THE HIGH COURT

[2009 No. 2999 P.]

BETWEEN

LYNETTE KILROY

PLAINTIFF

AND

GLENFORD BUILDERS LIMITED,

EAMONN HASSETT AND COMPANY LIMITED

(IN VOLUNTARY LIQUIDATION), BURROUGHS DESIGN

PARNERNERSHIP (IRELAND) LIMITED TRADING AS

BURROUGHS, AND FRANK ELMES AND CHARLES D. ELMES

TRADINGS AS FRANK ELMES ARCHITECTS

DEFENDANTS

AND

THE HIGH COURT

[2011 No. 10401 P.]

BETWEEN

PAUL GRAY

PLAINTIFF

AND

GLENFORD BUILDERS LIMITED, EAMONN HASSETT

AND COMPANY LIMITED (IN VOLUNTARY LIQUIDATION),

BURROUGHS DESIGN PARTNERSHIP (IRELAND) LIMITED

TRADINGS AS BURROUGHS, AND FRANK ELMES AND CHARLES

D. ELMES TRADING AS FRANK ELMES ARCHITECTS

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 11th day of July, 2018

1. These matters come before the Court by way of the applications, respectively, of the third defendant, and the fourth and fifth defendants, to dismiss the plaintiffs' claims for want of prosecution and/or for inordinate, inexcusable and prejudicial delay.

2. For the purpose of the within judgment the proceedings bearing record no. 2009/2999 P will be referred to as "the Kilroy proceedings", and the plaintiff therein referred to as the first plaintiff, and the proceedings bearing record no. 2011/10401 P will be referred to as "the Gray proceedings" and the plaintiff therein referred to as the second plaintiff.

The Kilroy proceedings

3. The Kilroy proceedings concern an apartment known as No. 6, the Cedar, Cruagh Wood, Stepaside, County Dublin which is one of approximately 132 units constructed as a residential development at that location. The first plaintiff purchased the apartment in or about December 2005 and went into occupation thereafter. She alleges that there are various defects in her apartment and consequential dampness, condensation and mould growth. It is alleged that the property was inadequately insulated and/or that the flooring of the property did not have a proper damp proof membrane. The plaintiff claims damages for alleged personal injuries in the form of asthma and sinusitis as a result of the alleged defects and also claims special damages for remedial works.

4. The first defendant was a building contractor which entered into a building contract with the first plaintiff dated 3rd June, 2005. It ceased trading and was dissolved with effect from 20th January, 2016. The solicitors for the first defendant came off record on 24th October, 2011. The second defendant appears to have been a contractor engaged by the first defendant and is in voluntary liquidation. The third defendant is a firm of engineers. The fourth and fifth defendants were architects involved in the building project. The fifth defendant is since deceased. Accordingly, reference hereafter will largely be to the fourth defendant.

5. The first plaintiff claims that the third defendant were the engineers responsible for the structural engineering of the apartment complex and who had oversight of the building project. She claims that the fourth defendant was also engaged in both a primary and a supervisory capacity as the retained architects for the building project.

6. The first plaintiff commenced her proceedings against the first defendant by way of a personal injuries summons which issued on 31st March, 2009.

7. By Order of the High Court (Charleton J.) made 13th July, 2010, the second, third, fourth and fifth defendants were joined as defendants.

8. On 22nd August, 2010 the first plaintiff issued her amended personal injuries summons whereby she claims that she suffered

personal injuries, loss, damage, inconvenience and expense as a result of, *inter alia*, the negligence and breach of duty including breach of statutory duty, nuisance, breach of contract and misrepresentation and/or negligent misstatement of the defendants, their respective servants or agents.

9. The amended personal injuries summons was served on the third defendant on 4th November, 2010. An appearance was filed on 11th November, 2010. The third defendant raised a notice for particulars on 27th January, 2011 and replies were received on 29th June, 2011. On 8th September, 2011, a notice seeking further and better particulars was served by the third defendant and on 15th September, 2011 it delivered its defence. On 3rd February, 2012, a notice of indemnity and/or contribution was served on the fourth and fifth defendants by the third defendant. On 6th March, 2012, the first plaintiff sought voluntary discovery from the third defendant. The first plaintiff replied to the request for further and better particulars on 16th July, 2012.

10. The fourth and fifth defendants entered an appearance to the amended personal injuries summons on 13th January, 2011 and raised a notice for particulars on 24th February, 2011. On 29th June, 2011, the first plaintiff replied to the notice for particulars. On 6th March, 2012, the plaintiff requested that the fourth and fifth defendants make voluntary discovery. The fourth and fifth defendants' personal injuries defence was delivered on 13th July, 2012. On the same date they wrote to the plaintiff's solicitors in respect of the plaintiff's request for voluntary discovery.

11. On 10th October, 2013, the fourth and fifth defendants served the third defendant with a notice of indemnity and/or contribution.

12. The fourth and fifth defendants' letter to the first plaintiff in response to the latter's request for voluntary discovery was not replied to until 14th February, 2014 when an amended request for voluntary discovery was made. On 8th September, 2014, the fourth and fifth defendants requested that the first plaintiff confirm the extent of her alleged claim and/or to discontinue the proceedings.

13. On 16th July, 2015, the first plaintiff issued a notice of intention to proceed.

14. The fourth and fifth defendants' motion to dismiss the first plaintiff's claim for want of prosecution and/or on the grounds of delay was filed on 23rd June, 2016. The third defendant's motion to dismiss issued on 14th July, 2016.

15. The third and fourth defendants maintain that the first plaintiff has failed to take any step in her proceedings since in or about 2012.

16. As between the third defendant and the first plaintiff, some seven affidavits have been sworn, four by Mr. Alistair Burroughs, Managing Director of the third named defendant and three by the first plaintiff.

17. In his grounding affidavit, Mr. Burroughs takes issue with the generic manner in which the first plaintiff's pleadings are couched. He avers that the criticisms levelled against the third defendant do not appear to be directed to the structural issues for which the third defendant was retained in the development project. He avers that the tenor of the first plaintiff's complaint is a failure to insulate the premises which, he states, was a matter for the architects and/or the appointed mechanical and electrical engineers' remit. He avers that "[i]nsulation is not a structural issue relating to the stability, stiffness, robustness and durability of the basic structure for which a Civil and Structural Consulting Engineer such as the Third Named Defendant would normally be responsible." He avers that insofar as a claim for misrepresentation has been made, the plaintiff has neither particularised nor withdrawn it and has simply attempted to respond generically so that the nature of the misrepresentation alleged against either the third and/or the fourth defendants remains "completely opaque". He avers that the first plaintiff has provided "almost no sensible information relating to the issues alleged against the Third Named Defendant" and that no effort has been made to clearly explain the actual nature of the defect or why it would conceivably be the responsibility of the third defendant.

18. He further avers that no useful step has been taken by the first plaintiff since the service of the notice of intention to proceed and notes that the service of that document was precipitated by correspondence from the third defendant's solicitors.

19. Mr. Burroughs further refers to another seven set of proceedings (which include the second plaintiff's proceedings) which were issued and served on the behalf of other clients of the first plaintiff's solicitors who have apartments in the same complex.

20. Mr. Burroughs highlights correspondence which passed between the first plaintiff and the third defendant. On 21st August, 2015, the third defendant's solicitors wrote requesting, *inter alia*, that the plaintiff might provide copies of any expert report procured by her. No response was received. On 13th January, 2016, the third defendant's solicitors again wrote making complaint about the absence of a response and requesting that the first plaintiff serve a notice of discontinuance, failing which a motion to dismiss would be brought. This and a further letter dated 29th January, 2016 failed to elicit a response. The third defendant sent a further letter on 17th February, 2016, advising that an application would be made to strike out the first plaintiff's proceedings. This precipitated a response dated 24th February, 2016 from the first plaintiff's solicitors which advised that they were instructed to proceed with the matter by way of issuing a motion for discovery in the Kilroy proceedings and by way of delivering statements of claim in the other cases.

21. No motion for discovery was in fact brought and no statements of claim delivered in the other cases. The Court has been advised that since the issue of the within motions, all of these proceedings, save those of the first and second plaintiffs have been discontinued.

22. As a basis for the claim that the first plaintiff's delay is inordinate and inexcusable, Mr. Burroughs points to the fact that the plaintiff's proceedings did not issue until 31st March, 2009, some three years and five months post completion of the development, and some considerable time after the plaintiff first complained about dampness, and almost a year after mould growth was allegedly detected in the plaintiff's apartment by a building surveyor. He avers that the third defendant was not joined as a defendant until July, 2010, some fifteen months after the proceedings had commenced and almost five years after the development had been completed. He states that the first plaintiff's proceedings have "progressed exceptionally slowly" since then.

23. Mr. Burroughs avers the prejudice which has been caused to the third defendant by the delay "is by no means general in character". It is averred that over and above the failure of the first plaintiff to provide any sensible breakdown of the claim being made against the third defendant, the position of the third defendant has been severely prejudiced by the death in 2014 of Mr. Graham Elmes, a director with the third defendant. Mr. Burrough states avers that while he is managing director of the third defendant, he was not directly involved in the engineering projects carried out by the third defendant in respect of the development of Cruagh Woods. The third defendant had a small number of engineers, namely Eamon Sweetman, Denis O'Brien, Robert Power and Graham Elmes none of whom now carry out engineering work for the third defendant. Mr. Burroughs avers that it was Graham Elmes who was most closely connected with the building project and accordingly "a person of considerable importance in the Defence of the

action, given his close knowledge of the file and what was undertaken by way of responsibility to the First Named Defendant". Mr. Burroughs avers that the late Mr. Elmes would have been on site when the foundations were being constructed. He avers that from his enquiries, he has determined that Mr. Sweetman had a limited role in relation to the project in that his name appears on certain certificates which he signed on behalf of the third defendant. Mr. Burroughs states that Mr. Sweetman has little or no recollection of his involvement in the project and that any site visit would have been carried out by other members of the third defendant's staff. It is thus averred that "the death therefore of Mr. Elmes is one which is both ultimately and also highly prejudicial for the Defence of the case as he was the person who provided instructions on matters of fact to the solicitors acting in the defence of these proceedings."

24. The first plaintiff swore a replying affidavit on 24th November, 2016. At the outset she accounts for the delay in the prosecution of her proceedings on the basis that she was under the impression "illusory as it now appears" that her legal team was progressing her case and that the passage of time between legal events in the case was due to inherent delays in the legal system rather than issues specifically attributable to the first plaintiff. The first plaintiff makes this averment on her own behalf and also on behalf of the second plaintiff (the Gray proceedings). She states that she has now changed "our entire legal team" and if cases are permitted to proceed, her now new legal team "intend to progress the matters as quickly as practicable".

25. She avers that arising from the damp issues she retained experts from 2008 and that opening up works were conducted in 2012 which showed that the floor of her apartment was composed of pre fabricated concrete slabs with no top screed, insulation or damp proof membrane.

26. The first plaintiff acknowledges that there is a passage of time (29th June, 2011 to 17th July, 2015) which may well be viewed as being inordinate but claims that the delay is excusable.

27. She refers, in particular, to the fact that in 2012 Waterman Moylan Engineering Consultants were on site taking samples from her apartment. She alludes to numerous unsuccessful attempts to contact her previous solicitors and unanswered requests for updates from the said solicitors. She refers to a number of personal events in 2014 and 2015, namely her marriage to the second plaintiff in June 2014, a time which she states that her and the second plaintiff's legal cases "were very far from our minds". In November 2014 she travelled to Australia to attend her brother's wedding. She refers to medical difficulties which commenced in or about March 2015 as a result of which she underwent medical treatment and surgery in the latter half of 2015 which rendered her unable to return to work until in or about April, 2016. She states that her return to work was against medical advice and was as a result of financial necessity. She avers that while she was dealing with her medical issues she "operated at all material times under the impression that [her] previous solicitors would deal with [her and the second plaintiff's cases] whilst we concentrated on our family and health". Accordingly, while she concedes the delay in the cases is inordinate she states that it should be excused for the reasons given.

28. The first plaintiff addresses Mr. Burrough's claim of prejudice as a result of the death of Mr. Elmes in the following terms:

> "15…Apart from this particularly bald assertion [that Mr. Elmes was responsible for the civil and structural engineering design of the development] the deponent does not tender any specific documentary evidence in support of this assertion and appears to be asking the Court to form the view that this person, in relation to the construction of some 132 accommodation units, was [the] only one capable of given this information. This, I say and believe, is quite a leap of faith to be undertaken. Furthermore, the interplay of relationships between the respective contracting parties in such a substantial development would be well documented and not a matter for personal evidence. A similar point arises in relation to the additional prejudice alleged in the Burroughs Affidavit due to the poor recollection of Eamon Sweetman, the unfamiliarity of Denis O'Brien with the project, and the fact that the deponent was 'never at the site'. It is also of note that Burroughs Affidavit is careful not to assert that there are no documents governing the complained of inter-relationships but rather purports to assert that a personal nexus and knowledge of the file of the deceased Mr. Elmes are of fundamental importance to the defence of the action.
>
> 16. The Third Defendant was involved in the construction of numerous developments within this jurisdiction and thereby bears responsibility in relation to any issues which may arise therefrom."

29. She also avers that it is the insurers on behalf of the third defendant who are defending the action and "thereby ample cover appears to remain in situ in this jurisdiction".

30. In his second affidavit, Mr. Burroughs takes issue with the first plaintiff's assertion that the third defendant had oversight of the building of the apartment project. He states that the third defendant were involved as structural engineers "which had nothing to do with the insulation of the projects and which is a matter either for the architect or the mechanical and electrical engineers". He further takes issue with the "shot-gun" approach adopted by the first plaintiff in naming a number of defendants without identifying with any clarity why any one person was responsible. He avers that insofar as the first plaintiff has involved the third defendant, an essential aspect of the third defendant's proofs would be that the best evidence would be put forward, which the third defendant is unable to do because of the death of its principal witness. He avers that the first plaintiff's attempt to speculate in relation to the value or otherwise of documents is unhelpful in circumstances where she herself has made no effort to distinguish between any of the defendants.

31. He further avers: (at para. 19)

> "Despite the protestations by the Plaintiff that the new legal team would in some way change matters, it is a matter of record that, despite the service of the Notice of Motion on 18th day of July 2016, it took until 24th November, 2016 for the Plaintiff to actually swear an Affidavit. While the Plaintiff may well seek to shift responsibility for this onto her current or former solicitors, the fact remains that the Plaintiff, at a remove of in excess 10 years after the events giving rise to her general complaint in relation to the dwelling, now proposes to deliver a "comprehensive Statement of Claim" in the matter. Leaving aside the fact that this is being proposed without exhibiting the amendments, the fact that the claim is in fact a personal injuries claim, with no such provision, the fact that the Plaintiff apparently intends to make yet a completely different claim, is a source of concern in its own right.

32. In her second affidavit sworn 15th March, 2017, the first plaintiff challenges Mr. Burrough's assertion that the third defendant's role was merely that of structural engineers. She refers, in particular, to the Opinion on Compliance furnished by the third defendant and to the Architects Opinion on Compliance furnished by the fourth and fifth defendants (all of which was done in 2005).

33. She refers to having commissioned Herr Engineering and Design Ltd to investigate and establish the extent of the dampness problem and to reports furnished by that firm in April, 2008, September, 2008 and January, 2011 which, she avers, identified that the construction of her apartment was not in compliance with Building Regulations.

34. With regard to the later survey report from Waterman Moylan Engineering Consultants dated 30th January, 2012, the first plaintiff avers that she spoke to her former solicitor about a week before the core tests were conducted by Waterman Moylan and that she "was informed that the Defendants had been invited to observe the tests being carried out by Waterman Moylan and/or to carry out their own inspection and investigations at the same time". She avers that the conclusions of the Waterman Moylan report were that the construction used in the ground floor slab of her apartment was seriously defective and in contravention of the Building Regulations.

35. In his third affidavit, Mr. Burroughs disputes the first plaintiff's assertion that the third defendant was invited to observe the tests being carried out by Waterman Moylan. He states that neither he nor his solicitor have knowledge of any such invitation. He further takes issue with the first plaintiff's assertion that the third defendant is now in the same position as it was in 2005 or 2012 and asserts that this cannot be the case given that Mr. Elmes is now dead. He further refutes the suggestion that the Opinion on Compliance furnished by the third defendant had any relevance to the issue of insulation or damp proof membranes and he avers that insofar as there were interactive inspections by the third defendant in 2005, these did not involve the opening up of works which had been completed.

36. In the course of her third affidavit, the first plaintiff asserts that some of the defects complained of "are visible from the external structure and are noticeable from a visual inspection of the exterior of the property." She asserts that "[t]his would have been identifiable from a visual site inspection for the purpose of certifying a property as being incompliance with building regulations". She again asserts that she was informed by her solicitors on record at the time that an invitation had been extended to the defendants to attend at the investigations being conducted by Waterman Moylan. She again reiterates that "it was not Mr. Elmes that certified the building was built in compliance with building regulations and in circumstances where there are visible defects to the exterior of the building, this would have been visible to Mr. Sweetman and would not have necessitated opening-up works." She further avers "[w]hile Mr. Burroughs [contends], at paragraph 17, that Mr. Elmes bore the [principal] responsibility for the project, Mr. Elmes delegated the responsibility of inspecting and signing off compliance to another representative of the Third Defendant. This delegation was presumably based on Mr. Elmes notes and memos taken at the time of the various milestone inspections and after an onsite visual inspection in order for Mr. Sweetman to be satisfied the building was compliant".

37. In his fourth affidavit, Mr. Burroughs refers to correspondence sent by the third defendant's solicitors on 16th June, 2017 to the first plaintiff's solicitors requesting, *inter alia*, details regarding the "visible defects" and of the invitation which it is claimed was sent to the third defendants to observe investigation works. He states that there was a "belated" response of 7th July, 2017 which merely states that the first plaintiff's present solicitors were advised that the first plaintiff's previous solicitors had advised her of the said invitation but that the first plaintiff did not have correspondence to this effect.

38. In response to the first plaintiff's reliance on the fact that Mr. Sweetman was the person responsible for signing the third defendant's opinion on compliance, Mr. Burroughs avers:

> "10… As previously deposed to, Mr. Elmes Deceased bore principal responsibility for the project. The difficulties involved in defending a case where there is a material witness who has died through the prolonged delay by the Plaintiff is amplified by the continued refusal of the Plaintiff to identify what she says were visible defects, which should have been identified at time of certification. The fact that in 2017 the Plaintiff is still not prepared to provide this information makes it all the more difficult to address the type of argument being put forward by the Plaintiff. The Defendant does not make the case that it has no Defence to the Plaintiff's claim, but makes the case that it has been significantly prejudiced in the defence of the claim because of the unavailability of a material witness. With due respect, the assertions made in relation to the adequacy of documentation are mere speculations on the part of the Plaintiff. The need to explain events, interpret notes and comment on what was or was not visible at the time of the original construction, are all matters which, in the ordinary course would be dealt with by the person with principal responsibility under the project. Given the amorphous character of the Plaintiff's latest allegations, the potential for further prejudice is palpable."

39. The fourth and fifth defendants' application to dismiss the plaintiff's claim is grounded on the affidavit of their solicitor, Ms Aoife Ryan. She avers therein to the first plaintiff's significant pre-commencement delay, in addition to the post-commencement delay. She avers that it is unfair and prejudicial to expect a defendant to properly defend proceedings brought against it which concerns matters which occurred in excess of ten years ago particularly in circumstances where the first plaintiff has demonstrated a clear want or absence of intention to prosecute her claim.

40. In her replying affidavit, the plaintiff highlights the same matters as were set out in her response to Mr. Burroughs. She asserts that the fourth defendant is attempting to "piggyback" on the third defendant's motion.

41. Ms. Ryan's second affidavit takes issue with the plaintiff's assertion that the fourth defendant is attempting to "piggyback" on the application brought by the third defendant in circumstances where the fourth and fifth defendants' motion issued a number of weeks prior to the third defendant's motion. She reiterates her complaint that the first plaintiff has not sought to explain any of the pre-commencement delay in respect of her claim. She highlights the fact that the professional negligence proceedings issued against the fourth defendant has resulted in the payment by him of increased yearly insurance premiums.

42. In her responding affidavit, the first plaintiff highlights, *inter alia*, the Architect's Opinion on Compliance furnished by the fourth and fifth defendants on 24th November, 2005 in respect of her apartment. She again highlights the efforts made by her to resolve the issues with her apartment, initially by liaison with the first defendants and thereafter commissioning Herr Engineering and Design Ltd to investigate and establish the extent of the problem. She refers to the further investigations conducted by Waterman Moylan Engineering Consultants in 2012 whose report dated October 2012 identified the same issues as the reports of Herr Engineering and Design Ltd. She again contends that the defendants in the proceedings were invited to observe the tests being carried out by Waterman Moylan and/or to carry out their own inspection and investigations at the same time. The first plaintiff cannot accept that the defendants are entirely prejudiced by the passage of time given that the building/design error of which she complains (the absence of insulation on the ground floor slab) remains in the same physical condition as pertained in 2005 and 2012

43. In her third affidavit, Ms. Ryan asserts that neither the existence nor the contents of the Opinion on Compliance furnished by the fourth and fifth defendants provide any explanation for the first plaintiff's inordinate delay. She further highlights that the first plaintiff has not exhibited the reports produced by Herr Engineering in 2008. She goes on to aver:

> "6…I say that the intervention of Herr Engineering and Design Ltd two years following the Plaintiff's knowledge of the suspected alleged defects … further highlights the pre-commencement delay of the Plaintiff in the prosecution of her claim in that she initiated proceedings against the First Named Defendant on the 31st day of March, 2009 and did not join my clients to these proceedings until October 2010 …"

44. Ms. Ryan also avers that no one in her office received any communication from the first plaintiff's former solicitors inviting the fourth and fifth defendants to either observe Waterman Moylan's tests or carry out investigations of their own. She takes specific issue the plaintiff's assertion that the fourth defendant is not prejudiced on the basis that the alleged building/design error in the plaintiff's apartment remains in the same physical condition as it was in 2005 and 2012. Ms. Ryan describes this as "an extraordinary proposition" in circumstances where it is clear from the first plaintiff's various affidavits that a number of tests have been carried out and a number of attempts made to remedy the alleged defects. She asserts prejudice:

> "in circumstances where (i) it is unfair to expect witnesses for the Fourth and Fifth Named Defendants to recall events which occurred in excess of eleven years ago; (ii) the Plaintiffs outstanding proceedings … amount to an action in professional negligence which has resulted in an increase in annual insurance premiums … and (iii) the death of Graham Elmes, who the Third Named Defendant identifies as having a fundamental role in the building project …has resulted in the loss of a key witness as to issues of fact between the Third, Fourth and Fifth Named Defendants."

The Gray Proceedings

45. The second plaintiff's claim is an action for damages in connection with the construction of an apartment at No. 3, the Cedar, Cruagh Wood, Stepaside, County Dublin. He issued his plenary summons on 17th November, 2011. The second plaintiff's proceedings were one of seven such sets of plenary proceedings instituted by apartment owners. The plenary summons was served on third defendant on 6th November, 2012, to which an appearance was entered on 22nd November, 2011. It was also served on the fourth and fifth defendants on 6th November, 2012. On 19th July, 2016, a conditional appearance was entered on the fourth and fifth defendants' behalf for the purpose of bringing the within application.

46. On 4th December, 2013, the solicitors for the third defendant wrote to the second plaintiff's solicitor complaining that no statement of claim had been delivered despite the fact that the proceedings had been served just before the expiry of the plenary summons. The second plaintiff was invited to serve a notice of discontinuance. No response was received. The third defendant's solicitor wrote again on 25th February, 2014 recording their expectation that a notice of intention to proceed would have been served if the second plaintiff intended to advance his action. This letter was not responded to. Further letters were sent on 16th March, 2015 and 10th July, 2015, recording the third defendant's complaints regarding the delay, and highlighting that the works which gave rise to the second plaintiff's proceedings had been completed some ten years earlier. The second plaintiff's solicitors responded on 17th July, 2015 enclosing a notice of intention to proceed. On 22nd July, 2015, the third defendant wrote requesting a fully particularised statement of claim within two weeks.

47. The third defendant wrote again to the second plaintiff's solicitors on 21st August, 2015 noting the expiry of the notice of intention to proceed and inviting the second plaintiff to provide copies of any expert reports to all of the defendants. They further advised that the alleged floor finishes and insulation defects were beyond the scope of the third defendant's responsibilities.

48. This letter was not responded to. The second plaintiff was again written to on 13th January, 2016 and was invited to serve a notice of discontinuance failing which an application would be brought to strike out the proceedings. A reminder letter to this effect was sent on 29th January, 2016. This again was not responded to. The third defendant's solicitor wrote again on 17th February, 2016, advising that unless a written response was received within seven days an application to strike out would be brought. On 24th February, 2016 the second plaintiff's solicitors responded suggesting that a motion for discovery would issue in the Kilroy proceedings and that statements of claim would be delivered in the other proceedings (including the second plaintiff's).

49. In his affidavit grounding the application on behalf of the third defendant to strike out the second plaintiff's proceedings, Mr. Burroughs avers that despite the assurances contained in the letter of 24th February, 2016, no action was taken and no statement of claim has been received in respect of the second plaintiff's claim. He goes on to state:

> "11. At the date of swearing hereof, the Plaintiff has not served a Statement of Claim so one could only guess what discovery may be required if he were to be permitted to proceed. Where this to occur, the Third Named Defendant is likely to be further prejudiced as it is unlikely to be able to obtain relevant discovery documentation from the First Named Defendant which is no longer represented and was dissolved with effect on 20 January 2016. The Second Named Defendant has been in voluntary liquidation since 2008 and is not legally represented either".

50. The second plaintiff swore an affidavit on 24th November, 2016 wherein he states that the contents of the first plaintiff's affidavit sworn 24th November, 2016 were an answer to the third defendant's application to dismiss his proceedings.

51. In a later affidavit sworn 23rd March, 2017, the second plaintiff, similarly to the first plaintiff, makes reference to having changed his legal team. He refers, *inter alia*, to the fact that in November 2005 the third defendant furnished an Opinion on Compliance in respect of his apartment at 3 The Cedar, Cruagh Wood.

52. Mr. Burroughs swore an affidavit in response on 25th April, 2017. He takes issue with the second plaintiff's reliance on expert reports obtained by the first plaintiff which were not exhibited by the second plaintiff. Moreover, Mr. Burroughs avers that the second plaintiff has not explained as to why, when he became aware of issues regarding his apartment in 2006, and certainly by September 2008, he did not act until 2011. He further states that the second plaintiff has not explained why he has seen fit to join the third defendant in the proceedings. Issues is also taken with the second plaintiff's reliance on information given by the first plaintiff to the effect that the third defendant had been invited to observe tests being conducted by Waterman Moylan in 2012.

53. The second plaintiff swore a further affidavit on 16th June, 2017, wherein, *inter alia*, he states that any samples that might now be taken by the defendants from his property will return the same core sample results as if taken in 2012 or indeed in 2005. He thus asserts that the third defendant cannot claim prejudice by virtue of not having conducted investigations earlier.

54. In his fourth affidavit, Mr. Burroughs asserts that the second plaintiff has not offered any "sensible explanation" for his delay in issuing proceedings, or in prosecuting them in circumstances where the second plaintiff's own affidavits disclose that he had the benefit of the first plaintiff's reports which were obtained in 2008. It is further averred that while the second plaintiff has referred to alleged defects visible from the exterior of the building (in common with the first plaintiff), he has not seen fit to plead the alleged defects or identify them on affidavit. Mr. Burroughs states that it is "intrinsically prejudicial" that the second plaintiff should seek to rely on defects which he is not prepared to outline.

55. The fourth and fifth defendants' motion to dismiss the second plaintiff's case is grounded on the affidavit of Mr. Noel Devins, solicitor for the fourth and fifth defendants. Mr. Devins avers to the second plaintiff's inordinate and inexcusable delay in or about the commencement and subsequent prosecution of his proceedings. It is asserted that it is unfair and oppressive to expect the third and

fourth defendants to defend the claim in respect of matters which occurred in excess of ten years ago and where the second plaintiff has demonstrated a clear want absence of intention to prosecute his claim in a timely fashion, including by delivering a statement of claim. The second plaintiff's response, set out in replying affidavit sworn 23rd March, 2017 echoes that of the first plaintiff.

56. In an affidavit sworn 11th May, 2017, Ms. Ryan, on behalf of the fourth defendants, avers that it was "highly probable" that the second plaintiff's state of knowledge of alleged defects ran from in or around January 2006 and that this "highlights the inordinate pre-commencement delay" in prosecuting his claim. Ms. Ryan repeats the same prejudicial factors as disposed to in her affidavits grounding her application to dismiss the first plaintiff's proceedings.

57. In his third affidavit sworn 16th June, 2017, the second plaintiff rejects allegations of prejudice and maintains that it is open to the defendants to take core samples from his apartment. He contends that significant documentation is available to the defendants from the construction of the project and on site inspections conducted at relevant time. Moreover, he states that the defendants are on notice of all issues since the issuing of the first plaintiff's proceedings. He avers that a judge at the trial of the issue would be in a better position to determine the prejudice, if any, that the defendants would suffer and to balance that prejudice against the prejudice the second plaintiff would suffer if his proceedings were dismissed, in circumstances where he does not have a marketable title for his property.

The relevant legal principles

58. The fundamental principles to which the Court must adhere in applications such as the present are set out in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. A party seeking dismissal on the grounds of delay in prosecution of an action must establish that the delay has been inordinate and inexcusable. Even when it is established that there has been both inordinate and inexcusable delay the Court must exercise a judgment on whether it is in discretion, on the facts of the case, the balance of justice is in favour or against the case proceeding.

59. More recently, Irvine J. in *Flynn v. Minister for Justice* [2017] IECA 178 adopted, with some modification, the principles as formulated by the trial judge (Barrett J.) in that case. She stated:

> *"19. In the course of his judgment the trial judge set out a summary of the key principles to be considered by a court when asked to exercise its inherent jurisdiction to dismiss proceedings on the grounds of inordinate and inexcusable delay. He did so by reference to a number of relatively recent decisions on the issue. Given that, subject to one important exception, these are not controversial I gratefully adopt and below set forth the summary of the relevant principles identified by Barrett J. at para. 5 of his judgment. I have also taken the liberty of including one additional factor emanating from the judgment of Fennelly J. in Anglo Irish Beef processors v. Montgomery[2002] 3 IR 510.*
>
> > *"(1) The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so.*
> >
> > *(2) The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard.*
> >
> > *(3) It must in the first instance be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable.*
> >
> > *(4) In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter.*
> >
> > *(5) Even when delay has been inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the case proceeding.*
> >
> > *(6) Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay.*
> >
> > *(7) The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.*
> >
> > *(8) In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.*
> >
> > *(9) Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.*
> >
> > *(10) All else being equal, persons against whom serious allegations are made that affect their professional standing should not have to wait over a decade before being afforded opportunity to clear their name.*
> >
> > *(11) The courts are obliged under Article 6(1) of the European Convention on Human Rights to ensure that all proceedings, including civil proceedings are concluded within a reasonable time. Any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its considerations, not only its own constitutional obligations but the State's Convention obligations.*
> >
> > *(12) The courts must make it clear that there will not be an excessive indulgence of delay, because, if they do not, they encourage delay, leading to breach by the State of its Convention obligations.*
> >
> > *(13) There is a constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures. There should be no culture of endless*

indulgence. (The court notes this is not the same as saying that there can be no indulgence).

(14) The courts can bring to their assessment of any (if any) culpability in delay the fact that the cost of litigation may act as a disincentive to prompt action.

(15) As in every case, the courts must bring to their considerations a necessary sensitivity to the personal and social background of persons who present before them.

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

Considerations

60. It is not disputed that the delay in both the first and second plaintiffs' cases is inordinate. It is also common case that the notices of intention to proceed filed by the both the first and second plaintiffs on 21st July, 2015 do not constitute a step in the proceedings, as said by Fennelly J. in *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510.

61. Furthermore, counsel for the plaintiffs acknowledges that the second plaintiff has offered little excuse for the delay in advancing his proceedings, such that his delay is inexcusable.

62. Counsel argues however that that is not the case as regards the first plaintiff. She has set out on affidavit a number of factors which she says accounts for the delay in the progressing of her proceedings. It is submitted on behalf of the third and fourth defendants that that is not sufficient for the first and second plaintiffs to ascribe the blame for the delay to their former solicitors given that it is a matter for the plaintiffs and their solicitor to establish their respective responsibilities. Counsel for the third defendant submits that if fault for the delay lay with the first and second plaintiffs' solicitors then they have other options to address this and the third defendant should not be put to the hazard of having to defend proceeding where inordinate and inexcusable delay has occurred and in circumstances where the third defendant pleads specific prejudice. It is thus submitted that the option of the plaintiffs pursuing their former solicitors in respect of the delay should be weighed by the Court when considering the balance of justice. It is further submitted that it is not sufficient for the first plaintiff to rely on family and medical matters for her failure to progress her case.

63. I accept the submissions of the third and fourth defendants that insofar as the first (and second) plaintiffs seek to attribute the inordinate delay in prosecuting their respect proceedings to their previous legal team that is not of itself a sufficient ground to excuse an inordinate delay. In *Gilroy v. Flynn* [2005] ILRM 290, Hardiman J. discussed the prospect of refusing to dismiss a claim for want of prosecution when the delay was attributable to legal advisors. He stated: at p. 294

> *"[T]he assumption that even grave delay will not lead to a dismissal of an action if it is not on the part of the plaintiff personally, but of a professional advisor, may prove an unreliable one."*

64. Nor do I consider it sufficient for the first plaintiff to proffer life events such as her marriage to the second plaintiff in 2014 and her travelling to Australia in late 2014 to attend her brother's wedding as sufficiently reasonable excuses for the delay in advancing her proceedings.

65. Undoubtedly, however, the first plaintiff had a serious illness between in the period March 2015 to April, 2016. Counsel for the fourth defendant highlights that no letter was ever sent to the fourth and fifth defendants to inform them that the first plaintiff was unwell.

66. This submission notwithstanding, the Court accepts that the first plaintiff's illness goes someway towards explaining some of the delay in her case but, overall, I am not persuaded that her illness provides a sufficient justifiable excuse for the inordinate delay which has occurred.

67. Accordingly, the Court must assess where the balance of justice lies as regards the respective proceedings of both the first and second plaintiffs.

68. A number of arguments have been canvassed by the third and fourth defendants in aid of their respective submissions that the balance of justices lies in favour of the dismissal of the proceedings.

69. The plaintiffs' cases relate in effect to establishing responsibility for alleged defects in their respective apartments. It is argued by the defendants that albeit that the first plaintiff commissioned a number of reports which deal with causation, she has not stated whether these reports attribute liability to the third or fourth defendants. What is at issue is whether these defendants, or either of them, are at fault for not detecting an alleged lack of insulation in a building constructed by the first and second defendants. Furthermore, the third defendant contends that the first plaintiff has not been forthcoming about the extent of the remedial work carried out by the first defendant. It is also argued that insofar as the first plaintiff refers on affidavit to defects in the building which are visible, and which the third and fourth defendants are at liberty to inspect, she has not specified what those defects are. The third defendant argues that the question which arises is whether these defects were visible when the third defendant certified the building in 2005. Thus, the third defendant maintains that it is not an answer to the third defendant's concerns for the plaintiffs to contend that their apartments remain available for inspection.

70. Furthermore, it is only at an extremely late stage (in affidavits sworn in 2017 for the purpose of the within motions) that the first and second plaintiffs asserted a claim in respect of the certification done by the third defendant in 2005. The third defendant also points out that the issuing of the Opinion on Compliance is not referred to at all in the first plaintiff's amended personal injury summons despite the first plaintiff being in possession of a number of expert reports by the time her personal injury summons issued.

71. It is argued that a fundamental difficulty for the fourth defendant is the generic manner in which the first plaintiff's case is pleaded. It is submitted that there is no clear distinction drawn between the third and fourth defendants as to their respective roles and responsibility for the first plaintiff's alleged loss. As set out in *Farrell v. Arborlane Ltd.* [2016] IECA 224, this is a factor for the Court to weigh in considering the balance of justice. It is submitted that the generic nature of the first plaintiff's claim is exacerbated by her failure or refusal to particularise aspects of her pleadings, as was requested by the fourth and fifth defendants by letter dated 24th February, 2011. The response of the first plaintiff on 29th June, 2011 was that she would furnish full particulars of alleged

breaches of the Building Regulations. These particulars have not been received.

72. In response to the foregoing submissions, counsel for the plaintiffs contends that it is noteworthy that the defendants do not maintain that they cannot defend the plaintiffs' respective proceedings. It is submitted that the defendants allude to generic difficulties only. In particular, counsel refutes the fourth defendant's contention that the first plaintiff's claim is generic. Albeit not pinned down as well as it might have been, the claim of the first plaintiff is such that, as professionals, the third and fourth defendants can readily discern from the pleadings the nature of the first plaintiff's claim against them. Counsel points to paragraph 14 of the amended personal injury summons which, it is submitted, makes clear the particulars of negligence, breach of duty (including breach of statutory), breach of contract, nuisance and misrepresentation being made against the third defendant and/or fourth defendants, namely that, *inter alia*, they:

> "
>
> …
>
> *(c) Failed to make any or any adequate provision for floor insulation.*
>
> *(d) Failed to ensure that the works were carried out or completed in accordance with plans, maps, designs, specification and planning permission.*
>
> …
>
> *(i) Failed to ensure a damp proof membrane was applied to the flooring.*
>
> *(j) Failed to take account of the insulation requirements of a ground floor apartment with an unheated car park below said apartment.*
>
> …
>
> *(n) Failed to take account of Building Regulations made pursuant to the Building Controls Act, 1990.*
>
> *(o) Failed to ensure insulation, in breach of Building Regulations 2002."*

73. Counsel also says it is thus not the case, as appears to be suggested by the third and fourth defendants, that the first plaintiff has not set out her case against them. It is further submitted that all matters could have been investigated by the defendants before they filed their respective defences.

74. Counsel also points to the fact that the first plaintiff has made specific reference in her affidavits to the Opinions on Compliance which the third and fourth and fifth defendants furnished in 2005.

75. Insofar as the defendants query what they are to do at this juncture, it is the plaintiffs' submission that it is open to them, as with all defendants in cases such as the present, to inspect the plaintiffs' apartments. This is particularly so where each of the defendants have put in a defence to the first plaintiff's claim. It is suggested that there is nothing to prevent the defendants from carrying out the type of core tests which were carried out on behalf of the first plaintiff in 2012.

76. Overall, having regard to the submissions advanced by the third and fourth defendants, while some weight has to be given to the argument that the first plaintiff's case could have been pleaded with more specificity, the Court is not persuaded that the third and fourth defendants' circumstances are such that they do not know the case being made against them. While it is true that no specific reference was made in the first plaintiff's personal injury summons to the respective Opinions on Compliance furnished on behalf of the third defendant and the fourth and fifth defendants in 2005 (on which the first plaintiff now relies), it remains the view of the Court that the absence of any reference to these documents in the first defendant's pleadings does not substantially prejudice the defendants in circumstances where the amended personal injury summons sufficiently particularises the first plaintiff's claim. Similarly, while I accept that the first plaintiff has failed to specify the provisions of the Building Regulations being relied on, and while I take account of this in weighing the balance of justice, in circumstances where both the third and fourth defendants are professionals and well acquainted with the Building Regulations, I do not perceive that the third and fourth defendants are greatly prejudiced by this failure. I also accept the plaintiffs' counsel's submission that the claims involve an alleged absence of insulation and damp proof membrane, a matter that remains capable of being ascertained, even at this remove. Thus, I do not perceive that, in this regard, justice has been put to the hazard by the passage of time.

77. Counsel for the third defendant submits that the first plaintiff could have issued proceedings against the third defendant (and the fourth and fifth defendants) earlier that she did in circumstances where she had export reports available to her from 2008.

78. Counsel for the fourth defendant points to the fact that that the first plaintiff was clearly aware of alleged defects in her apartment shortly after November 2005, yet she also took no action in respect of the fourth and fifth defendants until 2010 when she sought to join them as defendants consequent to the first defendant's third party application. It is submitted that, more significantly, no step has been taken in her proceedings since the fourth and fifth defendants delivered their personal injuries defence on 13th July, 2012.

79. It is the case that between July 2012 and the issuing of the fourth and fifth defendants' motion to dismiss on 23rd June, 2016, the only activity on the part of the first plaintiff was a belated response (together with an amended request for voluntary discovery) of 14th February, 2014 from the first plaintiff's former solicitors to the fourth and fifth defendants' letter of 13th July, 2012 which was sent in response to the first plaintiff's request in 2012 for voluntary discovery. It is also the case that the first plaintiff sought voluntary discovery from the third defendant on 6th March, 2012. However, no motion for discovery has ever been issued as against either the third or fourth defendants. It is now submitted on the first plaintiff's behalf that if permitted to continue with her case she will submit to a strict timetable.

80. I accept that I must take into account, in the requisite weighing exercise which the Court has engaged in, that the expert reports which the first plaintiff had from Herr Engineering from as early as 2008 suggests that she could have sought to join the third, fourth and fifth defendants earlier that she did. I do not believe, however, that this should be the predominant factor in the Court's decision.

81. The fourth defendant contends that the plaintiffs' claims equate to an action in professional negligence which has resulted in

increased annual insurance premiums. Thus, it is argued that the delay has impacted on the fourth defendant's business and reputation.

82. The impact of inordinate and inexcusable delay in prosecuting an action for professional negligence was discussed in *Celtic Ceramics Limited v. IDA* [1993] ILRM 248. O'Hanlon J. stated: at p. 258

> *"It seems very unfair and unjust that persons whose professional standing and competence are under attack should be left with litigation hanging over their heads for years by reason of inordinate and inexcusable delay on the part of a plaintiff and I would respectfully echo the view expressed by Henchy J. in Sheehan v Amond that it should be possible to invoke 'implied constitutional principles of basic fairness of procedures' to bring about the termination of such proceedings."*

83. In *Farrell v. Arborlane Limited,* Sheehan J.opined:

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

84. It is also submitted that the fourth and fifth defendants are entitled to their good name which entails that the proceedings be adjudicated on within a reasonable time, as recognised by Irvine J. in *Gorman v. Minister for Justice* [2015] IECA 41:

> *"30. In recent times, the constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures, has been emphasised in a number of judgments dealing with delay. The relevant constitutional provisions are contained in Article 34.1, which requires the courts to administer justice and Article 40.3.2 which guarantees the citizen the right to protect their good name.*
>
> *31. These specific constitutional obligations pre-suppose that litigation will be conducted in a timely fashion. If, as Henchy J. stated in O'Domhnaill, justice is put to the hazard as a result of undue and excessive delay, how then can the courts fulfil their constitutional mandate under Article 34.1? Moreover, where, as in the present case, the right to a good name of a number of members of An Garda Síochána, has been put at issue by the plaintiff, the effective protection of that right as guaranteed by Article 40.3.2 requires that such claims be adjudicated upon within a reasonable time."*

85. Similar views were expressed by Irvine J. in *Collins v. Minister for Justice, Equality & law Reform* [2015] IECA 27.

86. It is however of note that the fourth defendant has not said that he has been unable to secure insurance cover. Accordingly, I do not believe that prejudice to the extent set out in *Farrell v. Arborlane* has been demonstrated in the present case. Accordingly, I attach modest weight to the issue of the increased insurance premiums.

87. Counsel for the fourth and fifth defendants also submits that it is unfair to expect witnesses to recall events which are alleged to have occurred more than twelve years ago, a factor commented on by Hardiman J. in *J'OC v. DPP* [2000] 3 I.R. 478: at p. 499

> *"…a lengthy lapse of time between an event giving rise to litigation, and a trial creates a risk of injustice…"*

88. In *Gilroy v. Flynn* [2005] ILRM 290, Hardiman J. opined: at pp. 293-294

> *"[T]he courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued."*

89. It is further submitted on the defendants' behalf that it is to be presumed that the physical state of the first plaintiff's property has changed due to a number of tests carried out in the intervening years along with attempts made to remedy the alleged defects. The defendants say that their concern in this regard is against a background where they deny that an invitation to observe such tests was ever issued by the first plaintiff's former solicitors.

90. The third defendant's principal submission is that the third defendant has been placed in a position where very specific prejudice has arisen because of the death of Mr. Graham Elmes, who had responsibility for acting in connection with the building project on behalf of the third defendant. While it is acknowledged that other directors and employees can give evidence the third defendant's position is that they were not the persons dealing with the project on the ground and therefore they are not familiar with it. Accordingly, the third defendant contends that this is a particular difficulty, not least because of the diffuse character of the allegations being made against the defendants and the failure to specify the case being made against the third defendant.

91. It is thus submitted that the death of Mr. Elmes presents significant prejudice for the third defendant. While it was not he who certified the building in 2005, he was the person most closely associated with the project. As averred to by Mr. Burroughs, Mr. Sweetman, who signed the certificate, has no recollection of the matter. Counsel again contends that it is no answer to the third defendant's concerns that the buildings remain available for inspection.

92. The third defendant's position is not that they cannot defend the claims made against them. Rather, the third defendant's argument is that the claims are more difficult to defend given the death of Mr. Elmes who had a central role for the third defendant in the project. Contrary to the plaintiffs' submissions, it is not the case that the third defendant has not been prejudiced. No one can speak for the late Mr. Elmes; only he could have said what the Certificate of Compliance furnished in 2005 related to.

93. Thus, the third defendant's position is that the reliance placed by the first and second plaintiffs on Mr. Sweetman's role is not a sufficient response to the prejudice alleged by the third defendant. The reality is that such other witnesses as may be called by the third defendant will be less well-versed in the matter. This is not just regarding matters of contention between the plaintiffs and the third defendant. It is contended that not only is the third defendant, who has lost the witness with the most connection to the project, faced with the first and second plaintiffs' claims, there is also the issues of contribution which may arise between the

defendants.

94. It is further submitted that even if the late Mr. Elmes were still here, it would be difficult for the third defendant to defend the cases as the first plaintiff's current case may be entirely different to the situation on the ground in 2005.

95. In a similar vein, counsel for the fourth defendant contends that the death of Mr. Elmes has resulted in the loss of a key witness as to the issues of fact between the third and fourth defendants.

96. It is submitted on the plaintiffs' behalf that insofar as the third defendant places emphasis on the death of Mr. Elmes, in the particular circumstances of these cases that factor is not sufficient to weigh the balance of justice in the defendants' favour. This is so where the case has not been made that the third defendant cannot defend the claims in the absence of Mr. Elmes.

97. In *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510 Keane C.J. had the following to say where prejudice was asserted on the basis that a witness was dead:

> *"If those were the only factors to be considered, they would suggest, in my view, that contrary to what the trial judge concluded, the balance of justice was in favour of striking out the proceedings. There is, however, another factor to which, in my view, the trial judge, although conscious of it, unarguably gave insufficient weight, i.e., the fact that Mr. Devine is now dead and will be unable to confirm the defendants' understanding of the advice being tendered to them by Mr. Collins as to the nature and effect of clause 8 of the agreement.*
>
> *That evidence was critical to the defendants in maintaining their claim for an indemnity or contribution from the third party. Since, in accordance with the requirements of the Civil Liability Act, 1961 and the relevant provisions of the Rules of the Superior Courts, 1986, all these issues would be tried together, it follows inevitably that, in relation to an issue of central importance, i.e., whether, assuming the plaintiffs' claim is well founded, the defendants are entitled to contribution or an indemnity from the third party, the defendants will be deprived of a witness of critical importance as a result of the inordinate and inexcusable delay on the part of the plaintiffs in prosecuting the claim." (at p. 515)*

98. In *Leech v. Independent Newspapers (Ireland) Limited* [2017] IECA 8, Irvine J. considered the issue in the following terms:

> *" 45…That being so the High Court judge was required to have regard to any prejudice which the newspaper was in a position to establish would likely arise by reason of the delay. While it was, in my view, open to the trial judge to attach modest or moderate weight to the specific prejudice sought to be relied upon by the defendant, I am satisfied that he erred in law when he effectively rejected it. First on the basis that the claim of prejudice alleged to flow from Mr. Fanning's death had been belatedly made and could in any event be satisfactorily overcome by calling other witnesses and second by reference to the manner in which it was advanced. Further, I consider that he unfairly and incorrectly categorised the newspaper's evidence concerning prejudice as being no more than a solicitor's opinion that prejudice was inevitable.*
>
> *…*
>
> *47. It is true that if the newspaper thought it could not possibly defend the action because of Mr. Fanning's death it would probably have brought a motion to strike out the action on that basis. But that was not the case it sought to advance on the present application. It did not claim that it could not defend the action without Mr. Fanning or that his death alone warranted the dismissal of the proceedings. What it asserted was that it was less well placed to defend the action because of his death with the result that the Court should have regard to that prejudice as part of the overall circumstances when considering the balance of justice. Thus, I am satisfied that the trial judge erred in law when he relied upon the failure of the newspaper to bring a motion to dismiss the proceedings following Mr. Fanning's death as a reason to discount the prejudice alleged by the newspaper when considering the issue of the balance of justice.*
>
> *…*
>
> *49. To my mind, it does not follow, as is to be inferred from the judgment of the trial judge that merely because the newspaper could call a different witness to give evidence concerning these matters that it would not have been in a stronger position to defend the claim if its editor was available to give evidence on its behalf. In libel actions against newspapers, the evidence of the editor is often considered critical to the defence of the action and their unavailability to give evidence due to delay on the part of a plaintiff in prosecuting their claim has on many occasions provided the basis for an application on the part of the newspaper to have proceedings dismissed."*

99. Undoubtedly, the death of Mr. Elmes is a factor to which the Court must attach a considerable amount of weight. The question is however whether his death renders the third defendant *substantially* less well placed to defend the plaintiffs' proceedings and to deal with such issues of fact as may arise as between the third defendant and the fourth defendant.

100. To my mind a factor which the Court must also weigh in this regard is that it was not the late Mr. Elmes who duly certified the plaintiffs' respective apartments on 4th November, 2005. In both cases, that task fell to Mr. Sweetman, Chartered Engineer with the third defendant. It seems to me therefore that prejudice, which, the Court accepts, enures to the third defendant by reason of the death of Mr. Elmes is tempered by the fact that another engineer in the third defendant's firm was the person who in fact certified compliance with the requisite building and planning regulations. Albeit that it was the late Mr. Elmes who was the person in the third defendant's firm most associated with the apartment project, it is undisputed that it was Mr. Sweetman who duly certified the apartments on the third defendant's behalf. I am satisfied that this certification process could not have been done in a vacuum and that Mr. Sweetman must have had access to documents, plans and files in order to do so. Presumably, those same documents, plans and files remain available to him to assist with any deficit of recollection he may have due to the passage of time.

101. In all the circumstances, I am not persuaded that the late Mr. Elmes' demise can be considered as squarely tipping the balance of justice in favour of the third defendant, as far as the first plaintiff is concerned. I also take into account that insofar as the pleadings in the Kilroy proceedings disclose, much of the evidence on the liability side will most likely be expert evidence; therefore I attach only moderate weight to the defendants' submissions on the issue of frailty of recollection of witnesses.

102. Notwithstanding that counsel for the fourth defendant labelled the plaintiffs' criticism of the defendants' failure to bring motions before 2016 "an extraordinary proposition" , I give modest weight to the fact that the motions to dismiss could have been brought by the defendants earlier than 2016, i.e. at any time after 2012. I accept, however, there is no equality of inactivity here. By and large,

the third and fourth defendants' conduct cannot be called into question. There is no basis for any suggestion that the plaintiffs were lured into a false sense of security. This is evident from the correspondence sent both to the first plaintiff's former and present solicitors, as referred to in Mr. Burrough's affidavits.

103. In summary, the Court accepts that a level of prejudice arises for the third and fourth defendants arising from the manner in which the first plaintiff's case has been progressed. The Court, however, must also give weight to the nature of the proceedings and to the first plaintiff's claim (yet to be substantiated) that the home she bought in 2005 has been beset with problems arising from a lack of insulation. Having weighed all relevant factors, including that the first plaintiff, from an early stage, endeavoured to seek to rectify the defects in her apartment (including liaising with the first defendant and engaging experts from a relatively stage), and while accepting that the delay since 2012 is inordinate and for the most part inexcusable (the Court however does attach some weight to the fact of the first plaintiff's illness over a period of almost twelve months), it seems to me that the balance of justice is best served by letting the first plaintiff continue with her proceedings against the third and fourth defendants, subject however to the first plaintiff's undertaking to move with expedition and to adhere to a strict timetable regarding outstanding replies to particulars and discovery issues.

104. I turn now to the second plaintiff's proceedings.

105. As of yet no statement of claim has been delivered by the second plaintiff in respect of proceedings which issued only at a very late stage, namely on 17th November, 2011.

106. It is submitted by the third and fourth defendants that given the very late stage at which the second plaintiff's proceedings issued, their service on the third and fourth defendants almost a year later, together with the fact that the pleadings rest there, no statement of claim having been delivered, gives rise to prejudice for the third and fourth defendants.

107. In the first instance, I accept the submission that there was a heavy onus on the second plaintiff to expedite the hearing of his action given that he is bringing proceedings after a lengthy period of time since the accrual of his cause of action.

108. Counsel for the plaintiff accepts that it is the case that the second plaintiff allowed the first plaintiff to progress her proceedings and that he did not advance his own. Counsel thus agrees that the second plaintiff's delay is inordinate and inexcusable. He submits however that if the Court is not minded to dismiss the first plaintiff's proceedings, then the second plaintiff's proceedings should also be allowed to proceed since it cannot be said that the defendants are unaware of the nature of the case he intends to make.

109. Compared with the first plaintiff, who issued her proceedings against the first defendant in 2009, the second plaintiff delayed considerably in instituting his proceedings. Delay in the commencement of proceedings was considered by Finlay Geoghegan J. in *Manning v. Benson & Hedges Limited* [2004] 3 I.R. 556. She stated; at p.564

> *"The courts should not ignore the fact that the alleged wrongful acts took place a long time ago. At minimum where there is a long lapse of time between wrongful acts and accrual of a cause of action it may mean that the claim is already difficult for the defendant to deal with and prejudice caused by subsequent delay may have to be more critically examined. Also, such a long lapse of time places a special onus on a plaintiff to proceed with due expedition after the accrual of the cause of action."*

110. In *Collins v. Minister for Justice, Equality & Law Reform*. Irvine J. stated:

> *" Where a plaintiff waits until relatively close the end of the limitation period prior to issuing proceedings … they are then under a special obligation to proceed with expedition once the proceedings have commenced".* (at para. 33).

Moreover, the Court of Appeal has endorsed a proposition that where a plaintiff is guilty of culpable delay, a defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Rather, 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, as is clear from principle 8 of the principles adopted by Irvine J. in *Flynn v. Minister for Justice*:

> *"8. In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay."*

111. In *Leech v. Independent Newspapers*, Irvine J. again opined:

> *"45. Once there has been a finding of inordinate and inexcusable delay even modest prejudice may tip the scales of justice in favour of a defendant when it comes to a consideration of the balance of justice. (See Stephens v. Paul Flynn Limited)."*

112. In all the circumstances of this case, I am not persuaded by the second plaintiff's submission that if the first plaintiff's case is allowed to continue so then so should his. I am satisfied that by allowing the second plaintiff to progress his case would cause the third and fourth defendants prejudice, if only by dint of their having to now face into the processes which advancing his case would necessitate. This indeed may be modest prejudice but, to my mind, it is sufficient to weigh the balance of justice in the defendants' favour in the face of the second defendant's culpable delay, particularly his failure to deliver a statement of claim.

Summary

113. For the reasons set out herein, the reliefs claimed by the third and fourth defendants in the Kilroy proceedings are denied; the reliefs claimed by the third and fourth defendants in the Gray proceedings are hereby granted.