Neutral Citation [2015] IEHC 344

THE HIGH COURT

[2007 No. 3506 P]

BETWEEN

LOUIS J. O'REGAN LIMITED

AND

JEREMIAH O'REGAN

PLAINTIFFS

AND

CLARE COUNTY COUNCIL

AND

BOXINYE LIMITED TRADING AS AND FORMERLY KNOWN AS BABTIE PETTIT

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 21st day of May 2015

1. This matter comes before the court by way of motions on notice brought by the defendants for an order dismissing these proceedings. There are some differences apparent on the face of the two motions.

2. By its notice of motion dated the 4th October 2013, the first named defendant invokes the inherent jurisdiction of the court to dismiss these proceedings in the interests of justice and on the grounds of delay and/or alternatively for want of prosecution pursuant to the provisions of O.122 r. 11 of the Rules of the Superior Courts 1986 as amended.

3. By its notice of motion dated the 10th May 2013 the second named defendant seeks an order dismissing the proceedings for want of prosecution pursuant to the provisions of O.36, r.12(b) or, alternatively, pursuant to the provisions of O.122, r.11 of the Rules of the Superior Courts.

4. Order 36 rule 12(b) of the rules provides:

> *"If the plaintiff in any action does not within six weeks after the close of the pleadings, or within such extended time as the Court may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial (which, in cases where the plaintiff is entitled as of right to a jury, shall be for trial with a jury), or may apply to the Court to dismiss the action for want of prosecution; and on the hearing of such application, the Court may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court may seem just."*

6. Order 122 rule 11 provides:

> *"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule."*

7. Whilst particular considerations may apply to the exercise of the court's jurisdiction in respect of an application for relief on foot of any given order of the rules where the wording of the order is directive in relation to the exercise of the court's jurisdiction, such as where an application is made to strike out proceedings pursuant to O.19 r. 28, where the wording of the rule in effect requires the court to determine the application by reference to the pleadings alone, when the court is considering an application to dismiss proceedings for want of prosecution in the interests of justice whether brought invoking the inherent jurisdiction of the court or upon the jurisdiction conferred under O.36 or O.122, the underlying jurisdiction is the same. See *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and *Comcast International Holdings Incorporated & Ors v. Minister for Public Enterprise & Ors* [2012] 10 JIC 1701.

The pleadings motions and court orders.

8. The pleadings in this case commence by way of plenary summons issued on the 3rd of May 2007 and on which the plaintiff's claim is endorsed in the following terms:

> *"The plaintiffs and each of them claim for damages including exemplary damages together with punitive damages for the losses, expense and damage suffered and sustained by them as a result of the negligence, breach of duty, breach of statutory duty, breach of contract, misfeasance of public office, fraudulent preferment, or in the alternative negligent preferment, and the defamation of the plaintiffs and each of them on the part of the defendants and each of them, their respective servants or agents."*

9. Thereafter the following notices and pleadings were served and orders made:

> (a) The first defendant's notice of intention to proceed dated the 19th September 2008.
>
> (b) The first named defendants notice to proceed dated the 22nd April 2009.
>
> (c) The first named defendant's notice of motion dated the 25th May 2009 seeking to have the plaintiffs claim dismissed for want of prosecution.

(d) Notice of change of solicitor on behalf of the plaintiff dated the 26th June 2009.

(e) The order of Herbert J. dated the 13th July 2009 extending the time for the delivery of a statement of claim on or before the 29th July 2009 on terms that in default of so doing the plaintiff's claim should stand dismissed.

(f) The plaintiff's statement of claim dated the 29th July 2009.

(g) The second named defendant's notice for particulars dated the 7th August 2009.

(h) The second named defendant's motion dated the 18th November 2009 to compel replies to the second named defendant notice for particulars.

(i) The plaintiff's replies to particulars dated the 18th December 2009.

(j) Order of De Valera J. dated the 21st December 2009 striking out the second named defendant's motion for particulars.

(k) The second named defendant's notice for further and better particulars dated the 7th January 2010.

(l) The plaintiff's replies to particulars dated the 18th March 2010.

(m) The plaintiff's motion for judgment in default of defence against both defendants dated the 15th April 2010.

(n) The first named defendant's notice for particulars dated the 1st July 2010.

(o) The order of Lavan J. dated the 5th July 2010 extending the time by four weeks from the date of the order for the delivery of defences by the defendants.

(p) The defence of the second named defendant dated the 27th April 2011.

(q) The plaintiff's solicitor's motion to come off record dated the 18th December 2012.

(r) The order of Ryan J. made the 25th February 2013 giving the plaintiff's solicitors liberty to come off record.

(s) The second named defendant's notice of intention to proceed dated the 20th March 2013.

(t) The plaintiff's solicitor's notice of change of solicitor dated the 19th June 2013.

(u) The second named defendant's notice of motion to dismiss these proceedings dated the 10th May 2013.

(v) The first named defendant's notice of motion dated the 24th June 2013.

(w) The plaintiff's replies to the first named defendant's notice for particulars dated the 16th October 2013.

Background.

10. In late 2003 the National Roads Authority invited a number of companies to tender for a large construction project, namely the N18 Ennis Bypass Scheme which was due to commence in March 2004. It was anticipated that the project would last over a three year construction period commencing in 2004. Stabag Gama Joint Venture (Gama) submitted tenders to secure the contract for that project and in respect of which, following negotiations, the plaintiffs were invited by Gama to tender for a contract to supply that company with concrete aggregate and other stone material required by Gama for use in the construction project. The plaintiff submitted a quotation for that subcontract which was included in the tender submitted by Gama.

11. On the 13th January 2004, Gama's tender in the sum of €124,000,000 including VAT was accepted.

12. In July 2004 the plaintiffs commenced the supply of aggregate material to Gama from two quarries situate in County Clare and in respect of which the plaintiffs entered into two lease agreements. In addition the plaintiffs purchased a number of items of heavy machinery to facilitate completion of the contract.

13. The plaintiffs contend that the quarries had been used as quarries since 1935 and that, accordingly, the quarries constituted exempt development within the meaning of the Planning and Development Act 2000 as amended (the Act). In this connection the plaintiffs contend that the definition of exempted development in the planning code includes development consisting of the carrying out of works required for the construction of a new road or the maintenance or improvement of a road. Accordingly, the plaintiffs proceeded on the basis that quarrying stone and crushing works carried out by them as part of the works associated with the Ennis bypass project constituted exempt development. The plaintiffs, by application dated the 25th May 2004, sought to register the quarries under s.261 of the Act. The first defendant acknowledged receipt of that application on the 5th August 2004, however, on the next day it sent a letter to the first plaintiff warning that the works carried out at the quarries were unauthorised. The plaintiff's solicitors responded on the 22nd August 2004 denying that the works at the quarries were unauthorised for the reasons set out in that letter and to which they say no response was received from the first name defendant.

14. On the 12th August 2004 the second named defendant wrote to Gama advising that the quarries being operated by the plaintiffs were an unauthorised development and that therefore those quarries were not an approved source of material for the contract and that no material from those quarries should be imported or used.

15. On the 19th August 2004 the plaintiff's contend that the first defendant caused or otherwise permitted the 1st defendant's letter of the 6th August to be circulated to the press which ultimately resulted in an article being published in the Clare Champion on the 19th August under the headline *"Council sends serious warning to quarry operator"*.

16. On the 25th August 2004 the plaintiffs wrote to the second named defendant calling upon the second defendant to withdraw the letter of the 12th August which they had sent to Gama. There was no response to this request. Instead the second named defendant wrote to Gama referring to the contract and requesting them to confirm that the quarries providing the material for the works had full

planning permission. The plaintiffs allege that this compounded the effect of the letter of the 12th August 2004.

17. Consequent upon these events the plaintiffs claim that Gama refused to purchase any further product from the plaintiffs and instead appointed Whelan Limestone Quarries Ltd contractors for the purposes of the supply of this material. For reasons which will become apparent later in this judgment the planning status of a particular quarry owned by that company is significant in relation to the matters now before the court.

18. The plaintiffs claim that as a result of these actions, which they allege were unlawful, they have suffered severe financial loss which has been categorised under four headings :

(a) Loss of profit in relation to the supply of contracts

(b) Loss on sale of machinery

(c) Cost of quarry development

(d) Loss of quarry

19. These matters were all pleaded in the plaintiff's statement of claim which was delivered on the 29th July 2009 on foot of an order made by Herbert J. on the 13th of July and which had extended the time for delivery of the statement of claim by four weeks on terms that if not delivered these proceedings should stand dismissed.

20. This is of some significance in the context of the present application since that order was made on foot of an application made by the first defendant to have the plaintiff's claim dismissed for want of prosecution. That motion also invoked the inherent jurisdiction of the court as well as the jurisdiction conferred pursuant to Orders 27 and 122 of the rules for the purposes of having the proceedings dismissed on the grounds of inordinate and inexcusable delay.

21. In his replying affidavit to that motion, the second named defendant gave an explanation as why the proceedings had not been advanced and sought an extension of time for the delivery of the statement of claim. This affidavit also contained an undertaking to the court given on behalf of the plaintiffs whereby, in the event of the defendant's application being refused, they would seek to ensure that the case was progressed diligently.

Notices for particulars.

22. The first named defendant raised a notice for particulars on the 1st July 2010 which, amongst other things, sought confirmation that the plaintiff was not proceeding with claims for exemplary damages, punitive damages, misfeasance of public office, fraudulent preferment, negligent preferment and defamation. However, it was not until the 16th of October 2013 that replies were delivered by the plaintiff's present solicitors. The response made by the plaintiff to these specific queries and each of them was "not confirmed".

23. The second named defendant also raised a notice of particulars in respect of the plaintiff's claim in connection with the alleged liability on the part of that defendant including particulars as to the nature of the alleged illegality, negligence and breach of statutory duty. This notice for particulars, dated the 7th August 2009, was replied to on the 18th December 2009 as a result of which the second named defendant's motion to compel replies, having already been issued, was struck out on the 21st December 2009. Following receipt of those replies to particulars, the second named defendant raised a notice for further and better particulars dated the 7th January 2010. This was replied to by the plaintiffs on the 18th March 2010.

24. With regard to the alleged liabilities on the part of the second named defendant, the plaintiffs replied stating that the letter sent by the second named defendant was inaccurate in its content and accordingly constituted an unlawful interference in the plaintiff's contractual relations with Gama, moreover, the plaintiffs would contend that the second named defendant acted negligently and in breach of duty in sending that letter. No further particulars in that regard were sought.

25. Neither of the defendants delivered defences within the time permitted by the Rules of the Superior Courts, accordingly, the plaintiff's issued a motion against both defendants for judgment in default of defence. The motion was heard by Lavan J. on the 5th July 2010 when he made an order extending the time by four weeks for the delivery by the defendants of their defences. Neither defendant complied with the order by delivering defences within the time permitted, however, and with the consent of the plaintiff's solicitors, the second named defendant delivered a defence on the 27th April 2011. That defence puts the plaintiffs on full proof of their claim.

26. With regard to the delivery of the defence by the first named defendant its position was that before being in a position to do so it was necessary that the plaintiff's would furnish replies to its notice for particulars. In this regard, and prior to the date of the hearing of the plaintiff's motion for judgment in default by Lavan J., the first defendant's solicitors wrote to the plaintiff's solicitors on the 5th July 2010 making clear their position namely that on receipt of replies to particulars they would deliver their defence. They invited the plaintiff's solicitors to adjourn their motion for judgment in default so as to enable the plaintiffs to reply to the notice for particulars and invited the plaintiff's solicitors to confirm that they were in agreement with that course. Together with that letter the first named defendant's solicitor enclosed a very full defence which put the plaintiffs on full proof of their claim. Significantly, the draft defence contains a number of pleas which are directed to the legal status of the quarries the essence of which is that the quarries were not exempt development and that the quarrying activities constituted unauthorised development and were unlawful. No consent was forthcoming from the plaintiff's solicitors in relation to the course of action proposed by the first defendant; instead, the plaintiffs proceeded with their motion for judgment in default.

27. Notwithstanding the breach by the first defendant of the terms of that order, the plaintiff did not move the court in respect it. Similarly, it being then abundantly clear to the first defendant as to the position of the plaintiffs with regard to the proposed course of action, no motion was brought by it to compel the plaintiff's to reply to its notice for particulars nor has the first named defendant sough the consent of the plaintiffs, as the second named defendant did, for the late delivery of its defence nor was any application brought to amend the time for delivery of the defence, accordingly, the first defendant remains in breach of an order of the court.

28. Insofar as the plaintiff's claims as endorsed on the general endorsement of claim relate to claims for relief by way of exemplary and punitive damages generally as well as in respect of the claims for misfeasance of public office, fraudulent preferment, negligent preferment and defamation, these reliefs and alleged causes of action are manifestly not pleaded in the statement of claim as required pursuant to the provisions of Orders 19 and 20 of the Rules of the Superior Courts nor has any amendment of the statement of claim been made or sought in respect thereof, accordingly, the case presently before the court and which the plaintiffs seek to advance is that pleaded in the statement of claim as delivered and not otherwise.

29. Whilst the first named defendant maintains that in the circumstances of this case it is necessary that it have a reply to the notice for particulars dated the 1st July 2010, the provisions of O.19 r.7 (3) provides that particulars shall not be ordered by the court to be delivered before defence or reply, as the case may be, unless the court shall be of the opinion that they are necessary or desirable to enable the defendant or the plaintiff, as the case may be, to plead or for any other special reason to be so delivered. It follows that in default of agreement, which is absent in this case, it was necessary for the first defendant, if it considered itself unable to plead its defence without receipt of appropriate replies, to motion the court for an order to that effect. No such motion was brought.

The affidavits.
30. The first named defendant's motion is grounded on the affidavit of Tom Tiernan, senior executive engineer with the first named defendant and sworn the 4th October 2013. This affidavit sets out the essence of the first defendant's case.

31. This affidavit, referring to the plaintiff's failure to deliver replies to particulars, fairly acknowledges that the first defendant is in default of defence contrary to the order of Lavan J. made on 5th July 2010, however, it seeks to excuse or explain this by reference to the fact that the plaintiffs have at all material times been aware of the first defendant's position, namely, that before delivering it's defence it requires the plaintiff to reply to its notice for particulars. There is no explanation proffered by the first defendant as to why an application was not made to the court to compel the plaintiff's solicitors to reply to the notice for particulars of the 1st July 2010.

32. When the first named defendant became aware that Kane Tuohy Solicitors had ceased to act for the plaintiffs in these proceedings, it corresponded directly with the second named plaintiff and that correspondence is exhibited. It is apparent from that correspondence that when the court permitted the plaintiff's former solicitors to come off record by order dated the 25th February 2013, the first named defendant wrote to the second named plaintiff advising him that it was its intention to issue a motion to dismiss the proceedings for want of prosecution, the first named defendant being in possession at that time of the second named defendant's notice of intention to proceed. The response to that by the second named plaintiff was to indicate that he was engaging another solicitor to prosecute the claim and that whilst he had received correspondence and court papers from solicitors acting on behalf of the second named defendant, he was enquiring as to whether any defence had been delivered to the proceedings on behalf of the first named defendant and if there was such a defence he requested that he be copied with it. Thereafter the plaintiff was asked to confirm the plaintiff's precise involvement in the matter to which the second named plaintiff replied on the 29th April 2013. No other correspondence in respect of that aspect of matters is exhibited.

33. The complaint of the first named defendant is set out at paragraphs 12, 13 and 14 of Mr. Tiernan's affidavit and in particular this relates to the plaintiff's failure to take any step whatsoever to prosecute the proceedings in periods between the 18th May 2007 to the 29th July 2009 and from the 5th July 2010 to date and that as a consequence the first named defendant's right to a fair trial has been placed in peril moreover, the inaction of the plaintiffs has had the effect of circumventing the first defendant's right to a fair hearing of the proceedings within a reasonable time. It is averred that should the first defendant now be required to defend what is described as stale litigation its ability to do so would be necessarily compromised because of the delay. Any such hearing now would most likely have to be proceeded by discovery and that thereafter the hearing of testimony and the determination of questions of fact would take place many years after the occurrence of the events giving rise to the claim.

34. It is averred that the interests of justice would not be served by permitting the claim to take up valuable and important time of the courts, thereby wasting money and delaying many other plaintiffs who have diligently and promptly prosecuted their claims and that in all the circumstances the public interest outweighs the plaintiff's right of access to the courts. Finally, it is said that the balance of justice lies against the plaintiffs being permitted to proceed.

35. Without prejudice to these averments, Mr. Tiernan deposes that in relation to the plaintiff's claim against the first defendant that this had increased massively in size since first intimated by letter , had now extended to claims which had not initially been intimated ,and that the plaintiffs had been through no less than three firms of solicitors into the bargain. The correspondence between the plaintiff's solicitors and the first defendant in relation to the quarrying operations is exhibited including the warning letter of the 6th August 2004. In this regard it may be said that the first defendant always maintained that the quarrying operations undertaken by the plaintiffs were not exempted developments and specifically did not come within the exemption provided for under s.4 (f) of the Planning and Development Act 2000, there being no contract in place between the plaintiffs and the first named defendant.

36. It is also averred that at any hearing, issues that might likely arise for consideration and determination would revolve around an analysis of a number of matters including the legal interests of the plaintiffs in the quarries, whether the quarries have been used since 1935 and the interaction at material times between the plaintiffs and Gama. In respect of these matters the first defendant says that it has no evidence of any legal interest of the plaintiffs in the quarries and in that regard deposes to a number of matters in 2003 and 2004 which suggested that a Mr. William Flynn intended to institute proceedings against the first named plaintiff on the grounds that it was in unlawful occupation of the quarries to the exclusion of a Mr. Joe Nestor. In addition Mr. Flynn is said to have died on the 31st October 2010. Mr. Tiernan avers that he is unaware as to whether or not Mr. Nestor ever issued proceedings or as to whether or not he would be available to give evidence. Moreover, the first named defendant was aware that the plaintiffs had brought proceedings against Mr Tony Nolan and Mr Gerard O'Donoghue who appear to have been registered as full owners of the lands occupied by the quarries on the 20th October 2003.

37. Mr. Tiernan's affidavit also deals with the planning history in relation to the quarry and which is exhibited. He maintains that the quarries represent unauthorised development, moreover, he deposes to a prosecution history against Mr Joe Nestor which includes evidence of conviction on foot of enforcement notices in relation to his use and operation of the quarries in the 1990s. Mr Tiernan deposes that such history would be material and relevant to the issues as far as the first defendant is concerned and that a trial of these proceedings at such a remove from those events, apart altogether from the frailty of human memory and dimmed recollection of witnesses, would also likely deprive the first defendant of meaningful assistance from other witnesses who may have left the locality or otherwise the employment of the first defendant.

The second named defendant's affidavit.
38. The affidavit grounding the second named defendant's notice of motion is sworn by David Hurley, a partner in the firm of McCann Fitzgerald, solicitors on record for the second defendant. This affidavit is dated the 1st May 2013 and sets out the pleading and correspondence history insofar as the second named defendant is concerned and already referred to herein above. He deposes to the fact that the second named defendant is a wholly owned subsidiary of Jacobs UK, a company registered in the United Kingdom, and that that company is no longer trading. He avers that he had received instructions from the directors of the second named defendant that they are desirous of having the company wound up but that the existence of the within proceedings remains a contingent liability of the second named defendant which must be addressed before that step can be taken. He deposes to the fact that costs are involved in maintaining the second named defendant in existence and that therefore the second named defendant is prejudiced in having to remain a defendant in the proceedings in respect of which the plaintiffs have not shown any inclination to pursue and that

no steps having been taken in the proceedings in excess of two years since the delivery of the second defendant's defence on the 27th April 2011 the court should now grant the relief sought on the notice of motion.

The plaintiff's affidavits.
39. The second named plaintiff's replying affidavit was sworn on the 20th of November 2013. He sets out the plaintiff's case in relation to this motion. Firstly, it is said that insofar as the complaint of inordinate and inexcusable delay from the issue of the summons to the making of the order by Herbert J. on the 13th July 2009 is concerned and which extended the time for delivery of the statement of claim on terms that if not delivered by the 29th July the proceedings be dismissed, that that period of time cannot now be taken into account and is in essence *res judicata*. However, this proposition was not proceeded with at the hearing of these motions .

40. Thereafter the second named plaintiff avers that it was not until nearly a year later that the first named defendant raised a notice for particulars and it is suggested that this was only because the plaintiffs had brought a motion for judgment in default. Reference is also made to the fact that the first named defendant never issued a motion to compel the plaintiff to reply to its notice for particulars and avers that the first named defendant was not entitled in law or by procedure to await such replies before filing its defence.

41. With regard to the delays complained of by the first named defendant ,the second named plaintiff sets out in his affidavit an explanation for this delay which may be summarised as follows: namely, that the first solicitor whom he had retained, Colm Murphy, was struck off the roll of solicitors, that the second solicitor, Mr. Casey, fell ill and he too was struck off the roll of solicitors, that the second named plaintiff's relationship with his third firm of solicitors, Kane Tuohy broke down in late 2012, and that thereafter the second named plaintiff set about retaining another firm of solicitors to act on behalf of the plaintiffs. Ultimately he retained the services of his present solicitors who then assisted the plaintiffs in preparing replies to the first named defendants notice for particulars which were subsequently delivered on the 16th October 2013 and all of which matters resulted in the plaintiffs finding themselves in what are described as most unusual circumstances.

42. The second named plaintiff rejects any contention that the plaintiffs made no efforts to prosecute the case in a timely fashion and rejects any suggestion that there was inordinate or inexcusable delay.

43. Insofar as the court might consider otherwise ,the second named plaintiff avers that the first named defendant is not being imperilled by any such delay and that its ability to defend the action has not in any way been compromised, furthermore, he says that the actions of the first named defendant need to be investigated in the context of being a public body and that in such circumstances it is imperative in the interests of justice and in the public interest that the case be heard by the court and are matters for evidence.

44. Addressing issues pertaining to the O'Donoghues, Mr Flynn, Mr Nestor, and the enforcement notices, the second named plaintiff avers that these are also matters which he says existed previous in time to the proceedings and have nothing to do with the alleged delay. Moreover, the death of Mr Flynn in October 2010 does not prejudice the defendants in their defence of the action as the matter was not ready to proceed at the time of his death in any event, the defences not having been delivered. It is said that there was no prejudice to the defendants as a result of Mr Flynn's death.

45. With regard to the issues raised by the first defendant in relation to the plaintiff's interest in the quarries, the second named defendant exhibits a number of documents including an assignment of the lease to Healy Brothers Ltd, which leases were extant at the time of the matters the subject matter of these proceedings.

46. With regard to his application to register the quarries pursuant to the provisions of 261 of the Planning Acts on the 25th of May 2004 the second named plaintiff says that it was not until 2012 that a final determination was made in relation to the planning and that the effect of which he said means that the quarries were in fact exempted developments. As far as the plaintiffs were concerned the planning status of the quarry is of vital importance to the determination of the issues of the case between the plaintiff and the first named defendant.

47. As to the interaction between the plaintiffs and Gama, the plaintiffs say that no meaningful issues in this regard were raised in the first defendant's notice for particulars and in any event are an appropriate matter for discovery. The availability or otherwise of witnesses is, at this point in time, merely hypothetical.

48. Whilst the plaintiffs accept that no reply had been made to the first defendant's notice for particulars at the time when they brought their motion to compel the first named defendant to deliver its defence, no explanation is offered as to why the plaintiffs did not bring a further motion consequent upon the first defendants breach of the order extending time for delivery of the defences.

49. A replying affidavit on behalf of the first named defendant was sworn on the 6th January 2013 and a further replying affidavit by the second named plaintiff was sworn on the 20th January 2014.

50. The replying affidavit of Sinead Nunan sworn on behalf of the first named defendant takes issue with the averment by the second named plaintiff that his relationship with his former solicitor Mr Kane only broke down in late 2012. She exhibited an affidavit of Mr Hugh Kane, sworn the 18th of December 2012 for the purposes of coming off record, which stated that since the 16th November 2011 Kane Touhy would not be representing the plaintiffs by reason of the failure of the second named plaintiff to honour his undertaking to them, accordingly, she avers that it is manifestly incorrect for the second named plaintiff to have averred that his relationship with Mr Kane only broke down in late 2012.

51. Furthermore, she says that the first communication which the first named defendant's solicitors had from the plaintiff's present solicitors was not until late June 2013. She questions the veracity of the second named plaintiff's averment that he immediately set about engaging a new solicitor once his relationship with Mr Kane had broken down.

52. It is also deposed that the only correspondence from the second defendant after this time were letters dated the 12th and 29th of April 2013 which were generated by him in response to letters from Ms Nunan of the 10th and 18th of April 2013 threatening the within application.

53. In this affidavit she goes on to refer to the involvement in these proceedings of a number of solicitors on behalf of the plaintiff. As far as the first named defendant is concerned any professional difficulties with the Law Society encountered by Mr Greg Casey were wholly irrelevant to the plaintiff's delay in prosecuting the proceedings. Moreover she refers to other court proceedings involving the plaintiffs in which the plaintiffs were, apparently, represented by Casey & Company at the time. She takes issue with the plaintiffs

with relation to the planning status in relation to the quarries and in this regard avers that the developments remain unauthorised.

54. In my view, it is of some considerable significance in relation to the determination of the applications that on the 22nd of August 2012 the first defendant made a determination pursuant to S.261A of the Act 2000, Board Pleanála having already refused permission in respect of the quarries in June 2010, that the requirements in relation to registration were not fulfilled and that an enforcement notice would be issued. Such notice dated 8th November 2013 and relating to both quarries was subsequently sent to the first defendant. These documents were exhibited and have been considered by the court.

55. Moreover, it appears from her replying affidavit that the determination by the first defendant in relation to a S.261 application that the legal requirements were fulfilled and which was exhibited in the replying affidavit of the second plaintiff, upon which he had averred that the quarries were therefore exempted development, actually refers to an entirely different quarry owned by Whelan Limestone Quarries Ltd, Council Ref. No. EUQY4. However, there is in fact no doubt but that on the face of it the enforcement notice of the 8th November 2013 relates not to that but to the quarries in question in these proceedings.

56. In his replying affidavit of the 18th January 2014 the second named plaintiff sets out his reasons for the apparent absence of replies to the first defendant's notice for particulars and which he attributes the difficulties in which two of his solicitors found themselves with their professional body and as a result of which he engaged the services of Kane Touhy solicitors but who also subsequently came off record. However, it is apparent that it was not until in or about May 2013 that the plaintiff's engaged the services of their present solicitors. He contends that it is disingenuous and wholly incorrect for the first defendant to suggest that he had made no effort to prosecute his case in a timely fashion when they themselves had failed to comply with a court order. He reiterates his contention that he had done all that was reasonably possible to move the case forward and that in fact it is the first defendant who is responsible for a significant amount of the delay which had occurred in this matter. He concludes his affidavit by agreeing that it is in the interests of all of the parties that the matter be resolved and concluded as expeditiously as possible and agrees to be bound by any timelines directed for the delivery of pleadings that the court might order. Finally, he contends that neither of the defendants had been in any prejudiced in the matter by any delays on the part of the plaintiffs and that the application ought to be refused.

Submissions
57. Written and oral submissions were made by the parties which have been considered by the court.

58. It was submitted on behalf of the first defendant that the events giving rise to these proceedings arose in 2004 and now, even in 2014, the plaintiff had not properly replied to the first defendants notice for particulars and which it contends are essential in relation to what has now become a very substantial claim. It was submitted on behalf of both defendants that this was a clear case of inordinate and inexcusable delay and that there had been a failure on the part of the plaintiffs to provide a satisfactory explanation for the delay which had occurred, most of which could be laid at the feet of the plaintiffs. The older case authorities which were relied on had now, to be viewed, it was submitted, against a background of the provisions of Article 6 of the ECHR the effect of which was to tighten up the requirements to be satisfied before a plaintiff could obtain an order enabling the continuation of proceedings. The essence of the first defendant's submissions was that, on the facts and in the circumstances of this case, it would be unjust to allow the case to proceed.

59. It was accepted on behalf of the plaintiffs that the delay which had occurred was inordinate but that in the circumstances of this case that delay was excusable. If, however, that were not so, then the balance of justice favoured the plaintiffs.

60. The plaintiffs fairly conceded at the hearing that the order of Herbert J. of the 13th July 2009, extending the time for the delivery of a statement of claim on the motion to dismiss the proceedings for want of prosecution ,was not *res judicata* in relation to the timeline of the proceedings up to the date of the making of that order.

61. As to the failure of the plaintiff to deliver replies to the first defendant's notice for particulars before delivery by the first defendant of its defence, it was submitted by the first defendant that having regard to the nature of the case pleaded, it was in the interests of justice that such particulars should first be delivered and that the failure of the plaintiffs to deliver replies to the notice for particulars constituted an acquiescence by the plaintiff in the first defendants approach. It was also submitted that the plaintiffs ought to have moved the court on foot of the order of Lavan J. but failed to do so. The failure on the part of the first defendant to deliver a defence was not an acquiescence on the part of the first defendant in the plaintiffs delay which had to be laid fairly at the feet of the plaintiffs in failing to release the information by way of a replies to particulars and which they clearly had in their possession.

62. It was submitted that a fair analysis of what had happened was that the parties had in reality come to a consensus. The first defendant had written to the plaintiffs who had replied saying that they were going to furnish the replies in early course but failed to do so until October 2013. The defendants were not obliged to proceed or otherwise prompt the plaintiffs into action; rather that obligation lay on the plaintiffs.

63. No satisfactory explanation had been given for the plaintiff's delay. It was incorrect on the part of the plaintiff to say that the relationship with the third firm of solicitors had broken down in late 2012 whereas in fact it was clear from the affidavit of Hugh Kane that that had broke down in November 2011. It was apparent, on the face of the plaintiff's affidavit that contrary to what had been contended, the second plaintiff had not, upon a breakdown of professional relationships, immediately set about retaining an alternative firm of solicitors. Attributing the delay to the solicitor and any difficulties which they may have had with their professional body was incorrect; the truth of the matter was that there had been a breakdown of the relationship with the third firm of solicitor due to a breach by the plaintiffs of an undertaking.

64. With regard to any delays in the planning process, it was submitted, that that was entirely irrelevant and in any event the decision on which the plaintiffs relied related to a different quarry. The fact of the matter was that the quarries in question remained and were still unauthorised development and it was wholly disingenuous and incorrect on the part of the second named plaintiff to swear an affidavit to the contrary, moreover, any issue in connection with planning was not, as submitted by the plaintiffs, moot.

65. Not only was there a failure on the part of the plaintiffs to provide a satisfactory explanation for the plaintiffs delay but even if the court were to determine otherwise ,the balance of justice clearly favoured the defendants, and in this regard it was submitted that the plaintiffs failed to comply with an undertaking which had been given in the second defendants affidavit at the time of the first motion to dismiss the case for want of prosecution to thereafter pursue the proceedings with due diligence. In this regard no account had been given by the second named plaintiff as to what action had been taken by him to follow up and enquire of his previous solicitors what steps they were taking to ensure that the matter was proceeding diligently.

66. Even when the plaintiff did ultimately deliver replies they were wholly insufficient being expressed in general terms and without substance. The position remained as it always had been that in the absence of sufficient specific and substantive replies, the first defendant was not in a position to deliver its defence. In considering this application it was submitted on behalf of the defendants that the absence of expedition in the context of the delays which had to fairly laid at the feet of the plaintiffs was particularly significant in circumstances where there had already been a motion brought to dismiss the plaintiffs proceedings for want of prosecution.

67. The lack of expedition on the part of the plaintiffs was in complete contrast to the undertaking given by them to the court on the hearing of that motion. Moreover, not only was the explanation for the delay of the plaintiffs unsatisfactory it was also inaccurate and disingenuous. If the information sought by the notice for particulars was ever furnished, which itself might not be possible, there had been a totally inexcusable and inordinate delay since the events giving rise to the proceedings. There was a failure not only to prosecute the proceedings but also a failure to make proper disclosure. A clear and credible explanation had to be provided and that was absent here.

68. It was submitted by the first defendant that when the court is considering applications such as those now before it that there were two separate though sometimes overlapping strands of jurisprudence which could apply and in this regard *McBrearty v. North Western Health Board and Others* [2010] IESC 27 and *Clare Manor Hotel Ltd v. Lord Alderman and Others* [2013] IEHC 519 were cited.

69. Whilst *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 still represented the law in relation to the principals to be applied ,the court had to bear in mind that those principles were not to be regarded as exclusive or all encompassing. By way of example, it was submitted that the court could strike out proceedings where no specific prejudice to a defendant had been established and in this regard *Donnellan v. Westport Textiles Ltd* [2011] IEHC 11 is cited. The court was now also bound to have regard to the provisions of Article 6 of the ECHR. . The function of the court on an application such as the present was not to choose between one strand of jurisprudence and another, albeit overlapping, rather the court had a constitutional imperative to see to it that justice was done between the parties and that this was best achieved by ensuring that a litigant's right to a hearing, whether plaintiff or defendant, was secured and exercised within a reasonable time.

70. When exercising its inherent jurisdiction, the court was not in fact dependant on the existence of inordinate or inexcusable delay in the prosecution of a claim. It could, in certain circumstances, in the interests of justice, accede to a defendant's application to have proceedings struck out if it would be unfair in all the circumstances to compel a defendant to defend an action even where there had been no fault on the part of the plaintiff. See *McBrearty v. North Western Health Board* (supra). It was accepted that such jurisdiction, however, should only be exercised in the most exceptional circumstances. The threshold to be surmounted to justify the dismissal of proceedings where there was no culpable delay on the part of a plaintiff had to be more onerous than that which applied in the case of culpable delay. See *Comcast International Holdings Ltd v. Minister for Public Enterprise* [2012] IEHC 50.

71. It was submitted that, since the decision in *Primor* and the coming into operation of the European Convention on Human Rights Act 2003, that the legal landscape with regard to what now represents inordinate delay has been altered and in this regard the decisions in *Stevens v. Paul Flynn Ltd* [2008] 4, *Desmond v. MGN Ltd* [2009] 1 I.R., *Gilroy v. Flynn* [2004] IESC 98 were cited.

72. The onus of showing that delay is inordinate and inexcusable may be discharged by way of argument demonstrating that no reasonable or credible explanation has been offered or could reasonably be said to account for or excuse the delay , in this regard the defendants cited *O'Connor v. John Player & Sons Ltd* [2004] 3 JIC 1201.

73. It was also submitted that whilst a litigant acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of the solicitor, consideration of the extent of the litigant's personal blame worthiness for the delay was material to the exercise of the court's discretion and that that was something which was particularly apposite on the facts and circumstances of this case. In this regard reliance was placed on the decisions in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 was cited as was *Rogers v. Michelin Tyre Plc* [2005] IEHC 294 and *Silverdale and Hewetts Travel Agencies Ltd v. Italiatour Ltd* [2001] ILRM 464.

74. The consideration by the court of where the balance of justice lies is something which, it was submitted, arose only where the court was satisfied that the delay was both inordinate and inexcusable in the prosecution of proceedings. There was no requirement to assess the balance of justice if the court was satisfied in the exercise of its inherent jurisdiction that in justice it would be fundamentally unfair in all the circumstances of the case to compel the defendants to defend the action. Absent one or other of the factors enunciated in the *Primor* decision did not preclude the court from dismissing proceedings if the circumstances of the case otherwise merited dismissal and in this regard *Desmond v. MGN Ltd* [2009] 1 I.R. 737 was cited.

75. It was submitted that the whole approach of the plaintiffs to the prosecution of this case had the effect of oppressing the defendants. And it would, on the facts and in the circumstances of the case, be unfair and unjust to the defendants to permit the plaintiff to proceed after such a lengthy delay, the vast majority of which was attributable solely to the plaintiffs. The duty to prosecute the case with due diligence rested with the plaintiffs and it was not the duty of the defendants to prod the plaintiffs to do so.

76. The second named defendant in making its submission also adopted the submissions of the first named defendant.

77. In addition it was said that the second named defendant had delivered its defence albeit with the consent of the plaintiff's solicitors and was not itself guilty of any inordinate delay, moreover in terms of the substance of the action it had always acted in accordance with the decisions of the first named defendant in connection with Planning matters and that if the plaintiff considered that the decision of the first defendant as planning authority was infirm in law then the appropriate course of action was to seek to judicially review that decision but which patently the plaintiffs had failed to do. Apart altogether from these matters the fact that the second named defendant had been wound up put it in an invidious situation in terms of defending the action, it being by no means certain that after such a long period of time witnesses which otherwise might have been available to it at an earlier time may now no longer be available. It had long ceased to have any employees.

78. Whilst it was accepted that delay on the part of the plaintiffs was inordinate it was submitted on their behalf that that delay was excusable. In this regard it was submitted that with regard to the delay up until 2009 the plaintiff's initial solicitor, Mr Casey, had fallen ill with a stroke and desisted taking work in December 2004 and that at that stage the plaintiffs had retained Colm Murphy of Murphy Healy and Company Solicitors to act on their behalf. It had to be said that in January 2005 the plaintiff's solicitor, Mr Colm Murphy, did not renew his practising certificate. Between that time and March 2007 it was submitted that the plaintiff's were at all times under the impression and believed that their case was being pursued diligently by their solicitor. It was never made known to them that this was not so. The plaintiffs file was transferred to Mr Murphy's brother Conor, who took over the running of the file. In

reality it was not until June 2009 that the plaintiff's became aware of the true state of affairs at which stage they retained Kane Touhy Solicitors. Thereafter the matter progressed with the issuing of a motion for judgment in default of defence which was heard by Lavan J. on the 5th July 2010.

79. As to the period of time which elapsed between 2010 and 2013, the plaintiffs were at all times awaiting the defendant's defences .The second defendant ultimately delivered a defence in April 2011, having sought and obtained the consent of the plaintiffs. The first defendant was still in default. Due to what was described as unhappy differences arising between the plaintiffs and their solicitors in 2012 as a result of what was admitted as the plaintiff's cash flow difficulties, that firm of solicitors came off record following which the plaintiffs then immediately set about instructing their present solicitors.

80. It was submitted on behalf of the plaintiff that there was a delay on the part of the defendants; essentially they took no action to move the proceedings forward with both defendants being in breach of a court order until the delivery by the second defendant of its defence and with the first defendant still being in breach of that order. No motion was brought by the first defendant to compel replies to particulars which it contended were material to the delivery of its defence. Any suggestion that the plaintiffs had withheld information was without foundation. They had a manifestly good claim in law and but for the actions of the first defendant, which led to the actions of the second defendant, and which the plaintiffs claim were unlawful, the plaintiff s would have been in a position to perform their contract with Gama. In any event no particular prejudice has been identified by either defendant as a result of the delays which had occurred including delays attributable to them.

81. Had the order of the court extending the time for delivery of defence in July 2010 been complied with by the defendants, the plaintiff would have been in a position to proceed for discovery and thereafter serve notice of trial. The delay on the part of the second defendant and the continuing failure on the part of the first defendant manifestly added to the present state of affairs a matter in respect of which no credible explanation had been offered by the defendants. In determining any question as to where the balance of justice lay, when all the facts and circumstances pertinent to the determination of that question were considered it was submitted that a far greater injustice would be done to the plaintiffs than to the defendants by not permitting the plaintiffs to proceed with their action.

82. With regard to the law and the principles to be applied in applications such as the present the plaintiffs rejected the submissions of the defendants insofar as they had contended that the principles set out in the *Primor* decision had been recalibrated. The *Primor* principles had stood the test of time and had been reaffirmed by the Supreme Court in Comcast and subsequently followed by this court in *O'Carroll v. EBS Building Society* [2013] IEHC 30 and *Vernon v. AIBP* [2014] IEHC 98.

The law

83. In *Primor Plc v. Stokes Kennedy Crowley* (supra) Hamilton C.J., having referred to O.22 r.11 stated that it would be *"desirable to set forth the legal principles applicable to the consideration of an application to dismiss an action or proceedings for want of prosecution and the exercise by the court of its inherent jurisdiction in regard thereto"*. Referring to the judgment of O'Dalaigh C.J. in *Dowd v. Kerry County Council* [1970] I.R. 27 the Chief Justice observed:

> *"…it is clear that the matters which are fundamental to the consideration of the issue are the concept of fairness and justice, whether it is fair to the defendant to allow the action to proceed and whether it just to the plaintiff to strike out the action. Before these considerations can arise, it must be established that there was inordinate and inexcusable delay which would cause or be likely to cause prejudice to the defendant in the conduct of his defence to the proceedings and this undoubtedly depends on the particular circumstances of each case."*

81. The Chief Justice went on to enumerate the relevant principles as follows:

> *"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:-*
>
> *(a) The courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
>
> *(b) It must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable*
>
> *(c) Even where the delay has been both inordinate and inexcusable the court must exercise a judgement on whether, in its discretion, on the facts, the balance of justice is in favour of or against the proceeding of the case;*
>
> *(d) In considering this latter obligation the court is entitled to take into consideration and have regard to*
>
> *(i) The implied constitutional principles of basic fairness of procedures,*
>
> *(ii) Whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*
>
> *(iii) Any delay on the part of the defendant – because litigation is a two party operation, the conduct of both parties should be looked at,*
>
> *(iv) Whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
>
> *(v) The fact that the conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case ,*
>
> *(vi) Whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,*
>
> *(vii) The fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than*

that merely caused by the delay, including damage to a defendant's reputation and business."

82. From the judgments in *Comcast v. Minister for Public Enterprise* [2012] IESC 50 it is quite clear that the Supreme Court considered the principles enunciated by Hamilton C.J. in *Primor* had stood the test of time and were the principles to be applied on an application such as the present.

83. In his judgment McKechnie J. had considered the question as to whether or not there had been any "recalibration" of the principles enunciated in *Primor*. That question arose in light of the consideration by the Irish courts in a number of cases of the relevance of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedom to the question of delay in the prosecution of proceedings subsequent to the decision in *Primor* including *Gilroy v. Flynn* [2004] IESC 98, Stevens v. Flynn [2005] IEHC 148 and *Rohenhuis and Verloop v HDS Energy Ltd* [2011] 1 I.R. 611.

84. McKechnie J. considered this jurisprudence in his judgment in *Comcast*. On the nature of the jurisdiction of the court, whether the application, as in that case, was brought invoking the inherent jurisdiction of the court or pursuant to the rules of court making specific provision for the striking out of proceedings such as O.27 r.1 or O.122 r.11, he considered the underlying jurisdiction to be the same.

85. In *O'Carroll v. EBS Building Society* [2013] IEHC 30 this court endorsed and applied the previous judgments of the Supreme Court already referred to and in that regard O'Malley J. stated:-

> *"In more recent times the view has been put forward in some cases that the classic test may have to be, if not amended, "recalibrated" to reflect the interest of the justice system in progressing litigation efficiently. This view finds expression in particular in the judgments of Hardiman J in Gilroy v Flynn [2005] 1 ILRM 290, Kearns P in W v W [2011] IEHC 201, Clarke J in Stephens v Paul Flynn Limited [2005] IEHC 148 (Stephens) and Hogan J in Donnellan v Westport Textiles, Minister for Defence and Others [2011] IEHC 11 and Quinn v Faulkner t/a Faulkner's Garage & Anor [2011] IEHC 103.*
>
> *The most recent authoritative examination of the area is in the Supreme Court judgments in the case of Comcast International Holdings Incorporated & Ors v Minister for Public Enterprise & Ors [2012] IESC 50.*
>
> *The recalibration argument does not appear to have found favour with the Supreme Court. The Chief Justice applied the traditional Primor test without reservation. Hardiman J stated that the facts in this case were so unique that it would not be helpful to engage in an analysis of the case law in relation to delay. Fennelly J in a short judgment, referred to Desmond v MGN Ltd [2009] 1 IR 737 as endorsing the conventional test. McKechnie J, in a thorough treatment of the topic, saw nothing wrong with the approach in Primor and Rainsford . Referring to the judgment of Geoghegan J in McBrearty v North Western Health Board & Ors [2007] IEHC 431 he agreed that they had "stood the test of time" and he expressed concern with the concept of "recalibration". Clarke J adhered to his own view as expressed in Stephens which led him to a partial dissent in relation to the outcome of the case.*
>
> *It seems to me therefore, that I am bound to apply what has always been regarded as the classic test, which involves asking in the first instance whether there has been delay and if there has been delay, was it inordinate? If the delay was inordinate, is it excusable? If the delay is both inordinate and inexcusable then the balance of justice falls to be considered."*

86. A similar view was expressed by Barrett J. in *Vernon v. AIBP Ltd* [2014] IEHC98. I adopt these decisions as representing an exposition of the law as it stands in relation to the principles to be applied in considering the within applications whether grounded on the inherent jurisdiction of the court and/ or on foot of Orders 36 and 122 of the Rules of the Superior Courts.

Inordinate and inexcusable delay

87. The onus of proof is on the moving party to show the delay in respect of which complaint is made has been both inordinate and inexcusable. In *O'Connor v. John Player and Sons Ltd* [2004] IEHC 99 Quirke J. stated:-

> *"the onus may be discharged by way of evidence and argument demonstrating that no reasonable or credible explanation has been offered, or can reasonably be said to exist, which would account for, or excuse, the delay".*

88. In this case the plaintiffs fairly concede that there has been inordinate delay, however, the plaintiffs submit that their delay is excusable, accordingly, that question now falls for determination by the court.

89. Whether the delay is found by the court to be inordinate or where, as is conceded by the plaintiffs here, the question of whether such delay is excusable must depend on the circumstances of the particular case. However, any explanation offered must be referable to the conduct of the proceedings and not to extraneous matters. See *Truck and Machinery Sales Ltd v. General Accident Fire and Life Assurance Corporation Plc* [1999] IEHC 201.

90. Whilst a party acting through a solicitor may be found to be vicariously liable for the activity or inactivity of a solicitor consideration of the extent of the litigant's personal blameworthiness for the delay is material to the exercise of the court's discretion. See *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561. Where a plaintiff is unrepresented some latitude by the court may in such circumstances be warranted. Similarly the position of the plaintiff coming from an economically and socially deprived world is not to be equated with a corporation with considerable resources at its disposal. See *Guerin v. Guerin* [1993] ILRM 243 and *Silverdale and Hewetts Travel Agencies Ltd v. Italiatour Ltd* [2001] 1 ILRM 464. The same period of delay in different cases may demand different treatment. As observed by McKechnie J. in his judgment in *Comcast*:-

> *"… justice is best achieved by letting it react to given facts….Justice is not always referenced to the highest bar. If that were the case the wealthy, powerful and the influential would set it. That should not be allowed. Justice sets its own bar. A failure of the average man and his average lawyer to match the gold standard of their opposite in society and in practice must not be necessarily condemned."*

91. The taking into consideration by the court of a delay caused by a servant or by the solicitor or other agent of a party is warranted where the control of the litigation rests with the litigant. It would seem inappropriate to do so where that control cannot be exercised such as in the case of an infant or person under other legal disability. See *Brennan v. Western Health Board* [1999] 5 JIC 1801. This, however, is not without exception. That inordinate delay on the part of a plaintiff, injured when a young child, on attaining adulthood in circumstances where the defendant would have been required to face an allegation of negligence in respect of

an accident which had occurred some 24 years before the trial was held to be inordinate and inexcusable and that to allow such a case to proceed to trial would be contrary to natural justice, see *O'Domhnaill v. Merrick* [1985] ILRM 40.

The Balance of Justice
92. It is abundantly clear from the authorities that even where the delay is shown to be inordinate and inexcusable the court must then proceed to exercise discretion and decide whether, on the facts of the particular case, the balance of justice is in favour of dismissing the proceedings or permitting the action to proceed. In such cases the court is required to strike a balance between the plaintiff's need to carry on the delayed proceedings against the defendant and the defendant's right in justice not to be subjected to a claim which the defendant could not reasonably be expected to defend or as it was put by Hamilton C.J. in *Primor*:-

> *"…the court is obliged to consider whether the total delay has been such that a fair trial between the parties cannot now be had and whether the defendants have been prejudiced by the continued delay".*

93. In *O'Connor v. John Player* (supra) Quirke J. identified the issues which a court was required to consider when deciding whether the balance of justice lay in favour of dismissing or permitting the plaintiff's claim to proceed in the following terms:-

> *"(1) the conduct of the defendants since the commencement of the proceedings for the purpose of establishing, (a) whether any delay or conduct on the part of the defendant amounted to acquiescence in the plaintiff's delay and (b) whether the defendants were guilty of any conduct which induced the plaintiff to incur further expense in pursuing the action,*
>
> *(2) whether the delay was likely to cause, or has caused, serious prejudice to the defendants, (a) of a kind that made the provision of a fair trial impossible or, (b) of a kind that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action and*
>
> *(3) whether, having regard to the implied constitutional principle of basic fairness of procedures, the plaintiff's claim against the defendants should be allowed to proceed or should be dismissed."*

94. As was accepted in *Primor* where the delay is inordinate and inexcusable the matter of prejudice would seem to follow almost inexorably so even in the absence of definite evidence identifying specific prejudice which would be suffered by a defendant the result of the plaintiff's delay in prosecuting the proceedings the court may, in the circumstances of the case, accede to the defendant's application and dismiss the claim.

95. It has been said that different considerations apply to cases which are largely dependent upon documentary evidence as opposed to those which are largely dependant upon the evidence of witnesses. It is self evident that in a case which is dependent on the oral evidence of witnesses the longer the delay the greater the likelihood of prejudice. A witness may have become mentally infirm or may have died or may no longer be available to give evidence or may no longer be amenable to the processes of the court. Even if witnesses can be traced and can be made available to give evidence the lapse of time may be such as to have significantly impacted on the recollection of the witness. It has been said that memories fade and become less reliable with the passage of time and that the frailty of human memory may of itself lead to prejudice all of which may lead to substantial risk that it is not possible to have a fair trial. Thus a corporate defendant not yet dissolved but which has ceased trading and has no employees may be prejudiced by being unable to trace the whereabouts of any who might likely be witnesses.

96. The court has an interest and constitutional duty in seeing to it not only that a fair trail takes place but that such a trial is possible.

97. In considering the balance of justice the court is obliged to take into account the conduct of both parties since, as observed by O'Dalaigh C.J. in *Dowd v. Kerry County Council* [1970] I.R. 27 litigation is a two party operation or as has also been said, is a two way process.

98. In a number of cases a distinction was made between what has been described as "active delay" or "culpable delay" as distinct from "inactive delay" or "mere delay" on the part of a defendant. McKechnie J. in *Comcast* was unconvinced that such a formal compartmentalising of the defendant's conduct was justified. In *Dunne v. ESB* [1999] 10 JIC 1902 Laffoy J. held that the inaction of the defendant by failing to take any step over a period of four and half years to have the proceedings brought to trial or dismissed for want of prosecution tilted the balance of justice against acceding to the defendant's application. Acquiescence on the part of a defendant was considered by Henchy J. as conduct which constituted countervailing circumstances to be taken into consideration by the court.

99. Where the conduct of a defendant induces a plaintiff to incur further expenses in pursuing the action such conduct is a relevant factor to be taken into account by a judge in exercising discretion whether or not to strike out a claim with the weight to be attached to such conduct depending on all the circumstances of the particular case. See Primor and *Carroll Shipping Ltd v. Mathews Mulcahy and Sutherland Ltd* [1996] IEHC 46 and *Rooney v. Ryan* [2009] IEHC 154.

100. Also of relevance to the determination of the question as to where the balance of justice lies is the availability of an alternative remedy. In *Doyle v. Gibney* [2011] IEHC 10 where it was observed that merely because proceedings would otherwise be statute barred could not in itself be a ground for holding that a plaintiff had suffered a degree of prejudice such that the third limb of the Primor test must be resolved in the plaintiff's favour the learned trial judge stated:-

> *"One may therefore look at the question of prejudice in the following way. If the plaintiff was personally culpable for the delay (by, for example, not giving appropriate instructions to her solicitors), then she is not in a position to complain if the third limb of the Primor test is resolved against her. If, on the other hand, the fault is that of her legal advisors, then the fact that she is pursuing a professional negligence action against her former solicitors is a factor which…I am entitled to take into account in assessing the question of prejudice. Thus, the fact that she may have an alternative remedy significantly mitigates the potential prejudice which she would otherwise suffer."*

101. If a significant public interest issue is a factor which is required to be taken into account by the court in determining where the balance of convenience lies, it would seem unlikely that it would be sufficient to displace a finding of real or substantial prejudice. See *McKenna v. Farrell* [2007] IEHC 343.

Decision
102. The plaintiff having quite properly accepted that the delay which has occurred in this case is inordinate, the next question which

requires to be addressed is whether or not that delay is excusable.

103. In this regard the principle thrust of the plaintiff's case is that the plaintiffs always believed that the litigation was being pursued diligently by their solicitors but that for reasons, at the time unknown to them, there were various problems, including professional difficulties with the Law Society, which meant that the litigation was not being pursued by them at all.

104. Although the events giving rise to these proceedings are said to have occurred in 2004, the summons in this case did not issue until the 3rd May 2007. It took a motion to dismiss the case for want of prosecution in July 2009, just short of five years after the events in question, before the plaintiffs realised that, apart from the issue of the proceedings, no step had been taken to prosecute them.

105. The second named plaintiff swore a replying affidavit in relation to that motion on the 3rd July 2009 in which he sought to explain the period of time which had elapsed firstly until the proceedings were issued and then subsequently the time which elapsed between the issuing of the proceedings and the bringing of the motion. Part of that explanation related to the way in which the second named plaintiff actually found out about the motion to dismiss the proceedings namely, through a fortuitous meeting with Mr. Hugh Kane, of Kane Touhy solicitors whom, it appears, brought the matter to the second plaintiff's attention. Thereafter it is clear that the plaintiffs instructed Kane Touhy to come on record for them.

106. Reference has already been made to the undertaking on behalf of both plaintiffs and given by the second plaintiff to the court on the hearing of that motion, to the effect that if the plaintiffs were afforded a period of 28 days within which to deliver a statement of claim, the second named plaintiff would *"…seek to ensure that the case is progressed diligently".*

107. Although the second named plaintiff has also sworn affidavits in relation to the motions presently before the court and has averred that the plaintiffs believed that the proceedings were being prosecuted and although these affidavits attribute the delays which have occurred to inactivity, for one reason or another, on the part of their former solicitors, there is no averment as to what steps, if any, were taken by the plaintiffs with their former solicitors to ascertain what progress was being made in relation to the litigation. No factual basis is established on the face of the affidavits upon which the court could conclude that the plaintiffs had reason to believe that all was in order and that the proceedings were being prosecuted diligently. There is no suggestion that any contact had been made from time to time or at all to ascertain how the litigation was progressing.

108. The explanation offered for the delay is that at the time the second named plaintiff was unaware of the various difficulties being experienced by the plaintiff's former solicitors. It is not suggested that in response to enquiries that assurances had been received such as would found a belief that matters were progressing. As to the breakdown of the relationship with Mr. Hugh Kane, it is said that this occurred in 2012 and was as a result of the second named plaintiff being unable to comply with an undertaking in relation to the provision of fees. That averment, insofar as it relates to the period of time when the client solicitor relationship broke down, is incorrect since it transpires from the affidavit of Mr. Kane sworn for the purposes of coming off record that that situation was extant in 2011.

109. Given that the total of the special damages sought to be recovered by the plaintiffs against the defendants and pleaded in the statement of claim is €8,675,000.00, it is nothing short of extraordinary that the plaintiffs appear not to have made any inquiries of their former solicitors in relation to the progress of the proceedings. Had any such enquiries been made, particularly after the issue of the proceedings in 2007, and had any assurances from their former solicitors been received which might be said to have lulled the plaintiffs into the position in which it is now said they are, namely that the proceedings were being prosecuted, it is almost certain that such matters of fact would have been deposed to by the second named plaintiff in his affidavits. The fact that they weren't is highly unlikely to have been the result of an oversight.

110. Giving an undertaking to the court is a serious matter and is not to be taken lightly. The second named plaintiff undertook personally to ensure that the proceedings were litigated with diligence and on foot of that undertaking the plaintiff's obtained an order giving them liberty to deliver a statement of claim by the 29th July 2009, failing which the proceedings were to be struck out. Such provision in the order can only be referable to a consideration by the court of that motion on its merits and which must have included the second plaintiff's undertaking

111. The plaintiffs were not suffering from any legal disability. They were in control of the litigation. It is clear from case authority already referred to in this judgment that, apart altogether from any vicarious liability which could properly be visited on the plaintiffs as a result of the inactivity of their former solicitors, it is entirely appropriate that the court have regard to the conduct of the litigants themselves and in particular to the extent to which they may have personally responsible for the delay.

112. The failure to lay any evidence before the court for the purpose of establishing compliance with an undertaking inevitably leads to the conclusion that the plaintiffs failed to take any steps to ensure that the proceedings were prosecuted diligently. Whilst the plaintiffs cannot be visited with the consequences of the delays which also took place on the part of the defendants, the preponderance of the delay which has occurred in this action lies at the feet of the plaintiffs. It is in respect of this delay that the plaintiffs are required to provide by evidence and argument the basis upon which such delay may be excused. That they have failed to do; accordingly the court determines that their inordinate delay is also inexcusable.

113. Having so determined, it is now necessary for the court to proceed to consider on the facts and in the circumstances of this case whether the balance of justice is in favour of dismissing the proceedings or permitting the action to proceed.

114. It appears from the materials available to the court that on these applications that the second named defendant was a wholly owned subsidiary of Jacobs UK, a company registered in the United Kingdom which is no longer trading. The company has no employees and the directors are anxious to have it wound up. A financial cost is involved in keeping the company in existence and that the sole reason for this is the existence of these proceedings. The second named defendant appears to have been formed for the purpose of the planning and construction of the Ennis Bypass, which has long since been completed.

115. The period of time which has elapsed since the occurrence of the events giving rise to these proceedings already exceeds ten years. It is evident from the issues which arise on the pleadings so far delivered that the defence of the second named defendant would necessarily involve the calling of and would be reliant upon oral testimony. Given that the second named defendant has long since ceased to trade or have any employees it would inevitably be faced in preparing for any trial of these proceedings with trying to locate the whereabouts of those former employees. Whether such witnesses would even be traceable at this remove and even if traced whether they would be amenable to the process of the court is unknown. It is possible that a critical witness or witnesses may be dead, indeed one such individual has already been identified, or that a witness may be mentally infirm, or cannot otherwise be located. Whether or not that be so, even if such witnesses as are material to the defence of the claim of these proceedings were

available there must be a real risk that, having regard to the passage of time which has already elapsed, the memory of such witnesses would most likely be impacted to such a degree as would be material to the probative value of the evidence to be given by them.

116. Clearly, whilst the first named defendant continues to discharge all of its functions as a local authority, has employees and may well be in a better position to trace the whereabouts of former employees than the second named defendant, the same observations in relation to the passage of time and the impact that that might likely have on the memory of such witnesses also applies.

117. Apart from planning records and correspondence, some of which are before the court, it is also clear that were the court to make an order enabling the plaintiff's to proceed with the action and the first named defendants to deliver their defence, the determination of the issues raised would be substantially dependant upon oral testimony.

118. Applying the principles enunciated in *Primor*, I am satisfied that the inordinate and inexcusable delay attributable to the plaintiffs in the circumstances of this case where there would necessarily be a heavy reliance upon oral evidence to resolve the issues between the parties is sufficiently prejudicial to the defence of the proceedings as would make the provision of a fair trial unlikely if not impossible.

119. In reaching this conclusion the court has had regard, as it must, to the plaintiff's constitutional right of access to the courts and the plaintiff's need to proceed with their case. Moreover, in applying the principles consideration has been had to the delays on the part of the defendants. In this regard the court rejects the contention by the first named defendant that a consensus was arrived at between the parties in relation to the plaintiff's replies to particulars and the delivery of the first defendant's defence. On the evidence that was not the case. The response of the plaintiffs to the proposed course of action by the first defendant that replies be delivered before the defence was that not only did the plaintiff's solicitors not confirm their agreement to the proposed course of action but rather they proceeded with the motion for judgment in default.

120. Although the court extended time for the delivery of defences, the first named defendant maintained its position in relation to the necessity of having the replies to particulars delivered. The furnishing of a draft defence might properly be described as an act of *bone fides* in relation to the first defendant's intention with regard to delivering a defence, however, it does not in any way constitute a compliance with the rules of the court nor does it excuse the failure of the first defendant to comply with an order of the court extending the time within which it could deliver a defence.

121. Notwithstanding the importance which the first named defendant maintains it attached to obtaining replies to particulars, no motion was brought to the court to compel the plaintiffs to do so. For their part the plaintiffs did not themselves issue a further the motion when the first defendant failed to deliver its defence within the time it extended. As between the plaintiffs and the second defendant, although the second defendant was also in default of the order in failing to deliver a defence within the time extended, it subsequently did so having sought and obtained the plaintiff's consent.

122. The delays in this case on the part of the defendants, whilst not insignificant, pale in comparison to those on the part of the plaintiffs and were not, in the circumstances of this case, such as could be considered by the court to amount to acquiescence by either of the defendants in the delay of the plaintiffs, nor can it be said that the conduct of either of the defendants was such as to have induced the plaintiffs to incur further expense in pursuing these proceedings.

123. The rules of court exist for the purpose of and to facilitate the proper administration of justice and with which parties to litigation are obliged to comply. Provision is made enabling plaintiffs and defendants alike to expedite and bring proceedings to a conclusion within a timeframe which is reasonable and just to both. The consequences of the failure of any party to litigation to adhere to the rules or to comply with court orders made for the purpose of progressing litigation should where inexcusable and in appropriate circumstances, be felt by the party , whether plaintiff or defendant , found to be in default.

124. In the circumstances of this case, the old adage *"once bitten twice shy"* is, with due modification, apposite . Once the plaintiffs in this case were successful in resisting an application for an order to dismiss the proceedings, quite apart from the time requirements of the rules and the terms of the order of the court, they were, on foot of their undertaking, under an obligation to pursue the proceedings with diligence. Their failure to comply with the undertaking undoubtedly contributed significantly and substantially to the further delays which occurred subsequent to the making of the order.

125. The personal blameworthiness of the second plaintiff in this regard should not and cannot be overlooked by the court when determining where the balance of justice lies, nor can the fact that he swore an affidavit which sought to persuade the court that the operation of the quarries – and on foot of which the claims in these proceedings are brought – was exempt development by reference to a decision of the first defendant in relation to an application which in fact refers to a different quarry owned by another company.

126. Furthermore, on the evidence of the defendant and the materials made available to the court on these applications, the operation of both of the quarries constitutes to be an unauthorised development and in respect of which enforcement notices have been issued as recently as November 2013.

127. That being so it is difficult to see how there could be any substance to the plaintiff's claims that, but for the actions of the defendants, they would have been lawfully entitled to operate the quarries and fulfil the contract with GAMA.

128. Accordingly, and on the findings made and in the circumstances of the case, I am satisfied that the balance of justice is weighed in favour of dismissing the proceedings.

129. Having due regard to this judgment, I will discuss with counsel the final orders to be made by the court.