Neutral Citation [2015] IEHC 535

THE HIGH COURT

[2007 No. 9550P]

BETWEEN

SASHA FARRELL

PLAINTIFF

- AND –

ARBORLANE LIMITED, McGILL CONSTRUCTION LIMITED, THE NATIONALHOUSE BUILDING GUARANTEE COMPANY LIMITED, ROWE McGILL ARCHITECTS, TIMOTHY ROWE, MICHAEL McGILL AND ANTHONY LAWTON OPERATING UNDER THE STYLE AND TITLE OF LAWTON AND ASSOCIATES

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 9th July, 2015.

PART I

KEY ISSUE ARISING

1. Where does the balance of justice lie between (a) a woman who paid for a new apartment and is having to endure cracked walls, ongoing water ingress and other continuing problems, and (b) a professional engineer who issued a document attesting to the compliance of the relevant apartment complex with the Buildings Regulations but who contends that to allow him to be sued over that document would be an affront to justice, given the elapse of time arising and the "greater than moderate" risk of prejudice to which he now purports to be exposed?

PART II

KEY FACTS ARISING

2. Mr Lawton is a chartered engineer and the seventh-named defendant in the within proceedings. The proceedings themselves concern a development known as "The Ramparts", at Loughlinstown, County Dublin. The developer of "The Ramparts" was Arborlane Limited. McGill Construction Limited appears to have been the builder. The other defendants acted as architects and lead consultants on the project. Mr Lawton was retained by Arborlane to act as a structural and civil engineer on the project. The development was designed in 1998–1999. Mr Lawton's involvement in the project concluded in November 2000, at which time he issued Arborlane with anattestation as to the compliance of the development with the Building Regulations. It is useful to quote from the text of this attestation, the relevant portion of which reads:

> *"This Opinion relates to a five-storey development at The Ramparts, Loughlinstown, Co. Dublin….*
>
> *I, Anthony Lawton…hereby certify that Lawton Associates carried out the structural design of the above mentioned development and that, subject to normal engineering theory and practice, the design is in substantial compliance with Part A of the Building Regulations 1997.*
>
> *It is the responsibility of the Main Contractor to ensure that the construction of the works complies with the drawings and specifications and the standards of construction required by the Building Regulations.*
>
> *The construction work was monitored by an Engineer on site employed by the Client, and by site visits by Lawton Associates during construction. Any work inspected by Lawton Associates was in our opinion being constructed generally in compliance with our drawings and specifications.*
>
> *Lawton Associates were responsible for integrating within the overall design of the works the design of such parts as were designed by specialist suppliers and/or sub-contractors and the above opinions are subject to the design of such parts and of all proprietary products meeting the requirements of the performance specifications.*
>
> *The above opinions are issued solely for the purposes of providing evidence of the substantial compliance of the works with the Building Regulations at the above date. Except in so far as it relates to compliance with the Building regulations it is not a report or survey on the physical condition or on the structure of the building of which the works form part."*

3. Completion of "The Ramparts" happened sometime in late-2000 or early-2001. The present case concerns an apartment in the development, No. 99, which Ms Farrell appears to have purchased sometime in 2002. By the time Ms Farrell came to purchase the apartment, Arborlane had already started receiving complaints from various residents of "The Ramparts" about various deficiencies in their apartments; these included water ingress and cracking. Consequent upon these complaints, and subsequent complaints from Ms Farrell, Arborlane carried out a number of remediation works over the years 2001–2009. It appears that the third-named defendant (which operates the 'HomeBond' scheme) inspected the development at some point during this period and decided that the defects arising were non-structural and thus did not come within the scope of the cover it provides.

4. All of the remedial works done by Arborlane were carried out at its own expense, and it appears that there was no suggestion by Arborlane that Mr Lawton was responsible for any of the cost arising. Mr Lawton was aware that residents in the development had complaints about the development from a point in time after completion. However, by his own account, he understood that Arborlane was accepting responsibility to accept the defects and did not understand that his own work was being called into question. Be this as it may, as an experienced professional gentleman and as the author of the above-quoted attestation as to compliance of the apartment complex with the Building Regulations, Mr Lawton must have contemplated the possibility that he could be drawn into any legal battle that might yet ensue; and he might, perhaps not unreasonably, be accused of a certain misplaced optimism if he did not.

5. In September 2007, the Ramparts Residents' Association commissioned a structural engineer's report from Horgan Lynch Engineers. Horgan Lynch concluded that such water penetration and cracking as had occurred were largely the result of inadequate detailing and poor construction. In July 2009, Arborlane went into liquidation.

6. When it comes to the within proceedings, the summons issued in December 2007 and was served in October 2008. Although other residents in "The Ramparts" have issued like proceedings, in none of these has a Statement of Claim yet been delivered. The present case thus represents the most advanced of all of these cases. An appearance was entered for Mr Lawton in November 2008 and a Statement of Claim requested. Thereafter, no steps were taken by Ms Farrell until May 2010 when a notice of intention to proceed was filed. This notice was served on Mr Lawton in August 2011.

7. By letter of February 2012, Ms Farrell's solicitors stated that they were in the process of finalising a Statement of Claim and would

be delivering it shortly. They also gave some indication of Ms Farrell's continuing woes, stating:

> *"We enclose as promised copy photographs showing the damage to 99 The Ramparts as it stands at the moment…. [T]his is a two bedroomed apartment. One of the rooms is uninhabitable. It is let. One of the tenants has left because of the condition of the bedroom which is virtually uninhabitable thanks to the water penetration and dampness….These problems must be addressed."*

8. What is perhaps most notable about this letter is that while it waves the 'big stick' of litigation, it seems quite clear that even at this stage Ms Farrell is really seeking that someone remedy the deficiencies affecting Apartment No. 99. It would not be the first letter written by a solicitor in which rumblings about continuing litigation are made but the implicit thrust of the letter is to seek some sort of practical resolution to matters, notwithstanding the mention of litigation.

9. By letters of May 2012 and June 2013, Mr Lawton's solicitors called on Ms Farrell to discontinue the proceedings. By letter of July 2013, Ms Farrell's solicitors stated that they were preparing a Statement of Claim. Of passing interest in this regard is the observation of Ms Farrell's solicitors that:

> *"[T]he problems that gave rise to the proceedings in the first place are continuing and if anything have deteriorated to the point that some of the units owned by our clients are uninhabitable and currently remain unoccupied."*

10. The Statement of Claim was eventually delivered in May 2014. Curiously, despite the fact that he now comes to court complaining about how long it took Ms Farrell to provide the Statement of Claim, it was about ten months from the receipt of the Statement of Claim that Mr Lawton filed the within application. This has been waved away by Mr Lawton's counsel with reference to his client using the time to take legal advice and contemplate his next move.

11. Mr Lawton contends that Ms Farrell has been guilty of inordinate and inexcusable delay in the institution and prosecution of the within proceedings. He contends too that no fair trial of the within proceedings is possible any longer. Mr Lawton contends that, by virtue of the passage of time, it is unfair and unjust to require him to address issues arising so far in the past. He notes in this regard that Arborlane has been in liquidation since July 2009. Given the passage of time, his own papers, he avers, "*may not be complete*". For someone who is seeking to foreclose someone else's access to the courts, it might perhaps be contended that he could have troubled himself to ascertain the position with greater certainty. What kind of basis is it for an application for strike-out that an applicant's papers "*may not be complete*"? Weak, at best.

12. Mr Lawton maintains that if Ms Farrell's claim had been made within a reasonable period after identification by her of the alleged defects, and had it been prosecuted with reasonable expedition, discovery could have been made by him prior to the winding-up of Arborlane. This, with respect, seems far-fetched. The summons was served in September 2007. Arborlane went into liquidation in July 2009. Yet in June 2015, Mr Lawton comes to court and says that eight years after receiving a summons, his papers "*may not be complete*". Did he think to check them after he received the summons? Did it never occur to him to contact the management team at Arborlane during the period to July 2009, or even the liquidator in the period thereafter, and ask to take copies of such papers as he thought necessary to defend himself, or to take such other steps as may have seemed or been appropriate? Yes, he did not yet have the Statement of Claim. But he knew from the summons that he was being sued for breach of contract, negligence and breach of duty. He knew too that any claim against him would have to focus on the attestation he gave as to compliance with the Building Regulations. What else could be in issue? Even if more was alleged, had he but taken these steps, had he even a better sense now as to whether his records are deficient are not, Mr Lawton would likely have met with more sympathy from the court as regards the merits of his application when it comes to weighing the balance of justice.

PART III

THE THREE IMPUGNED DELAYS

13. There are three periods of impugned delay. Each of these is considered hereafter.

1. Pre-action delay

14. Mr Lawton's involvement in the Ramparts' project came to an end in November 2000 when his opinion issued. Thereafter, Ms Farrell purchased her apartment on an unspecified date in 2002. The summons was issued in December, 2007, relatively close to the expiry of the applicable limitation period. Prior to this, the first communication that issued from Ms Farrell's solicitors and Mr Lawton was on 30th October 2007. Counsel for Mr Lawton has laid some emphasis on this last fact, *i.e.* that Mr Lawton did not have notice of any claim against him until 30th October, 2007. The court does not accept as plausiblethe notion that Mr Lawton was an 'innocent abroad', unaware of the potential for the significant problems at "The Ramparts" to envelop him in a possible legal battle.

15. The court notes too that the summons appears to have issued against Mr Lawton within the relevant limitation period. If the Oireachtas establishes a limitation period, then one has until the last moment of the last day of that limitation period within which to act, albeit that delay within that period may count in any calculation of inordinate and inexcusable delay or any weighing of the balance of justice.

2. Ostensible delay in serving Summons

16. The summons issued in December 2007 and was served in October 2008. An appearance on behalf of Mr Lawton was entered in November 2008. Counsel for Mr Lawton sought to make much of this so-called ten-month delay in the serving of the summons. However, an initial summons has an initial lifespan of one year and this Court does not find it appropriate or necessary to read into that one-year lifespan an implicit shorter lifespan that is conditioned upon and in effect created by, say, the requirement for renewal that there have been reasonable efforts to effect service during the one-year lifespan of an initial summons. If the rule of law means anything, it is that law must have meaning. There seems to the court to be little reason and less justification for foreshortening the lifespan of an initial summons, as settled upon by law. An initial summons has a lifespan of one year, and here the initial summons was served within that one-year period, albeit that delay within that period may count in any calculation of inordinate and inexcusable delay or any weighing of the balance of justice.

3. Ostensible delay in serving Statement of Claim

17. There was a significant delay in the issuance of the Statement of Claim, perhaps because Ms Farrell preferred that matters be resolved without matters going to court. Be that as it may, the Statement of Claim was requested of Ms Farrell's solicitors in November 2008. By letter of February 2012, three years and three months later, Ms Farrell's solicitors stated that they were in the process of finalising a Statement of Claim. By letter of July 2013, almost a year-and-a-half on, Ms Farrell's solicitors stated that they were still preparing the Statement of Claim. The Statement of Claim was eventually delivered ten months later in May 2014. Oddly, as mentioned above, notwithstanding that the Statement of Claim was received in May 2014, the supposedly hard-pressed Mr Lawton

did not issue the motion grounding the within application until February of this year, a ten-month period of delay which has gone unexplained apart from a somewhat vague 'he was considering his options with his lawyers and contemplating his next move' excuse. On this brief account of events, one might reasonably conclude that Ms Farrell had been guilty of inordinate and inexcusable delay. However, there are two sides to every story. And Ms Farrell and her legal team had much to say about the allegations of delay.

PART IV

WHAT IS ALLEGED IN THE STATEMENT OF CLAIM

18. It is possible sometimes in these procedural applications to lose sight of the substance of the legal dispute between the parties. The court has described the facts in some detail above. But it is worth mentioning the particulars of damage contained in the Statement of Claim, by way of identifying the scale of the wrong that Ms Farrell alleges to have been done to her – and these are but allegations which, at least in the case of Mr Lawton (the court does not know the position of the other defendants), stand denied. Ms Farrell alleges that the defendants jointly or severally:

> *"i. Exposed the Plaintiff to a risk of loss and/or damage;*
>
> *ii. Failed to exercise any or any reasonable care in and about design and construction of the premises.*
>
> *iii. Caused, allowed or permitted piping to be and/or to become and/or to remain in a state of disrepair;*
>
> *iv. Caused, allowed or permitted piping to be and/or to become and/or to remain in a state of disrepair.*
>
> *v. Caused, permitted or allowed water to escape into the premises.*
>
> *vi. Caused, permitted or allowed the leak complained of to cause damage to the premises;*
>
> *vii. Failed to take the necessary or appropriate steps to prevent water getting into the Plaintiff's premises;*
>
> *viii. Permitted water to penetrate into the Plaintiff's premises and thereby maintained a nuisance on the Plaintiff's premises.*
>
> *ix. Did not design, supply, fit any or adequate flashing and counter flashing details.*
>
> *x. Caused, suffered and/or permitted internal cracking of block work;*
>
> *xi. Did not design, supply, fit contract ring beams;*
>
> *xii. Did not design, supply, fit any or adequate movement joints;*
>
> *xiii. Did not design, supply, fit or make any or adequate provision for expansion joints within the superstructure.*
>
> *xiv. Caused, allowed or permitted damage to the finishes up to and including roof level;*
>
> *xv. Caused or allowed or permitted cracked-up stands at roof level;*
>
> *xvi. Caused, allowed or permitted damage to the roof finishes;*
>
> *xvii. Caused, allowed or permitted damage to the roof tiles;*
>
> *xviii. Supplied, designed and/or used inadequate weathering material;*
>
> *xix. Supplied, designed and/or used inadequate materials to seal the joints;*
>
> *xx. Failed to provide water proofing membrane to the balcony slab;*
>
> *xxi. Failed to provide up-standing flashings to the parapet or gable walls built off the balcony;*
>
> *xxii. Caused, allowed or permitted inadequate drainage from the balcony area;*
>
> *xxiii. Caused, allowed or permitted structural movement between the southern end of the curved block and the glazed link to the smaller rectangular block;*
>
> *xxiv. Caused, suffered and/or permitted structural movement at the northern end of the curved block;*
>
> *xxv. Failed to design or construct cold bridging between the penthouse level apartments and the apartments beneath;*
>
> *xxvi. Failed to provide robust waterproofing details for the primary waterproof membrane and flashings;*
>
> *xxvii. In the alternative; supplied, used and fitted a primary waterproof membrane that was inadequate and unfit for purpose;*
>
> *xxviii. Failed to appropriately design or construct thermal expansion and contraction within the large areas of tiling to penthouse terraces having regard to the large expanses of south and west facing terraces;*
>
> *xxix. Caused large areas of tiling to lift and break up;*
>
> *xxx. Caused and/or suffered the wooden floors in the premises to bow;*
>
> *xxxi. Caused the floor tiles to lift off the wall.*
>
> *xxxii. Created sewage problems in the Plaintiff's en-suite bathroom downstairs;*

xxxiii. Failed to drain the sewage properly.

xxxiv. Did not restore the premises to an acceptable standard;

xxxv. Breached their duty of care to the Plaintiff in all the circumstances."

19. Again, the above particulars comprise alleged wrongs only. Any wrong-doing is denied by Mr Lawton.

PART V

REASONS OFFERED FOR THE THREE IMPUGNED DELAYS

20. The following reasons are put forward by Ms Farrell for some of the delays referred to elsewhere above.

21. First, it is stated that from the outset Ms Farrell sought to engage with the relevant parties and that the eventual liquidation of Arborlane complicated matters in this regard.

22. The court accepts that some necessary delay would arise in identifying the relevant parties, which necessary delay must be viewed in the context of the fact that Ms Farrell had her life to get on with and presumably was not devoting all hours of the day to resolving such deficiencies as she encountered with her apartment, albeit that these would undoubtedly have been very troubling to her. Moreover, the court does not accept the contention of counsel that there is no explanation of what difficulties the winding-up of Arborlane would have presented to Ms Farrell. It is all very well for counsel learned in the law to query several years later what possible difficulties could have arisen in this regard. The practical reality of life is that most people are not aware of the niceties and nuances of company law. The sudden disappearance of Arborlane from the scene seems to the court to be precisely the kind of issue that Ms Farrell would find thoroughly disconcerting when Arborlane was the company she had been dealing with, when Arborlane had been doingremediation works for her, and when likely all she wanted done was to have her apartment fixed, not to spend a sojourn before the superior courts. The court considers that the delay between 2007 and 2009 is entirely explainable by the fact that between the issuance of the summons in December 2007 and July 2009, Arborlane was seeking to remediate the problems affecting Ms Farrell's apartment. Mr Lawton knew too that this work was on-going and, it would seem, assumed that with Arborlane doing the necessary, he was in the clear. *"I at all times understood it to be accepted by Arborlane"*, he avers, *"that it was its responsibility to address such defects as existed at the Development".* So be it, if so. But the outstanding existence of the summons issued by Ms Farrell in December 2007ought to have left Mr Lawton in no doubt that the active pursuit by Ms Farrell of her proceedings against him was a real and continuing risk.

23. Second, it is claimed that there were significant issues regarding the identification and alleged responsibility of the defendants as regards the alleged defects arising at "The Ramparts". Specifically, Ms Farrell points to the fact that she was at one point advised by Mr Lawton's solicitors that Mr Lawton had not acted as a certifier for the development when in fact he had issued the attestation concerning compliance with the Building Regulations.

24. The court accepts that some necessary delay would have arisen as regards the identification of the persons allegedly responsible for any defects presenting. Counsel for Mr Lawton contends that these difficulties are not explained. This contention may make some sense within the narrow context of the pleadings as expressly worded. However, the court considers that it is allowed to take some cognisance of the fact that there is a world beyond Gandon's granite in which people go about their lives, happily un-schooled in the law and sometimes unaware as to who may be responsible for such vicissitudes as are wrongly visited upon them. Realising that one may be the victim of wrong-doing, recognising that there may be a remedy, and reaching the phone for a solicitor are steps that likely present in all litigation and which will inevitably engender an inherent and necessary delay for which the court can make reasonable allowance in proceedings. The fact that people would be fearful of the cost of going to law and might seek to resolve matters lawfully between them other than through the courts is also a matter of which the courts have taken cognisance since at least the time of *O'Donnell v Dun Laoghaire Corporation* [1991] I.L.R.M. 301. As to the letter from Mr Lawton's solicitors, this issued after the Statement of Claim issued and thus the court does not accept that this could have affected Ms Farrell in respect of any period of delay relevant to this application.

25. Third, Ms Farrell points to the fact that prior to issuing proceedings, she was arranging for and facilitating the remedial works (a process which, by its nature, necessarily protracted the pursuit of legal proceedings when the issues that would be the subject of those proceedings were already the subject of at least some of the remediation that was effected).

26. The court accepts that Ms Farrell has for long taken the logical, even laudable step of seeking to have the defects to her property remedied without recourse to the courts. Counsel has pointed to the fact that Ms Farrell failed to engage with Mr Lawton until October 2007. The court does not attach the same significance to this fact as counsel for Mr Lawton. Ms Farrell had been dealing with Arborlane, and Arborlane had been doing remediation works. Was Ms Farrell supposed to reach out to all potential defendants and say 'Despite the fact that Arborlane is doing all the remedial works that I have sought, and despite the fact that you know this, and despite the fact that no mis-chance has yet arisen in my dealings with Arborlane, on the off-chance that it does, would you be willing to do the works, because otherwise I'll sue you?' Perhaps it makes some sense, though only with the glorious Technicolor of hindsight, that Ms Farrell would have reached out to Mr Lawton and put him on notice of her views, if any, as to his liability. However, life is lived in the now, and with Arborlane doing all that seemed necessary, Ms Farrell's failure to reach out to Mr Lawton in this regard is entirely understandable and, so far as this Court is concerned, not a matter in respect of which any blame attaches or, indeed, of which any criticism falls to be made.

27. Fourth, Ms Farrell maintains that any delay in serving the summons is explained by the fact that she was continuing in her efforts to engage with the defendants. The court accepts this as a reasonable explanation and notes, for what it is worth, that the summons was served within its initial one-year lifetime.

28. Fifth, as to the delay following the service of the summons and the issuance of the Statement of Claim, it is claimed that Ms Farrell was facilitating the preparation of a schedule of necessary works and that she continued to engage with the defendants in an effort to manage the defects in respect of which complaint was made.

29. Unfortunately for Ms Farrell, the court considers her to hit a significant difficulty in this regard. Five-and-a-half years between the service of a summons and the issuance of a Statement of Claim is, in the context of this case, inordinate and inexcusable delay. Having commenced her claim, it was necessary for Ms Farrell to progress her claim with due expedition. The court does not consider that anyone could reasonably consider that she is permitted to serve a summons and then do nothing further for over half a decade. Of course, despite the fact that the delay was, in the court's view, inordinate and inexcusable, the court also needs to examine whether the balance of justice nonetheless inclines in Ms Farrell's favour. The court does so later below. Before that, however, it

considers the principles applicable to cases brought for strike-out on grounds of inordinate and inexcusable delay.

PART VI

APPLICABLE PRINCIPLES

30. When it comes to the issue of inordinate and inexcusable delay, there seems little point in the court ploughing afresh a field of law that has been well furrowed in recent years. Instead the court confines itself to a summary of what it considers the key principles to be derived from recent judgments of the superior courts. All judgments are, of course, ultimately but essays on the margins of the law, and here the law falls to be considered within the penumbra of the constitutional right of access to the courts to defend and vindicate one's legal entitlements, a right of signal importance in any democracy, a right that received perhaps its finest articulation in the judgment of Walsh J. in *Byrne v. Ireland* [1972] 1 I.R. 241, a right which in no sense has been relegated to second-tier status or banned like a naughty child from the courtroom because it is has proved so troublesome in the past, and a right which has not (yet) been immolated before the god of administrative efficiency.

Key principles applicable to issue of inordinate and inexcusable delay

> (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***.[1].***
>
> (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***. [2].***
>
> (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***.[3].***
>
> (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.***[4].***
>
> (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***.[5].***
>
> (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***.[6].***
>
> (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***.[7].***
>
> (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***.[8].***
>
> (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***.[9].***
>
> (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, ***[10]***
>
> (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***.[11].***
>
> (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***.[12].***
>
> (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)***.[13]***.
>
> (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***.[14].***
>
> (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***.[15].***

31. The following authorities support the above-mentioned principles:[***1***]*Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561; *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 499; *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27, para.32).[***2***]*Allen v. Sir Alfred McAlpine & Sons Limited* [1968] 2 Q.B. 229 at p.254; *Collins*, para.32.[***3***]Primor; Collins, para.32. [***4***]*Cahalane v. Revenue Commissioners* [2010] IEHC 95; *McBrearty v. North Western Health Board* [2010] IESC 27; *Collins*, para.33. [***5***]*Primor; Collins*, para.32.[***6***]*Primor; Coll*ins, para.32; *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510; *Granahan v. Mercury Engineering* [2015] IECCA 58, para.24.[***7***]*Collins,* para.37; *Cassidy v. Provincialate* [2015] IECCA 74, paras.35–36. [***8***]*Stephens v. Flynn* [2008] 4 I.R. 31; *Cassidy*, para.36; *Gorman v. Minister for Justice, Equality and Law Reform* [2015] IECA 41, para.59. [***9***]*Primor; Collins,* para.32. [***10***]*Gorman*, para.73. [***11***]*Granahan*, para.11. [***12***]*Stephens v. Paul Flynn Limited* [2005] IEHC 148; *Rodenhius& Verloop B.V. v. HDS Energy Limited* [2011] 1 I.R. 611; *Collins*, para.43. [***13***]*Quinn v. Faulkner t/a Faulkner's Garage* [2011] IEHC 103; *Collins,* para.39; *Gorman*, para.30. [***14***]*O'Donnell v Dun Laoghaire Corporation* [1991] I.L.R.M. 301 at p.318; *Forum Connemara Limited v. Galway County Local Community Development Committee* (Unreported, High Court, 15th June, 2015, para.7)). [***15***]*Comcast International Holdings Limited v. Minister for Public Enterprise and Others*[2012] IESC 50; *Harrington v. EPA*

[2014] IEHC 307, para.7; *Forum Connemara*, para.6.

PART VII

THE BALANCE OF JUSTICE

32. So, where does the balance of justice lie between (a) a woman who paid for a new apartment and is having to endure cracked walls, ongoing water ingress and continuing sewerage problems and (b) a professional engineer who was satisfied to issue a document attesting to the compliance of the relevant apartment complex with the Buildings Regulations but who contends that to allow him to be sued over that document would be an affront to justice, given the elapse of time arising and the mere "*greater than moderate*" risk of prejudice to which he is allegedly exposed?

33. The essence of this application is that a claim was commenced within the relevant statutory limitation period, there was due service of the related summons during its initial one-year lifetime, and there was then a five-and-a-half year delay in the service of the Statement of Claim. During all periods of delay continuing and understandable efforts were, it seems, made by the plaintiff to get one or more of the defendants to do the remediation works that she needs to have done to her apartment and which, if done correctly, would presumably reduce, if not obviate, any need for her to come to court.

34. By his own account, Mr Lawton remains unaware as to whether he has the papers necessary to defend this case, despite having had eight years to check them, including two years when Arborlane was still in existence. Moreover, he admits that any prejudice arising to him from the delay arising is but "greater than moderate", which seems little more than a fancy way of saying 'not a lot'. Even so Mr Lawton has elected, as is his right, to bring the within application to strike out the plaintiff's proceedings on grounds of inordinate and inexcusable delay. Noticeably, however, he took the better part of a year to do so, after receiving a Statement of Claim for which he had apparently been so eagerly awaiting.

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

36. For the reasons stated above, the court declines to make the orders sought by Mr Lawton. That said, Ms Farrell ought now to prosecute the within proceedings with the greatest despatch possible.