has appealed from the judgment and order of the High Court. In its notice of appeal filed on 26 April 2021, the plaintiff advanced six grounds of appeal. The grounds relied upon by the plaintiff in his written submissions and in the oral submissions at the hearing were further refined to the following:

- (1) While it was acknowledged that the plaintiff was guilty of inordinate and inexcusable delay, the judge ought to have allocated some responsibility for



that delay to N6 by reason of its failure to deliver a defence until February 2019;

- (2) The judge erred in principle in holding that cases which turned largely on expert evidence (or on documentary evidence) or in which such evidence was decisive were not to be treated as a separate category of cases in terms of the balance of justice to those which were dependent on the recollection of witnesses. Having made that error, it was contended that the judge proceeded on the mistaken understanding that the plaintiff was advancing the argument that his case would turn “*solely* ” or “*only*” on the basis of expert or technical evidence. The plaintiff was not making that case nor was it necessary for him to do so.
- (3) The judge erred in holding that N6 had advanced a sufficiently strong case of prejudice. Alternatively, the judge attached excessive weight to the prejudice relied on by N6 and ought, in the exercise of her discretion, to have concluded that the balance of justice favoured allowing the plaintiff’s case against N6 to proceed to trial.

**54.** It was made clear on behalf of the plaintiff that he was not disputing the principles to be applied, namely, those identified by Hamilton C.J. in *Primor* and developed in the cases that followed. The plaintiff conceded in his written submissions and at the hearing that there was inordinate and inexcusable delay in the progression of his case against N6. As noted earlier, it was unclear as to whether that concession made during the course of the appeal extended beyond the concession made by the plaintiff in the High Court where inordinate and inexcusable delay for the period up to October 2017 was conceded by the plaintiff. My understanding from the plaintiff’s counsel’s submission was that the plaintiff was not taking issue with the judge’s finding that there was inordinate and inexcusable

delay on the part of the plaintiff for the entire period found by the judge and was not making the case that the judge ought to have found that other parties were responsible for the delay from October 2017 onwards. In any event, as I explain below, I am quite satisfied that the judge was correct in her finding that there was inordinate and inexcusable delay on the part of the plaintiff in progressing his claim against N6 for the entire of the period from commencement in March 2012 to the date on which N6 brought its application to dismiss and indeed in the period thereafter.

**55.** While the plaintiff's counsel referred on several occasions during the course of his submissions to the fact that N6 delayed for several years in putting in its defence, he did not seek to attack the judge's conclusion that N6's solicitors were under the mistaken impression that a defence had previously been delivered by N6. That is the conclusion drawn by the judge on the basis of the correspondence. In my view, the judge was perfectly entitled to draw that conclusion and it would have been very difficult to see how she could have concluded otherwise.

**56.** The plaintiff contended that the court should have treated the case as one which would largely turn on expert evidence rather than on the basis of recollections of witnesses. He argued that such cases (as well as documents cases) should be treated as a separate category of cases in which it was more difficult for a defendant to demonstrate sufficient prejudice to shift the balance of justice in favour of the dismissal of proceedings. The plaintiff argued that the judge incorrectly distinguished *Manning* and did not attempt to distinguish *Nolan*.

**57.** The plaintiff had submitted before the High Court that both parties were proceeding on the basis that expert engineering evidence would be decisive. In its written submissions to this Court, the plaintiff relied on what Mr. McSweeney said on behalf of N6 in the affidavit he swore for the purpose of grounding N6's application for inspection facilities.

At para. 5 of that affidavit, Mr. McSweeney referred to the fact that N6 had appointed an engineer to advise in relation to the case so that it could prepare and deliver its defence and that:

*“...given the highly unusual nature of the claim, ...it is necessary to appoint an engineer to survey and inspect the plaintiff’s property, make technical findings and advise generally on the matter.”*

**58.** Reliance was also placed on a letter from N6’s solicitors dated 2 September 2014 in support of that application in which it was stated that:

*“It is vital that you immediately afford us joint inspection facilities in this matter, given the nature of the claim advanced...”*

**59.** The plaintiff contended that questions as to whether the flood was caused by works which altered the pre-existing groundwater and surface water regime in the locality was not something which could be seen or observed by an ordinary person but was a matter for expert evidence. He further contended that the issue as to whether the works caused the flood in this case could only be resolved by expert evidence and referred to the averment by Mr. McGuinness on behalf of the plaintiff (at para. 23 of his replying affidavit) that:

*“It is clear that this a matter where expert engineering evidence will be extremely relevant if not decisive.”*

**60.** The plaintiff contended that expert evidence cases (as well as documents cases) were still to be treated as a distinct category of cases which merited different treatment to cases which turned largely on the recollection of lay witnesses. In addition to relying on *Manning* and *Nolan*, the plaintiff also relied on the judgments of Noonan J. in the Court of Appeal in *Kenny v. Motor Network Limited* [2020] IECA 114 (“*Kenny*”) and in *Cavanagh v. Spring Homes Developments Limited* [2019] IEHC 496 (“*Cavanagh*”). The plaintiff submitted that in both of those cases that the court distinguished between cases where the

issues could be “*largely*” determined by reference to documentary evidence (*Kenny*) or “*probably largely*” on the basis of the record or which “*may to a significant extent*” depend on the evidence of experts (*Cavanagh*). The plaintiff also relied on the judgment of Faherty J. in the High Court *Kilroy v. Glenford Builders Limited* [2018] IEHC 432 (“*Kilroy*”), where the court concluded that much of the evidence in relation to liability would “*most likely*” be provided by experts and, therefore, only “*moderate weight*” was attached to the possibility of the frailty of the recollection of witnesses. (para. 101). The plaintiff referred also to the judgment of MacGrath J. in *Murphy v. Magnet Networks Limited* [2019] IEHC 461 (“*Murphy*”), where the court noted that there would be “*considerable focus*” placed at the trial on the context of contractual documents and the court was, therefore, not satisfied that any prejudice which might arise arising from the recollection of witnesses concerning the relevant background was such as to tip the balance of justice in favour of dismissing the proceedings. (para. 60).

**61.** In addition to arguing that the judge had incorrectly concluded that expert evidence cases should not continue to be treated as a separate category of cases, the plaintiff also argued that insofar as the judge did consider the extent of prejudice which might arise for N6 in circumstances where expert evidence would be given at the trial, the judge overstated or misstated the case which the plaintiff was making in reliance on the expert evidence. The judge incorrectly proceeded on the basis that the plaintiff was arguing that the case would proceed “*solely*” on the basis of expert evidence or “*only on the basis of technical evidence*” to be called from experts where that was not the case made by the plaintiff. The plaintiff was not contending that the case would proceed only on the basis of technical or expert evidence and accepted that witnesses other than expert witnesses would need to be called. The case made by the plaintiff was that a crucial issue in the case,

namely, the cause of the flooding, would largely turn on such expert evidence. It was not saying that that was the only evidence which would be called.

**62.** The next point advanced by the plaintiff was that the judge incorrectly concluded that N6 had demonstrated prejudice sufficient to tilt the balance of justice in favour of dismissing the claim or, alternatively, that she attached too much weight to the alleged prejudice relied on by N6 and, therefore, incorrectly exercised her discretion to dismiss the claim on the basis that the balance of justice so required. Although in argument the plaintiff's counsel accepted (as he had to) that the type of prejudice which could be taken into account was not confined to prejudice arising from the risk of an unfair trial (or "fair trial" prejudice), but could extend to other types of prejudice, nonetheless the main focus of the plaintiff's submission on prejudice was to the effect that N6 had not advanced examples of the sort of prejudice which would result in an unfair trial. N6 had not, for example, pointed to any particular witness who would not be available but merely relied on generic assertions that witnesses might not be traceable. N6 could not point to any particular witness who had passed away since the proceedings occurred and had not provided evidence as to whether witnesses were interviewed at the time. The plaintiff also relied on the fact that N6 had instructed an engineer who carried out an inspection of the premises in September 2015 as well as the fact that the plaintiff provided a copy of his engineer's report with the replies to particulars in July 2014. The plaintiff contended that the prejudice relied on by N6 was more of an administrative kind under which it was required to continue to comply with regulatory, audit and taxation filings by reason of the continued existence of the proceedings. The plaintiff submitted that these could not be unduly burdensome in circumstances where N6 had not traded since 2009. He contended that notwithstanding that it might only be necessary for N6 to demonstrate a "*modest*" degree of prejudice, it still had to demonstrate some prejudice and had not done so in this

case. In those circumstances, it was contended that the judge erred in the manner in which she treated the prejudice relied on by N6 and incorrectly exercised her discretion to strike out the claim against N6 on the basis that the balance of justice favoured that course of action.

**63.** In the course of the hearing the plaintiff's counsel submitted that if given a further opportunity, the plaintiff would proceed with his case with the "*speed of light*" and would agree to a strict timetable. Contrary to the position adopted in the High Court, he submitted that there would be no need for discovery and therefore discovery would not delay the progress of the case.

**(b) N6's Position**

**64.** In response, N6 submitted that, while acknowledging that it was open to this Court to exercise its discretion in a different way to the High Court judge, the Court should afford deference to the views of the trial judge and to her assessment of the weight to be afforded to the various factors in terms of the balance of justice. N6 submitted that the judgment of the High Court judge was cogent and well-reasoned and applied the well-established and agreed legal principles. It urged the court to dismiss the appeal.

**65.** N6 proceeded on the basis that the relevant principles were accepted by the plaintiff and were those set out by Hamilton C.J. in the Supreme Court in *Primor* as considered and applied in subsequent cases. As the plaintiff had conceded inordinate and inexcusable delay in the High Court and in this Court, N6 submitted that the only issue for this Court to decide is where the balance of justice lies.

**66.** Insofar as the court found it necessary to consider further the question of delay and, in particular, any delay on the part of N6, it submitted that, as regards the delay in delivering its defence, the judge properly concluded that that delay was due to an oversight on the part of N6's solicitors who had thought that the defence had been delivered some

years previously. N6 submitted that that conclusion was supported by the correspondence and referred, in particular, to its solicitors' letter of 18 April 2017. N6 further submitted that there was no question of any acquiescence on the part of N6 in the plaintiff's delay. Nor did the conduct of N6 in any way induce the plaintiff to incur further expense. N6 was not, it was submitted, complicit in any delay on the part of the plaintiff in the progress of his claim.

**67.** In its written submissions, N6 reviewed the case law following *Primor*, including those decisions which stressed the relevance of the Convention and the “*constitutional imperative*” that litigation be conducted in a timely manner as well as the reassessment or recalibration of the test by the Court of Appeal in 2015 and 2016 in cases such as *Cassidy*, *McNamee* and *Millerick*. N6 submitted that, in light of these authorities, in circumstances where the plaintiff was responsible for inordinate and inexcusable delay in the progress of his case, it was only necessary for N6 to show a “*very modest level of prejudice*”, for reasons explained by Irvine J. in the Court of Appeal in *McNamee*. It further submitted that the authorities made clear that the type of prejudice on which it could rely was not confined to “fair trial” prejudice and could include other types of prejudice. It submitted that insofar as the plaintiff appeared to concentrate primarily on “fair trial” prejudice he was confusing the two strands of jurisprudence relevant to applications to dismiss where there is delay or a lapse of time between the relevant events and any trial: N6 referred in that context to the judgment of Noonan J. in the Court of Appeal in *McGuinness v. Wilkie & Flanagan Solicitors* [2020] IECA 111 (“*McGuinness*”). It was pointed out that N6 was relying on both (a) “fair trial” prejudice and (b) prejudice in terms of oppression to N6 on the particular facts of the case.

**68.** With respect to (a), namely “fair trial” prejudice, N6 relied on the significant passage of time between the relevant events and any trial which might take place in the

proceedings. It referred, for example, to the fact that the relevant motorway and associated works took place between 2006 and 2009, thirteen to sixteen years ago and the first incident of alleged flooding occurred in November 2009, more than twelve years ago. While not identifying any particular witnesses who have now become unavailable with the passage of time, N6 relied on the fact that it has not traded since the completion of the project in 2009, has no facilities or employees and all its employees and staff have long since departed. It also relied on the fact that there are significant issues between N6 and the Council as to any potential responsibility for the flooding and, in particular, whether it was caused by motorway construction works (for which N6 could potentially be liable) or by the construction of a link road (for which the Council could be responsible). It pointed to the potential relevance of records including construction and design records dating back more than fifteen years, to possible changes to the topography of the relevant area over the course of the period since the works were completed, to the need for witnesses to give evidence as to the alleged damage caused and as to the possible alternative sources of the flooding. All of these elements were relied upon by N6 as amounting to the sort of “*moderate*” prejudice which it had to establish. It submitted, for example, that the issue as between N6 and the Council was not an issue which could be determined on the basis of documents only. While expert evidence would be important in determining that issue, so too would the recollection of witnesses dealing, for example, with the damage allegedly sustained, the building construction and engineering records which may or may not still be available and the inevitable changes to the topography and the built and natural environment occurring over the long period of time since the construction of the motorway was completed, as well as alternative potential causes and sources of the flooding. N6 acknowledged that while engineering evidence would be critical, it would also be necessary for witnesses to deal with the factual position on the ground. While it was not



saying that it would be impossible for there to be a fair trial and while acknowledging that N6 might not succeed in an application brought under the second strand of the relevant jurisprudence deriving from *O'Domhnaill v. Merrick* [1984] I.R. 151 ("*O'Domhnaill*"), it was submitted that these elements were sufficient to amount to the sort of "*moderate*" prejudice which it had to demonstrate and that the judge was correct in reaching that conclusion.

**69.** With respect to (b), namely prejudice in terms of oppression to N6 in the particular circumstances of the case, N6 pointed to the fact that it was a special purpose vehicle formed as a joint venture company solely for the purposes of constructing the M6 motorway. The motorway has long since been completed and commissioned and is operational. N6 has no ongoing role in its operation or maintenance. It is no longer a functioning or trading entity with any continuing administrative function or employees. Employees with knowledge of the construction project have long since left its employment. It will inevitably have difficulties in tracing relevant witnesses. N6 has been anxious to wind up its affairs since completion of the motorway in 2009 but has been unable to do so as a result of the proceedings. It has had to continue to comply with regulatory requirements and incur the ongoing cost and administrative burden of doing so in circumstances where the purpose of N6 had long since ceased to exist on the completion of the construction of the motorway in 2009. These factors, combined with the other factors which bear upon the fairness of any trial which might take place, together amount to sufficient prejudice to support the application to dismiss or strike out the plaintiff's claim against it and the judge's decision to accede to that application.

**70.** N6 further submitted that the judge was correct in the way she dealt with the expert cases, including *Manning* and *Nolan*. With respect to *Manning*, N6 noted that crucially the plaintiff's claim in that case turned on the ability of experts to replicate a particular

laboratory test. It submitted that in *Nolan*, what was at issue was the composition of the allegedly defective bricks and that could be determined by testing in a laboratory. The difficulties caused by a flooding case were, it submitted, quite different. It further submitted that the judge was correct in pointing out that *Manning* and *Nolan* were decided before the Court of Appeal looked again at the application of the *Primor* test where inordinate and inexcusable delay was established and decided that it was sufficient for a defendant to establish moderate prejudice in order to secure a dismissal of the claim.

**71.** N6 also disputed the plaintiff's protestations that if the court permitted the claim to proceed against N6, it would be brought on with great haste. N6 noted that such an approach was entirely inconsistent with the manner in which the case had been conducted to date and with the way in which even this appeal had been conducted. It pointed to the fact that the plaintiff had not served his notice of appeal within the required time period and was eight weeks late in serving his written submissions. N6 submitted that there has been, and continues to be, delay on the part of the plaintiff at all stages of the proceedings, including in the appeal. It also submits that there is still no end in sight in circumstances where the plaintiff has not obtained a defence from the Council and has not even now brought a motion for judgment in default of defence against the Council. N6 dismissed as unrealistic the idea that the case could proceed without discovery. It stated that it would certainly be seeking discovery, at least from the Council.

**72.** For these reasons, N6 urged the court to dismiss the appeal and uphold the judgment and order of the High Court judge.

## **7. Assessment and Decision**

### **(a) Approach of this Court on Appeal**

**73.** The approach that this court is required to take when considering an appeal from a decision of the High Court on an application to dismiss a claim where there has been inordinate and inexcusable delay is well settled and was not the subject of any dispute between the parties in this appeal.

**74.** In *Collins v. The Minister for Justice, Equality and Law Reform* [2015] IECA 27 (“*Collins*”), a judgment delivered by Irvine J., this Court held that the approach to be taken was that set out by MacMenamin J. in the Supreme Court *Lismore Builders Limited (in receivership) v. Bank of Ireland Finance Limited* [2013] IESC 6, as follows:

“...While the Court of Appeal...will pay 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.” (per Irvine J. at para. 79)

**75.** That is the approach which has been taken in a whole series of judgments of the Court of Appeal dealing with appeals in this area including *Tanner v. O'Donovan* [2015] IECA 24 (“*Tanner*”), *William Connolly & Sons Limited v. Torc Grain & Feed Limited* [2015] IECA 280 and *Cassidy*. In *Cassidy*, Irvine J. stated:

“In *Collins* the Court considered the nature of an application to dismiss proceedings on the grounds of inordinate and inexcusable delay and concluded that such applications require the presiding judge to decide mixed questions of law and fact rather than questions which might be considered to be of a truly discretionary nature. It also expressed itself satisfied that, given that applications of this type are resolved by reference to facts which are fully set out on affidavit, it is difficult to advance any valid reason as to why the merits of the High Court decision on such an

*issue should not be fully reconsidered on an appeal, should the interests of justice so require.” (para. 27)*

**76.** Irvine J. continued:

*“...while this Court must give due consideration to the conclusions of the High Court judge, it is nonetheless free to exercise its own discretion as to whether or not the claim should be dismissed, if satisfied that the interests of justice dictate such an approach.” (para. 28)*

**77.** That is the approach which must, therefore, be taken in considering this appeal from the judgment and order of the High Court dismissing the plaintiff’s case against N6.

#### **(b) Relevant Legal Principles**

**78.** For the most part, the applicable legal principles are not in dispute. As explained in a number of the cases, including *Cassidy* and *McGuinness*, there are two separate but sometimes overlapping strands of jurisprudence which may be relevant when an application is brought to dismiss a case in circumstances where there has been delay in the prosecution of the case or where the case relates to events which took place in the distant past. The first strand is that discussed by the Supreme Court in *Primor*. That jurisprudence is applicable where there has been inordinate and inexcusable delay on the part of a plaintiff in the prosecution of its claim. The second strand arises in the circumstances discussed by the Supreme Court in *O’Domhnaill* where, when the application to dismiss the claim is brought, a significant period of time has elapsed between the events giving rise to the proceedings and the likely trial date. It was agreed by the parties and accepted by the judge that N6’s application fell to be determined in accordance with the first strand described in, and subsequently developed after, the decision of the Supreme Court in *Primor*.

**79.** There are three limbs to the *Primor* test. The defendant must first establish that the delay on the part of a plaintiff in the prosecution of the claim has been inordinate. If it establishes that the defendant must then establish that the delay has been inexcusable. If the defendant establishes, or if it is agreed, that the delay is both inordinate and inexcusable, “*the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the proceeding of the case.*” (per Hamilton C.J. in *Primor* at para. (e) on p. 475).

**80.** As the moving party on the application to dismiss, the defendant also has the burden of proving that the balance of justice favours the dismissal of the claim (see, for example, per Irvine J. in *Cassidy* at para. 35). However, as we shall see, the defendant does not have to establish the same level or degree of prejudice which must be established in order to have a claim dismissed under the second strand of jurisprudence described in *O’Domhnaill*. Although it did not feature in the written or oral submissions on this appeal, on one reading of paras. 21, 29 and 30 of her judgment, the judge might be understood as stating that once inordinate and inexcusable delay is established by the defendant, the plaintiff bears the onus of proving that the balance of justice lies in favour of allowing the claim to proceed. While nothing turns on this in terms of the outcome of the appeal, if and insofar as the judge may have felt that the plaintiff bore that onus of proof, I do not believe that that would be correct. The onus remains on the defendant to establish that the balance of justice favours the dismissal of the case. The position in fact is, as was stated by Fennelly J. in the Supreme Court in *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 IR 510 (“*AIBP*”), citing what Henchy J. stated in *O’Domhnaill*, that a person responsible for delay which is found to be inordinate and inexcusable:

*“will not be absolved of fault unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess*

*the third consideration...namely whether ‘on the facts the balance of justice is in favour of or against the proceeding of the case’.*” (per Fennelly J at p.519)

**81.** Such countervailing circumstances would have to be “*weighty to cancel out the effects of the plaintiffs’ behaviour*” and would include any disadvantage or disability affecting the plaintiff or delay or acquiescence by the defendants which might “*redress the balance of fault*” (per Fennelly J. at p.519). While these are matters which the plaintiff would have to point to in order to redress the balance of fault or cancel out the effects of its delay, they do not mean that a plaintiff bears the burden of proving that the balance of justice favours the case proceeding. That burden of proof remains with the defendant as the moving party who seeks to have the claim dismissed. I do not believe that O’Flaherty J. in *Primor* intended to suggest otherwise when, at the conclusion of his judgment when summing up counsel’s submission, said that there was much in the suggestion that “*once delay which is inordinate and inexcusable is established then the matter of prejudice would seem to follow almost inexorably*” (at p. 521). Ultimately, however, any possible disagreement with the judge on where the burden of proof lies when considering the balance of justice is not in any way material to the outcome of this appeal as I am quite satisfied that the judge was correct in concluding that the various elements of prejudice raised by N6 were made out and that she correctly concluded that, by reason of that prejudice, the balance of justice lay in favour of dismissing the case against N6 rather than permitting it to proceed.

**82.** In considering whether the balance of justice lies in favour of or against permitting the case to proceed, Hamilton C.J. in *Primor* stated that the court was entitled to take into consideration and to have regard to the following matters:

“(i) *the implied constitutional principles of basic fairness of procedures,*

- (ii) *whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the Defendant to allow the action to proceed and to make it just to strike out the Plaintiff's action,*
- (iii) *any delay on the part of the Defendant because litigation is a two party operation, the conduct of both parties should be looked at,*
- (iv) *whether any delay or conduct of the defendant amounts to acquiescence on the part of the Defendant in the Plaintiff's delay,*
- (v) *the fact that conduct by the Defendant which induces the Plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the Defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,*
- (vi) *whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the Defendant,*
- (vii) *the fact that the prejudice to the Defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a Defendant's reputation and business.” (per Hamilton C.J. at pp. 475-476)*

**83.** In *AIBP*, Fennelly J. observed that:

*“The separate considerations mentioned by Hamilton C.J. should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just.” (p. 518)*

**84.** I agree with the judge when she stated (at para. 10 of her judgment) that the factors set out by Hamilton C.J. (quoted above) “*are intended to guide a court in determining where the balance of justice lies as between the parties, they are not intended as an exhaustive list of all of the factors that a court is permitted to consider.*” As the judge also observed (at para. 10 of her judgment), and as the plaintiff’s counsel correctly submitted, each case very much depends on its own facts.

**85.** Both Hamilton C.J. and O’Flaherty J. in *Primor* referred to the relevance of the Constitution in assessing the balance of justice. Hamilton C.J. referred to the “*implied constitutional principles of basic fairness of procedures*” as being a matter to which the court should have regard in assessing the balance of justice (at p. 475). O’Flaherty J. referred to the “*constitutional obligations to make sure that justice is neither delayed or denied*” (p. 521). Subsequent decisions have stressed the constitutional dimension as noted by the judge at para. 11 of her judgment.

**86.** In a series of judgments, Hogan J. in the High Court and, subsequently, in the Court of Appeal and Irvine J. in the Court of Appeal referred to the “*constitutional imperative*” to ensure the timely and effective administration of justice. In *Donnellan v. Westport Textiles Ltd.* [2011] IEHC 11, Hogan J. referred to the “*speedy and efficient despatch of civil litigation [being] of necessity an inherent feature of the court’s jurisdiction under Article 34.1.*” (para. 31). He continued:

“As I ventured to suggest in my own judgment in *O'Connor v. Neurendale Ltd.* [2010] IEHC 387, this constitutional imperative means that the courts have a jurisdiction (and, in an appropriate case, a duty) to exercise their powers in a way which will best ensure that a litigant's right to a hearing within a reasonable time is best vouchsafed...One might add that this duty also extends to protecting the public interest in ensuring the timely and effective administration of justice...” (para. 31)



- 87.** Hogan J. reiterated those sentiments in his judgment in the Court of Appeal in *Tanner* where he referred to the courts' *"fundamental constitutional mandate to administer justice as prescribed by Article 34.1 of the Constitution."* (para. 40)
- 88.** Similarly, in a series of judgments delivered in the Court of Appeal in 2015 and 2016, Irvine J. stressed that constitutional dimension. In *Collins*, she said:
- "More recently, the constitutional imperative to end stale claims so as to ensure the effective administration of justice and basic fairness of procedures has been emphasised in a number of judgments dealing with cases of delay. In addition, it must be recalled that Article 34.1 of the Constitution requires the courts to administer justice and that Article 40.3.2 guarantees the citizen the right to protect their good name. Quite independently of guarantees of basic fairness of procedures, these specific constitutional obligations also pre-suppose that litigation will be conducted in a timely fashion. If...justice is put to the hazard in a given case by undue and excessive delay, how, then, can the courts fulfil their constitutional mandate under Article 34.1?"* (para. 38)
- 89.** In *Cassidy*, Irvine J. referred to the *"constitutional imperative to bring to an end the culture of delays in litigation so as to ensure the effective administration of justice and the application of procedures which are fair and just."* (para. 39).
- 90.** In *Millerick*, Irvine J. said:

*"Finally, recent decisions of the Superior Courts emphasise the constitutional imperative to bring to an end the all too long standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures. These decisions have emphasised the constitutional provisions contained in Article 34.1 which require the courts to administer justice. This constitutional*

*obligation presupposes that the court itself will strive to ensure that litigation is conducted in a timely fashion.” (para. 40)*

**91.** In *Collins and Millerick*, Irvine J. cited with approval the following observations of Hogan J. in the High Court criticising the tolerance previously exercised by the courts for inactivity on the part of litigants in *Quinn v. Faulkner T/a Faulkners Garage* [2011] IEHC 103:

*“While as Charleton J. pointed out in Kelly v. Doyle [2010] IEHC 396 it would be wrong for the court to strike out proceedings because of judicial disapproval. It must also be acknowledged that experience has also shown that the courts must also become more active in terms of undue delay, since past judicial practices which have tolerated such inactivity on the parts of litigants and which led to a culture of almost ‘endless indulgence’ towards such delays led in turn to a situation where inordinate delay was all too common: see e.g. the comments of Hardiman J. in Gilroy v. Flynn [2004] IESC 98, [2005] 1 ILRM 290 and those of Clarke J. in Rodenhuis and Verloop v. HDS Energy Limited [2010] IEHC 465.” (para. 29) (quoted by Irvine J. in Collins at para. 39 and in Millerick at para. 40).*

**92.** As well as stressing the constitutional aspects, since the comments of Hardiman J. in the Supreme Court in *Gilroy*, the courts have also had to consider their obligations, stemming from Ireland’s obligations under Art. 6.1 of the Convention and the jurisprudence of the European Court of Human Rights to ensure that civil rights and liabilities are determined within a reasonable time.

**93.** These developments were all referred to and considered by the judge in her detailed judgment, (for example, at para. 11). The judge correctly noted that as a result a stricter approach came to be taken by the courts when dealing with delays in the conduct of litigation. The judge correctly observed that while the fundamental principles to be applied

have not changed since *Primor*, “the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court’s obligation to ensure that litigation is progressed to a conclusion with reasonable expedition.” (para. 11)

**94.** That recalibration and the reasons for it were explained by Clarke J. in his judgment in the Supreme Court in *Comcast International Corporation & Ors. v. Minister for Public Enterprise* [2012] IESC 50 (“*Comcast*”). While noting that the overall test remained the same, the factors first identified by Hardiman J. in *Gilroy* require that the application of the test be approached “on a significantly less indulgent basis than heretofore” (para. 3.9).

**95.** At para. 3.13, Clarke J. stated:

“...I do, remain of the view that tightening up is required. While the court will, understandably, be concerned to balance the interests of justice arising in the case before it, and, in that regard, to consider all relevant facts, nonetheless the overall approach of the courts, if unduly lax, 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 its progress is adversely affected by a culture of delay.”

**96.** Among the factors relevant to the balance of justice identified by Hamilton C.J. in *Primor* are any relevant delay on the part of the defendant and conduct amounting to acquiescence in the plaintiff’s delay on the part of the defendant. In some of the cases a distinction is drawn between culpable delay on the part of the defendant in taking a step in the action and mere inaction by a defendant who does nothing to advance the claim and does not seek to have it dismissed: see, for example, the judgment of Fennelly J. in *AIBP* (at p. 519) and that of Irvine J. in the Court of Appeal in *Millerick* (at para. 33). The validity of that distinction was doubted by McKechnie J. in his judgment in the Supreme

Court in *Comcast*. Nonetheless, in a passage frequently cited, Fennelly J. in *AIBP* observed that:

*“The defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him it would have to amount in the particular circumstances to something ‘akin to acquiescence’ as indicated in the judgment of Henchy J. [in O’Domhnaill].”* (at pp. 519-520)

**97.** N6’s behaviour in the present case is, therefore, relevant to the assessment of the balance of justice and was a factor considered by the judge in her decision on N6’s application.

**98.** Also significant in the factors identified by Hamilton C.J. in *Primor* is his acknowledgment that prejudice to a defendant could arise in many ways and is not confined to the risk that a fair trial might not be possible. It can also include damage to a defendant’s reputation and business and indeed other forms of prejudice. A good example of prejudice in addition to “fair trial” prejudice can be seen in the judgment of Noonan J. in the Court of Appeal in *McGuinness*. In that case, among the types of prejudice found by the court to tilt the balance of justice in favour of dismissing the claim was having serious claims hanging over the heads of professional people over a protracted period of time (para. 26). In *Myrmidon*, MacGrath J. referred to the prejudice to defendants arising from *“the oppressiveness of a claim hanging over them for such a period of time”* (para. 50). As a matter of principle, therefore, in assessing where the balance of justice lies, the court can consider prejudice other than “fair trial” prejudice. The judge did so in this case and cited with approval the comments made by MacGrath J. in *Myrmidon* to which I have just referred.

**99.** Also of significance to the question of prejudice to a defendant is the clarification by the Court of Appeal in a series of judgments in 2015 and 2016 of the degree of prejudice

which must be established in order to have a claim dismissed. Having described the two strands of jurisprudence potentially relevant where there has been a delay in the prosecution of a claim or a lengthy period of time between the relevant evidence giving rise to the claim and a trial. Irvine J. in the Court of Appeal in *Cassidy* stated that, for the purposes of the third limb of the *Primor* test “*which obliges the defendant to prove that the balance of justice favours the dismissal of the claim*”, the defendant does not have “*the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the O’Domhnaill test.*” (para. 35). Irvine J. explained that while a real risk of an unfair trial or an unjust result is one of the factors which can be relied on by a defendant seeking to persuade the court that the balance of justice favours the dismissal of a claim, the defendant “*does not have to establish prejudice to the point that it faces a significant risk of an unfair trial*”. (para. 36). She continued:

“*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.*” (at para. 36)

**100.** Irvine J. noted that that followed from the judgment of Kearns J. in the Supreme Court in *Stephens v. Flynn* [2008] 4 IR 31 where he accepted that the defendant only had to establish “*moderate prejudice*” arising from the delay for the purposes of the third limb of the *Primor* test. On the other hand, where a defendant seeks to rely on the *O’Domhnaill* strand of jurisprudence, it must persuade the court that there is “*a real risk of an unfair trial*” (para. 37). Irvine J. described that as a higher standard of proof than that imposed on a defendant under the third limb of the “*Primor*” test. In *Cassidy* she said:

“*Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice.*” (para. 37)

**101.** Irvine J. repeated those comments in *McNamee* (at para. 34) and summarised the position as follows:

*“Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the Primor test.”* (para. 35)

**102.** In *Millerick*, Irvine J. reiterated that *“in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings.”* (para. 32)

She went on to say:

*“That 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. [in Primor]... ”* (para. 32)

**103.** The judge referred to a number of these cases and applied the principles stated in them in assessing the prejudice relied on by N6 in support of its application. (see paras. 23-30 of the judgment).

**104.** The plaintiff contends that there are certain categories of cases in which the risk of prejudice, including moderate prejudice, will be considerably lower than in other cases on the basis of the evidence likely to be adduced at the trial. One such category, the plaintiff claims, are expert evidence cases, namely those cases that can be determined largely on the basis of expert evidence and not on the basis of witnesses whose evidence may suffer from frailties of recollection due to the delay or lapse of time involved. The plaintiff claims that support for those cases being in a separate category of cases can be seen in the judgments

of Faherty J. in the High Court in *Kilroy* and of Noonan J. in the High Court in *Cavanagh* as well as in *Manning* and *Nolan*. Another such category, the plaintiff contends, are the “documents” cases. The plaintiff relies on cases such as *Kenny* (where Noonan J. in the Court of Appeal held that the case at issue was not one where the determination of the issues could largely be made by reference to documentary evidence thereby reducing the potential for injustice arising from the frailty of the recollection of witnesses) and *Murphy* (where MacGrath J. in the High Court held that sufficient prejudice had not been established due to the fact that considerable focus was likely to be placed at the trial on the contents of contractual documents).

**105.** While it is unnecessary to decide for the purposes of this appeal whether the plaintiff is correct in his contention that there are certain categories of cases such as expert evidence cases and documents cases which should be treated differently to other cases, I do not find it particularly helpful to draw such a distinction in principle. It is undoubtedly the case that there are certain cases in which it may be more difficult for a defendant to establish prejudice, even moderate or marginal prejudice, where the issues in the case largely turn on expert evidence or on documents and not on witnesses whose evidence may have become impaired over the passage of time. However, it is difficult to distinguish those cases from others as a matter of principle for at least two reasons. The first is that each case has to be decided on the basis of its own particular facts. The second reason is that the suggested categorisation of these types of cases as being different to other cases is based solely on one form or type of prejudice, namely, “fair trial” prejudice. As we have seen, there are of course many other forms of prejudice apart from “fair trial” prejudice which are potentially relevant in the assessment of where the balance of justice lies in a particular case. For those reasons, the treatment of expert evidence cases or documents cases as a separate category of cases is not particularly helpful. It is preferable, in my view, to consider on the

facts of each case the nature of the prejudice asserted by the defendant and to weigh that prejudice as part of the overall assessment of where the balance of justice lies. That is not to say, however, that it may not be considerably more difficult for a defendant in certain types of cases to establish sufficient prejudice to justify the dismissal of a case.

**(c) Decision on Plaintiff's Appeal**

**106.** I am satisfied that the judge's decision to accede to N6's application and to dismiss the plaintiff's claim against N6 on the basis of the *Primor* test was the correct one.

(i) Inordinate and Inexcusable Delay

**107.** Both in the High Court and in this Court the plaintiff's counsel fairly and reasonably accepted that the plaintiff was responsible for inordinate and inexcusable delay in the prosecution of his case against N6. The concession in the High Court was limited to a period of delay of approximately five and a half years. The concession was not expressly so limited before this court. However, when pressed on the extent of the concession, the plaintiff's counsel very fairly acknowledged that having conceded that period of delay as being inordinate and inexcusable, the plaintiff was not really in a position to dispute the judge's finding that the length of that inordinate and inexcusable delay was greater than expressly conceded by the plaintiff. Even without that concession on behalf of the plaintiff, however, I am quite satisfied that the judge was correct in concluding that the delay on the part of the plaintiff in the prosecution of his claim against N6 was inordinate and inexcusable in respect of the entire period of the delay from the commencement of the proceedings in March 2012 right up to the bringing of the motion to dismiss by N6 and indeed continued after that in the prosecution by the plaintiff of his appeal to this court.



**108.** The chronology of events show that the motorway works were carried out between 2006 and 2009 with the first incident of flooding occurring in November 2009. The proceedings were commenced in March 2012, more than ten years ago. The plaintiff's case against N6 will involve events dating back up to at least sixteen years ago at this stage. Taking account of the additional time involved in the bringing of this appeal, it is unlikely that a trial would take place before early 2024. N6 had to motion the plaintiff for particulars and for engineering inspection facilities. Its solicitors had to press plaintiff's solicitors throughout that period to progress the plaintiff's claim against N6. Notwithstanding that, the plaintiff's case was not moved on against N6 or against its co-defendant, the Council. The judge was right to highlight the repeated failure by the plaintiff's solicitors to respond to correspondence from N6's solicitors seeking to get the case on.

**109.** In light of the chronology of events referred to in the judgment of the High Court and outlined earlier in this judgment, I am satisfied that the judge was correct in concluding that the plaintiff's delay in the prosecution of his claim against N6 was inordinate and inexcusable in respect of the entire period between the commencement of the proceedings and the bringing by N6 of its motion to dismiss. I am also satisfied that the plaintiff's tardiness continued in the prosecution of his appeal by failing to serve the notice of appeal within the required time period and by serving his written submissions more than eight weeks after they were required. The judge was quite right, therefore, in my view to hold that the plaintiff is responsible for the inordinate and inexcusable delay in the prosecution of his case against N6. The judge was correct in concluding, therefore, that the first and second limbs of the *Primor* test were satisfied.

(ii) Balance of Justice

**110.** The consequence of so finding is that the judge was then required to consider the third limb, namely, where the balance of justice lies, by reference to the approach set out in *Primor* and by the Court of Appeal in the series of cases in 2015 and 2016 including *Cassidy*, *McNamee* and *Millerick*. The judge was required to consider whether the balance of justice lay in favour of permitting the plaintiff's case against N6 to proceed or in favour of the dismissal of that case. In doing so, the judge was required to consider various matters including any relevant delay on the part of N6 and the question of prejudice. With respect to prejudice, the judge was required to consider not only "fair trial" prejudice but also any other type of relevant prejudice. That is precisely what the judge did in her careful and detailed judgment.

**111.** With respect to the delay on the part of N6 in delivering its defence, I am satisfied that the judge was correct in concluding that that delay was not relevant or significant in terms of the manner in which the plaintiff progressed his claim against N6. It is true that culpable delay on the part of a defendant in taking a step in the action can have the effect of cancelling out the effect of the plaintiff's delay or redressing the balance of fault for that delay (as discussed by Fennelly J. in *AIBP*). However, the judge considered the reason offered on behalf of N6 for the delay in delivering its defence. The judge concluded that the delay in the delivery of the defence occurred as a result of a genuine oversight in that N6's solicitor genuinely thought that the defence had been filed some years before April 2017. She also concluded that that delay did not impact in any way on the plaintiff's ability to progress his case. In my view, those conclusions are amply supported by the evidence and, in particular, by the correspondence. N6's solicitors were consistently and persistently writing to the plaintiff's solicitors seeking to get them to move the case on and also seeking a copy of the defence delivered by the Council. It is clear from the correspondence that they were not seeking a copy of the defence in order to draft N6's

defence but rather to press the plaintiff to serve a notice of trial or to enable them to do so themselves. That is clear from a review of the entire body of correspondence exchanged between the parties but, in particular, from N6's solicitor's letters of 24 March 2017 and 18 April 2017.

**112.** I am in complete agreement with the judge, therefore, that the oversight on the part of N6's solicitors in delivering its defence to February 2019 was not material on the particular facts of this case, did not impact on the plaintiff's ability to progress his case and did not redress the balance of fault or cancel out the effects of the plaintiff's delay. I also agree with the judge's conclusion that there was nothing in N6's conduct which could be said to amount to acquiescence in the plaintiff's delay. On the contrary, I agree with the judge's conclusion that N6's solicitors were persistent in their efforts to try to get the plaintiff to progress the case. There was, therefore, no conduct on the part of N6 which amounted to acquiescence in the plaintiff's delay or which caused the plaintiff to incur further or unnecessary expense. In fairness, the plaintiff did not contend otherwise on the appeal.

**113.** I turn to the judge's consideration of the other aspects of balance of justice. I have already indicated that insofar as the judge appeared to suggest that the onus of proof lay on the plaintiff to prove that the balance of justice lay in favour of allowing his case to proceed against N6, I do not think that that is correct. As the moving party on the application, N6 bore the onus of proving each limb of the *Primor* test including that the balance of justice of in favour of the dismissal of the claim. Where I think some confusion may have arisen is where the judge came to consider whether the plaintiff could point to any "*countervailing circumstances*" to counteract or cancel out the effects of the plaintiff's delay, as discussed by Fennelly J. in *AIBP*. The fact that it is open to a plaintiff to point to such countervailing circumstances, including a disadvantage or disability affecting the

plaintiff or a delay or acquiescence on the part of a defendant, does not mean that the burden of proof in terms of where the balance of justice lies shifts to the plaintiff. As the moving party on the application, the defendant continues to bear that onus of proof (see, for example, *per* Irvine J. in *Cassidy* at para. 35). The establishment of such countervailing circumstances may, of course, serve to make it more difficult for the defendant to discharge that onus but it does not shift the onus to the plaintiff. However, in my view, the decision on where the onus of proof in the case lies is not material to the outcome of this appeal nor did it feature at all in the submissions of the parties in the appeal. I am satisfied that the judge would have reached the same decision as she did, had she concluded that N6 had the onus of proving that the balance of justice lay in favour of the dismissal of the claim against it.

**114.** Having concluded that the plaintiff's delay was inordinate and inexcusable and that there were no countervailing circumstances which might redress the balance of fault or cancel out the effects of the plaintiff's delay, the judge then considered the question of prejudice to N6. That prejudice had to be balanced against the loss by the plaintiff of his entitlement to pursue his case against N6 as a result of his inordinate and inexcusable delay. I am satisfied that the judge correctly identified the legal test to be applied in assessing the extent of the prejudice claim by N6. She referred to a number of the relevant Court of Appeal judgments including *Cassidy* and *McNamee* which outline the extent of the prejudice which a defendant has to prove in a case where the court has concluded that the plaintiff's delay has been inordinate and inexcusable. In such a case, as Irvine J. noted in *Cassidy* and again in *McNamee*, the defendant:

*“need only prove moderate prejudice arising from that delay in order to succeed under the Primor test.” (per Irvine J. at para 35 of Millerick)*

**115.** The judge also correctly noted that the type of prejudice on which N6 could rely could range from demonstrating that it was unable to obtain a fair trial to the general inconvenience of being subjected to protracted litigation and that the effect and significance of the prejudice claimed would vary from case to case. I agree with the judge's conclusion that the prejudice relied on by N6 did not establish that it would be impossible for N6 to obtain a fair trial. However, the judge correctly concluded that it was not necessary for N6 to establish that it would be unable to receive a fair trial in order to rely on the *Primor* test as discussed in the subsequent cases such as *Cassidy*, *McNamee* and *Millerick*. The judge was correct in concluding that it was open to N6 to rely on other types of prejudice and not merely prejudice in the defence of the proceedings. I referred earlier to the relevant legal principles in that regard.

**116.** I am satisfied that the judge correctly considered and weighed up the prejudice advanced by N6 and concluded that, while they would not necessarily lead to an unfair trial, there were nonetheless "*weighty concerns*" which had to be considered as part of the court's assessment of the balance of justice. I have referred earlier to the various matters relied on by N6 in its assertion of prejudice. They include the fact that N6 is a special purpose vehicle which was incorporated solely for the purpose of constructing the M6 motorway which was completed in 2009. It has no role in maintaining or operating the motorway and has no employees, office or other facilities. It has no ongoing purpose and has not traded for several years. None of those involved in carrying out the work remain in its employment. It is stated on its behalf that the majority of its former employees are no longer within the jurisdiction and, in many cases, are not traceable. It is understandably anxious to wind up its affairs in light of the fact that the very purpose for which it was established ceased on completion of the motorway in 2009. It relies on further ongoing prejudice by having to comply with regulatory requirements and to incur the ongoing costs

and administrative burden, small as that might be, of doing so. N6 relies on a combination of factors relevant to its ability to have a fair trial (although properly conceding that it could probably not establish that a fair trial would be impossible) as well as factors arising from the fact that it has to continue in existence solely by reason of the continued existence of the proceedings, the progression of which has been so seriously delayed as a result of the inaction on the plaintiff's side. I am satisfied that the judge was entitled to take into account all of these factors in her assessment of where the balance of justice lay.

**117.** I am also satisfied that matters which must also be factored into the assessment of the balance of justice include the fact that the plaintiff's solicitors did furnish a copy of the plaintiff's then engineer's report with the replies to particulars in July 2014 and that N6's engineer was afforded inspection facilities in September 2015. It should be noted, however, that the plaintiff replaced his engineer in 2016 and that the report provided to N6 with the replies to particulars was prepared by his previous engineer who having been replaced, would presumably not be giving evidence at any trial. It is true too that there is no suggestion that N6's engineer will not be available to give evidence on its behalf. N6 was also in a position to put in a defence making specific pleas of contributory negligence which must presumably have been based on advice from its engineer. Also relevant is the fact that N6 has not identified any specific witness who cannot be traced or who would otherwise be unavailable to give evidence at any trial. These are all factors relevant to the question as to whether a fair trial would be impossible. They might well mean that if N6 was relying on the *O'Domhnaill* strand of jurisprudence, it could not succeed having the case against it dismissed. That much was effectively conceded by N6 at the hearing of the appeal. However, N6 is not just relying on "fair trial" prejudice but also the prejudice of having effectively to remain in existence solely as a result of the existence of these proceedings with the consequent cost and inconvenience of doing so, in circumstances

where there has been inordinate and inexcusable delay on the part of the plaintiff in progressing them.

**118.** In submissions N6 referred to other relevant elements of “fair trial” prejudice on which it was seeking to rely, including the fact that there are issues between N6 and the Council as to the responsibility for the alleged flooding, the need to review design and construction records dating back now almost sixteen years, the likely changes in the topography of the area in the period since construction and the need to consider alternative sources and causes of the flooding.

**119.** Having considered all of these matters afresh, I am satisfied that the judge was correct in her assessment of the balance of justice and, in particular, in concluding that the elements of prejudice relied upon by N6 were sufficient to tilt the balance of justice in favour of the dismissal of the plaintiff’s case against it. The various different elements of prejudice relied on by N6 together, in my view, are sufficient to enable the court properly to conclude that N6 has discharged the onus of proof which lies upon it to establish “*moderate*” prejudice in circumstances where the plaintiff has been guilty of inordinate and inexcusable delay in the conduct of his case against N6. Those elements of prejudice are all relevant, in my view, to the court’s attempt to aim at a “*global appreciation of the interests of justice*” (being the phrase used by Fennelly J. in *AIBP* at p.518).

**120.** I have dealt earlier with the plaintiff’s contention that the judge was incorrect in not treating this case as falling within a separate category of case namely, the expert evidence cases. I do not accept that the plaintiff’s criticisms of the judge’s judgment in that respect are valid. As I have explained earlier, I do not find it particularly helpful to seek to adopt an *a priori* categorisation of cases as a matter of principle, in circumstances where each case must be determined on its particular facts. That is how the judge approached N6’s application in this case.

**121.** I am also satisfied that the judge was correct in the manner in which she treated the two cases principally relied on by the plaintiff in the High Court, namely, *Manning* and *Nolan*. The judge made the obvious point that those cases were decided before the Court of Appeal delivered the important judgments in 2015 and 2016 clarifying the extent of the prejudice which a defendant has to establish where there has been inordinate and inexcusable delay on the part of a plaintiff. The judge was careful to note that she was not necessarily saying that either case would be decided differently now. In my view, the judge was correct in distinguishing *Manning* and in making the point that the facts of that case were unusual. It was central to Laffoy J.'s decision in that case that the relevant scientific tests could be replicated. It was also significant that the relevant testing had taken place many years prior to the events giving rise to the proceedings. Although not expressly stated by the judge in her judgment, it was also regarded as significant by Keane J. in *Nolan* that test reports in respect of the allegedly defective bricks had been in existence for some time and that the bricks remained available for inspection and for any further testing that might be required.

**122.** Bearing in mind that each case must be decided on its facts, I do not agree with the criticisms made of the way in which the judge dealt with *Manning* and *Nolan*. Further, the judge correctly took into account the other forms of prejudice which were relied on by N6 in addition to the "fair trial" prejudice relied on.

**123.** Nor do I think there is any substance to the plaintiff's complaint that the judge misunderstood, overstated or misstated the case which the plaintiff was making in terms of the importance to the case of the expert engineering evidence. While the judge did state that the plaintiff had not established that this was a case which would "*necessarily proceed solely on the basis of expert evidence*", and while the plaintiff contends that he never made that case, I do not see how assuming the plaintiff is correct in that contention, that can



affect the validity of the judge's conclusion on this issue. Whatever about the argument advanced by the plaintiff, the judge was undoubtedly correct in her conclusion that, if the case were to proceed to trial, there would be evidence apart from expert engineering evidence in the case. It may well be the case that the plaintiff or N6 or the Council would be relying significantly on expert evidence in support of, and for the purpose of defending, the plaintiff's case. However, as correctly stated by the judge, the fact that that is so and that such evidence will be important does not mean that it is the only evidence. The judge was correct in concluding, as N6 submitted, that there may well also be other issues relating to the design and carrying out of the works and the processes involved and the ground and surface water conditions before and during the works as well as changes to those conditions in the period since then as N6 submitted. While expert evidence is undoubtedly very important in flooding cases such as this, experience has shown that evidence of non-expert or lay witnesses can also be quite significant. This can be seen, for example, in the judgment of the High Court (Laffoy J.) in *Superquinn Limited v. Bray Urban District Council* [1998] 3 IR 542. Laffoy J. attached significant weight to the evidence of eyewitnesses in the case in terms of the nature and cause of the flooding the subject of that case. In my view, therefore, the judge was correct in recognising that it is likely that witnesses other than the engineers who were involved in the inspections carried out on behalf of the plaintiff, and on behalf of N6 and more laterally on behalf of the Council would likely have to give evidence in the case.

**124.** I am satisfied that the judge understood the case being made by the plaintiff and did not misunderstand, misstate or overstate that case. She was right to consider as part of her assessment of the balance of justice the fact that evidence in addition to the engineering evidence would probably be required at the trial and to take account of the fact that the relevant events took place, at that stage, more than fifteen years earlier.

## **8. Conclusion**

**125.** In conclusion, therefore, I am satisfied that the judge applied the correct test, namely, that contained in *Primor* as subsequently considered by the Court of Appeal in cases such as *Cassidy, McNamee and Millerick*, was right to conclude that the plaintiff was responsible for inordinate and inexcusable delay in the prosecution of his claim against N6, was right to conclude that there was no material culpable delay on the part of N6, identified several factors relevant to the question of prejudice and correctly concluded that, by reason of the prejudice suffered by N6 as a result of the plaintiff's delay in the conduct of his case against N6, the balance of justice lay in favour of dismissing the plaintiff's case against that defendant.

**126.** In those circumstances, I would uphold the decision of the High Court, dismiss the appeal and affirm the order of the High Court.

**127.** As the plaintiff has been unsuccessful in his appeal, it would seem to me that he should be ordered to pay N6's costs of the appeal, such costs to be adjudicated upon in default of agreement. I would make an indicative order for costs in those terms. If the plaintiff wishes to argue for a different order for costs, he may, within fourteen days from the delivery of this judgment, contact the Office of the Court of Appeal and request a short hearing at which the Court will hear submissions from the parties on the issue of costs. In the event that the plaintiff requests such a hearing and is unsuccessful in altering the indicative order for costs referred to above, he may be required to pay the costs of that further hearing.

**128.** As this judgment is being delivered electronically, Faherty J, and Ní Raifeartaigh J. have requested that I state that they are both in agreement with this judgment and with the order proposed.

