THE HIGH COURT

[2017 No. 8203 P.]

BETWEEN

CATHERINE HONAHAN AND LIAM HONAHAN

PLAINTIFFS

AND

MCINERNEY CONSTRUCTION LIMITED, ARTHUR COMYN,

CARL O'MAHONY TRADING AS CARL O'MAHONY & CO., BERNARD MURPHY TRADING AS MURPHY MACNAMARA & CO., ADRIAN MACNAMARA TRADING AS MURPHY MACNAMARA & CO., ORLA DEASY TRADING AS MURPHY MACNAMARA & CO. AND WILLIAM M BOLAND TRADING AS JULIAN O'BRIEN AND BOLAND

DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered on the 8th day of May 2018

1. Before the court are three applications to dismiss the plaintiffs' claims on the grounds of inordinate and inexcusable delay and/or want of prosecution. In the alternative the applications for dismissal are claimed to be in the interest of justice and/or in the public interest. The applications are brought on behalf of the third defendant Carl O'Mahony the fifth defendant Adrian MacNamara and the sixth defendant Orla Deasy.

The Claim

2. In 1995 the plaintiffs contracted with the first defendant, McInerney Construction Limited, for the purchase of a site and the building of a house thereon. The plaintiffs were represented in the transaction by Arthur Comyn & Company Solicitors and in particular by the sixth named defendant/applicant Orla Deasy who was a solicitor employed in that firm. The site being purchased by the plaintiffs was identified on a site layout plan. The purchase of the site and dwelling house was completed in February 1996 and the plaintiffs acquired their property at 43 Ferndale, Carrigaline, Co. Cork. In due course an approved Land Registry map identifying the plaintiff's site was produced. There was an alleged discrepancy between the original site layout map of property attached to the contract and the Land Registry Approved Scheme map. It is the manner of resolution of that issue that has given rise to the current proceedings.

3. The plaintiffs claim that the title acquired by them to 43 Ferndale, Carrigaline, Co. Cork is less than that to which they are entitled under the relevant contract for sale and they further claim that, in breach of contract, there are public water and sewer pipes running under and adjacent to the property of which they should have been advised and which they claim has both impeded the development of the property and has seriously devalued the property. In 1999 the plaintiffs were registered as owners of lands contained in Folio 7998F of the County of Cork. The first defendant McInerney Construction undertook to provide a Declaration of Identity in respect of the property which had not been provided to the plaintiffs on closing the sale.

4. The sixth defendant/applicant has averred that before the contract was signed she had a meeting and discussion with the plaintiffs in the office of the second defendant, Arthur Comyn, and explained to them that the map attached to the contract was for identification purposes only and that they would only receive title to the lesser area of land shown on the Land Registry Approved Scheme map. The sixth defendant/applicant avers that having been so advised the plaintiffs entered the contract.

5. Between contract and closing there were discussions between the sixth defendant/applicant as solicitor for the plaintiffs and the seventh defendant as solicitor for McInerney Construction about the disparity in size between the site attached to the contract map and that contained in the Land Registry Approved Scheme map. It appears that the reason that it was not possible to transfer the full area depicted on the contract map was because some of the contract map lands contained underground drains and pipes which would have to be transferred to the local authority as part of the common areas of the development. The plaintiffs maintain that they were not told that the reason why a portion of the land had to be retained was because of the presence of public water mains and sewers under part of the lands.

6. A compromise appears to have been reached whereby some additional lands were transferred to the plaintiffs by the first defendant McInerney Construction and, in addition, they agreed to allow the plaintiffs to take possession of the retained open space land and to allow them to attempt to acquire title to same by adverse possession. This is evidenced by a letter of 8th February, 1996 from the sixth defendant/applicant to the second plaintiff. The sixth defendant/applicant avers that the arrangement was fully explained to the second plaintiff at a lengthy meeting during which she avers that she told him that while he might be able to acquire legal title by acts of possession over a twelve year period, they would never be able to build on the open space lands because of the presence of underground public pipes.

7. In February of 2000, four years after the contract had been concluded and the property at 43 Ferndale Carrigaline had been conveyed to the plaintiffs, the sixth defendant/applicant Orla Deasy moved from the firm of Arthur Comyn to the firm of James G. O'Mahony & Co. Solicitors, as an employed solicitor. She took the plaintiffs' file with her for the purpose of completing outstanding matters. On 15th February, 2000, Orla Deasy wrote to Ark Life Assurance informing them that an undertaking given by Arthur Comyn in relation to title documents would now be honoured by James G. O'Mahony & Co. The evidence before the court suggests that the title deeds were furnished to Ark Life who had provided finance for the purchase, on 25th March, 2002. Meanwhile, the Declaration of Identity which McInerney Construction had undertaken to furnish remained outstanding. The evidence also suggests that, while the file was in the office of James G. O'Mahony & Co., letters were written to Julian O'Brien and Boland the solicitors for McInerney requesting compliance with their undertaking to furnish a Declaration of Identity. Notwithstanding repeated requests and an apparent threat of being reported to the Law Society, the Declaration of Identity was not furnished.

8. The firm of James G. O'Mahony & Co. was dissolved amid some acrimony in April/May 2005. Three new firms emerged from the ruins, being James G. O'Mahony & Sons, Carl O'Mahony & Co. and Murphy MacNamara & Co. The principals in these new firms had all been partners in James G. O'Mahony & Co. at the time of its dissolution. Orla Deasy moved to Murphy MacNamara & Co. as an employed solicitor. The plaintiffs' conveyancing file went to the firm of James G. O'Mahony & Sons.

9. At the same time as James G. O'Mahony & Co. was being dissolved, the plaintiffs were applying to Cork County Council for planning permission to extend their dwelling on to the land adjoining the side of their property, including it appears at least some of the open

space lands. The application was refused on 23rd May, 2005 by Cork County Council on the grounds that the proposed development would adversely affect access to a public sewer which ran beneath the adjoining land. The plaintiffs contend that this was the first time they knew of the presence of a public foul sewer and a public storm sewer on or adjacent to their property. This is disputed by the defendants.

10. In November, 2005, the plaintiffs sought advice from a solicitor in the new firm of James G. O'Mahony & Sons, Maurice O'Connor. From the correspondence exhibited by the first plaintiff in his affidavit of 6th November, 2017, it appears that the solicitor had access to the complete file. He sought relevant documents from the Land Registry and from Ark Life Assurance who held an equitable deposit of the title deeds. Mr. O'Connor identified that the Declaration of Identity had still not been furnished by McInerney's despite threats of referral to the Law Society. A Declaration of Identity was finally furnished on 24th November, 2005.

11. In early 2006, Mr. O'Connor sought expert engineering advice as to the factual position in relation to boundaries and services and sewers on the plaintiffs' property. From the correspondence exhibited, there appears to have been a lack of enthusiasm for this task among the Cork engineers who were approached by Mr. O'Connor. In August 2006, Mr. O'Connor notified the plaintiffs that he was leaving the firm of James G. O'Mahony & Sons. According to the plaintiff's affidavit, Mr. O'Connor gave him the entire file relating to his property. The plaintiffs have averred that following Mr. O'Connor's departure from James G. O'Mahony & Sons they approached four different firms of solicitors in Cork, all of whom declined their instructions, either on the grounds of connection to the potential defendants or to conflicts of interest. The second plaintiff avers that he was eventually referred by a business associate to his current solicitors Walter A. Smithwick & Sons in March 2007.

12. Ultimately, the claim brought against these three defendants/applicants by the plaintiffs is for damages for loss caused by their alleged negligence, breach of contract, breach of duty, breach of solicitor's duty and breach of statutory duty in:

> (a) failing to take all necessary steps and do all necessary things to ensure that the entirety of the property, the subject of the said Contract for Sale and/or any subsequent modification of same, was transferred to the plaintiffs and to enforce the undertakings of the first defendant and the seventh defendant in this regard;
>
> (b) failing to take all necessary steps and do all necessary things to obtain a Statutory Declaration of Identity and to enforce the undertakings of the first Defendant and the seventh defendant in this regard, and/or to ascertain the existence of local authority sewerage pipes under or in the vicinity of the property, and/or to advise the plaintiffs of the consequences that the presence of the said pipes for the future development of the property;
>
> (c) failing to advise the plaintiffs as to their potential causes of action against the first defendant, the second defendant and the seventh defendant and/or the facts grounding these causes of action.

The plaintiff's counsel accepted in argument that any liability of these defendants, and in particular the third and fifth defendants/applicants, is a contingent liability which would only arise in the event that the plaintiffs could establish primary liability against McInerney Construction Limited and/or the firm of Arthur Comyn & Co. which had acted for the plaintiffs in the transaction.

The Proceedings

13. Initiating letters were sent by the plaintiffs' solicitors in August 2007. The letters were sent to five parties; McInerney Construction Limited; Orla Deasy personally: the firm of James G. O'Mahony & Co., Arthur Comyn of Arthur Comyn & Co. and William Boland of the firm of Julian O'Brien & Boland, the solicitors for McInerney's. The letters set out the plaintiffs' complaint that they had not received the full extent of the property which they had contracted to buy and, secondly, that there was a breach of a warranty that the property in sale was not affected by any of the way leaves in favour of Cork County Council.

14. The letter to Orla Deasy personally states:-

> *"Mr. and Mrs Honohan were represented by you whilst engaged with Arthur Comyn & Co., Solicitors and subsequently by James G. O'Mahony & Co. McInerney Construction Limited was represented by Julian O'Brien & Boland, Solicitors of 43 South Mall, Cork.*

Having set out their complaint the letter goes on to invoke the classic O'Beirne formula:

> *"At this stage our clients are unable to say whether the loss and damage is due entirely to the breach of contract of McInerney Construction Limited or the negligence and breach of duty of Arthur Comyn & Co. Solicitors who acted for the Honahans initially or James G. O'Mahony & Co. who acted subsequently, or you in your capacity as solicitor for the Honahans, or Julian O'Brien & Boland Solicitors who acted on behalf of McInerney Construction Limited.*
>
> *We are writing to all of the parties in similar terms and we would invite you to admit responsibility and agree to compensate our clients for the loss and damage which they have sustained. In the event that you should fail to do so, we intend issuing proceeding and joining all parties to the action for damages and loss……*

The significance of this correspondence in the court's opinion is that, as of August, 2007, the plaintiffs' solicitors had clearly identified all potential defendants to the plaintiffs' claims. The Court will return to this matter later

15. The initiating letter sent by the plaintiffs' solicitors to James G. O'Mahony & Co., founds its way to James G. O'Mahony & Sons. They replied to the initiating letter on 17th August, 2007. That office pointed out that the firm of James G. O'Mahony & Co. had been dissolved in 2005 and was still in the process of being wound up. The plaintiffs' solicitors were told that the principal, James G. O'Mahony, was deceased since 2006. The letter identified the surviving partners as Carl O'Mahony the third defendant/applicant, Bernard Murphy the fourth defendant and Adrian MacNamara the fifth defendant/applicant. Addresses and phone numbers for the surviving partners were also supplied. Thus as of 17th August, 2007, the plaintiffs' solicitors were fully apprised of the identities of all parties who on their case, had a liability to the plaintiffs.

16. A plenary summons was issued three months later, on 6th November, 2007. Notwithstanding the prior, clear identification of those against whom liability was alleged, proceedings were issued against entirely different entities. The summons was issued against McInerney Construction Limited; all of the partners in the firm of Comyn Kelleher & Tobin Solicitors numbering eight in total; Carl O'Mahony, Bernard Murphy, Adrian McNamara and Orla Deasy, who were all sued as trading as James G. O'Mahony & Sons, and William Boland who was sued as solicitor for McInerney's.

17. The firm of Comyn Kelleher & Tobin had never acted in any respect in relation to the plaintiffs' contract. Carl O'Mahony, Bernard

Murphy and Adrian MacNamara had never traded as James G. O'Mahony & Sons. Orla Deasy had at all material times been an employed solicitor, first in Arthur Comyn & Co. Solicitors, thereafter successively in James G. O'Mahony & Co. Solicitors and Murphy MacNamara & Co. Solicitors. The explanation proffered by the plaintiffs' solicitor for joining firms to the proceedings which had no involvement in the matters giving rise to the plaintiffs' claim, and further suing solicitors as partners in a firm with which they had no involvement was apparently because of a belief on the part of the plaintiffs' solicitor that any liability attaching to the defendants would be covered by the insurance cover applicable to their current firm and that accordingly they should be named by reference to those firms. This in the court's view was a serious error.

18. The error of this approach should have become clear to the plaintiffs' solicitors when the plenary summons was sent to the firm of Comyn Kelleher & Tobin in early February, 2008. On 11th February, 2008, Mr. Eamon Harrington, a partner in Comyn Kelleher & Tobin wrote in clear terms to the plaintiffs' solicitors asserting that the firm of Comyn Kelleher & Tobin had had no involvement with nor liability to the plaintiffs. He stated *inter alia*:-

> *"We are aware that your clients intend bringing proceedings arising out of alleged negligence on the part of the practice of Arthur Comyn relating to matters which occurred in the mid-1990s.*
>
> *Arthur Comyn was not a member of the firm of Comyn Kelleher & Tobin in 1995. Rather he had a separate practice.*
>
> *Mr. Comyn had no connection with this firm until 2004.*
>
> *We do not see any basis for a claim against Diarmuid Cunningham, Eamon Harrington, Katharine Kelleher, Olann Kelleher, Denise Kirwan, Deborah Moore and Thomas Tobin. They are not joint tort feasors. They were not partners of Mr. Comyn at the relevant time. They are not partners of Mr. Comyn at this time. Mr. Kelleher is not a partner in this firm at this time and has not been since June 2007.*
>
> *This firm has never assumed any liabilities of Mr. Comyn (if any, as it is our understanding that Mr. Comyn is adamant that he has no liability to the Plaintiffs).*
>
> *In the circumstances could you please explain the basis for a claim against Cunningham, Harrington, Kelleher, Kelleher, Kirwan, Moore and Tobin. Could you please also confirm that you have an expert report supporting that claim.*

A solicitor Timothy J. Hegarty & Son came on record for Arthur Comyn solely, in May, 2008 and ultimately the partners in Comyn Kelleher & Tobin were deleted as defendants when the Plenary Summons was amended in 2011.

19. Having issued but not served their proceedings, other than on McInerney Construction Limited in November 2007, the plaintiffs did nothing to progress their claim. The next event in the proceedings was the service of a notice of intention to proceed, served in July 2010. The plaintiffs seek to explain and justify this delay of 2 years and 8 months by the fact that during that period they were in negotiations with McInerney Construction Limited. Unfortunately, while the plaintiffs delayed in serving their proceedings, events moved on. It appears from the evidence that McInerney Construction Limited was placed in receivership in July 2011. The firm of James G. O'Mahony & Sons, which had been wrongly named in the plenary summons of November 2007, had also been disbanded and was now a practice trading as James G. O'Mahony under a new principal. Furthermore, the time for bringing a claim against the estate of James G. O'Mahony had elapsed.

20. The plenary summons issued in November 2007. While sent to various parties, it had never been served on any of the applicants in these proceedings, being the third defendant, Carl O'Mahony, the fifth defendant, Adrian MacNamara and the sixth defendant, Orla Deasy. The summons expired at the latest on 6th November, 2008. The plaintiffs took no steps to renew it. Without renewing the summons, the plaintiffs successfully applied to the High Court to amend it, by notice of motion issued on 20th April, 2011. The Order was made on the 30th May, 2011 and the amended summons issued on the 13th June, 2011. Though none of the three defendants/applicants challenged the validity of the amended summons and each ultimately entered an appearance to the amended summons, the questionable status of that summons is something which, in the court's view, falls to be considered in assessing the balance of justice.

21. The amended summons is markedly different from the original summons. Gone are all the named partners in Comyn Kelleher & Tobin, leaving Arthur Comyn as principal of Arthur Comyn & Co. Gone is the reference to the firm of James G. O'Mahony & Sons. The original summons had wrongly sued Carl O'Mahony, Bernard Murphy, Adrian MacNamara and Orla Deasy trading as James G. O'Mahony & Sons. None of them had ever so traded. Carl O'Mahony third defendant/applicant was added in the amended summons, not as a partner in James G. O'Mahony & Co., the firm which had handled the plaintiffs' file from 2000 to 2005, but rather as a solicitor trading in his own firm of Carl O'Mahony & Company. This is a firm which never had any involvement with the plaintiffs. Similarly Bernard Murphy and Adrian MacNamara the fourth and fifth defendants were joined, not as partners in James G. O'Mahony & Co. but as partners in Murphy MacNamara & Co., a firm which equally never had any dealings with the plaintiffs. Orla Deasy is joined in the amended summons as a partner in Murphy MacNamara & Co., a position which on the evidence she never held, in a firm which had had no dealings with the plaintiffs.

22. It is somewhat ironic that in the one application the plaintiffs released eight solicitors precisely because their firm had no involvement with the plaintiffs and then joined four solicitors in their capacity as partners in firms which equally had no dealings with the plaintiffs.

Further proceedings against the fifth and sixth defendants/applicants

23. In any event, the amended plenary summons was served on the fifth defendant/applicant Adrian MacNamara on 11th April, 2012, ten months after it issued. While this summons was never formally served on the sixth defendant/applicant Orla Deasy, an appearance was entered on behalf of both she and Adrian MacNamara on 22nd February, 2013. The appearance entered on their behalf was not conditional but it did request service of a statement of claim. By the time of the hearing of this application a statement of claim had still not been delivered, more than four years and ten months after it had been requested and more than ten years since the proceedings were first issued. While the court is willing to accept that the failure to serve a statement of claim on the fifth and sixth defendants/applicants was simply an oversight on the part of the plaintiffs' solicitors, the court does not accept the plaintiffs' contention that there was, in effect, a duty on the fifth and sixth defendants/applicants to bring such oversight to the attention of the plaintiffs' solicitors.

Further proceedings against the third defendant/applicant

24. In April 2012, almost ten months after the amended plenary summons had issued, it was served on the third defendant/applicant Carl O'Mahony. He entered an appearance on 7th June, 2012 and he received a statement of claim on 18th June, 2012. A further ten

months elapsed before a warning letter in respect of judgment in default of defence was served by the plaintiffs' solicitors on Carl O'Mahony. A further warning letter was sent almost four months later on 7th August, 2013 and a further warning letter was sent on 1st November, 2013. On 22nd November, 2013 a notice for particulars was raised by Carl O'Mahony and three days later on the 25th November, 2013 he served his defence and counterclaim. On 15th August, 2014 the plaintiffs delivered replies to Carl O'Mahony's notice for particulars. No further substantive step was taken to advance the claim against Carl O'Mahony for a period of almost three years, though a notice of intention to proceed was served in December 2016.

Further hiatus in the proceedings
25. It appears on the evidence that throughout 2014 and 2015 the plaintiffs' solicitors were preoccupied with an issue arising from their failure to serve the seventh named defendant William M Boland, trading as Julian O'Brien & Boland with either the original or the amended plenary summons. While the summons had been sent to him it had never been served on him and the amended summons, even if valid, had expired on the 12th June 2012.

26. On 9th February, 2015, the plaintiffs applied *ex parte* to the High Court for an order permitting renewal of the amended plenary summons for the purposes of service on William Boland. Having secured an order permitting renewal from the High Court, it was discovered that the original amended plenary summons had been mislaid. On 16th March, 2015, a further High Court order was sought deeming a copy of the amended plenary summons to be an original. On 1st April, 2015, the amended and renewed plenary summons was served on solicitors for William Boland. On 21st April, 2015, the solicitors for William Boland wrote to the plaintiffs' solicitors reserving their rights to have the order permitting the renewal of the amended plenary summons set aside. On 24th August, 2015 solicitors for William Boland issued a motion seeking to set aside the renewal of the amended plenary summons. The motion was returnable to 19th October, 2015. On that date the application was adjourned to 1st February, 2016. On the 1st February, the motion was further adjourned to 13th June, 2016. On 13th June, 2016, the motion was once again adjourned to 14th November, 2016. On this latter date the motion was settled on the basis that the proceedings against William Boland the seventh defendant and solicitor in the original transaction for McInerney Construction Limited be discontinued.

27. The litigation of that issue resulted in a further two year delay in the remaining proceedings. As already stated a notice of intention to proceed was served on 13th December, 2016. There was some further correspondence in January 2017, looking for defences from Murphy MacNamara & Co. and Arthur Comyn. On 17th February, 2017, the third defendant/applicant Carl O'Mahony issued a motion to strike out the proceedings on the grounds of inordinate and inexcusable delay and further or in the alternative pursuant to the Courts' inherent jurisdiction in the interest of justice and/or in the public interest. The fifth and sixth defendants/applicants issued an identical motion a month later.

The Law
28. There is no dispute between the parties as to the applicable law. The court must apply the *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 test as refined and developed since that seminal decision. In addition the court must if necessary apply the alternative test which emerges from the *O'Domhnaill v Merrick* [1984] IR 151 line of authority. Thus the court must consider whether there has been inordinate and inexcusable delay and if so, whether the balance of justice requires that the proceedings be dismissed. The relevance of the *O'Domnaill* test is that even where a delay is found to be excusable a case can still be dismissed if the prejudice suffered by a defendant by reason of delay is such that a fair trial has become impossible. The two strands of delay jurisprudence have recently been married in a decision of the Court of Appeal, *Flynn v The Minister for Justice* [2017] IECA 178, in which Irvine J. has updated and consolidated the principles and the criteria to be applied by the Courts in assessing and determining the issue of delay. Irvine J. set out the principles as follows:-

> *"Given that, subject to one important exception, these are not controversial I gratefully adopt and below set forth the summary of the relevant principles identified by Barrett J. at para. 5 of his judgment. I have also taken the liberty of including one additional factor emanating from the judgment of Fennelly J. in Anglo Irish Beef Processors v. Montgomery [2002] 3 I.R. 510.*
>
> *(1) The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so.*
>
> *(2) The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard.*
>
> *(3) It must in the first instance be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable.*
>
> *(4) In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter.*
>
> *(5) Even when delay has been inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the case proceeding.*
>
> *(6) Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay.*
>
> *(7) The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.*
>
> *(8) In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.*
>
> *(9) Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.*
>
> *(10) All else being equal, persons against whom serious allegations are made that affect their professional standing*

should not have to wait over a decade before being afforded opportunity to clear their name.

(11) The courts are obliged under Article 6(1) of the European Convention on Human Rights to ensure that all proceedings, including civil proceedings are concluded within a reasonable time. Any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its consideration, not only its own constitutional obligations but the State's Convention obligations.

(12) The courts must make it clear that there will not be an excessive indulgence of delay, because, if they do not, they encourage delay, leading to breach by the State of its Convention obligations.

(13) There is a constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures. There should be no culture of endless indulgence. (The court notes this is not the same as saying that there can be no indulgence).

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

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

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

These are the principles which this court must apply in determining this application.

Submissions of the third named defendant/applicant

29. On 17th February, 2017, the third named defendant/applicant Carl O'Mahony issued a motion to strike out the plaintiffs' claim for delay. The third named defendant/applicant points out that the contract at the centre of these proceedings was signed in May 1995 and the conveyance was completed in February 1996, at a time when he was not even qualified as a solicitor. The original plenary summons issued on 6th November, 2007 and was subsequently amended and reissued in June 2011.

30. The third named defendant/applicant entered an appearance on 7th June, 2012 and was served with a statement of claim on 18th June, 2012. He entered a defence and counterclaim on 25th November, 2013. Three notices of intention to proceed were issued by the plaintiffs in April 2010, July 2014 and December 2016. Since replying to the third named defendant's/applicant's notice for particulars on 15th August, 2014, no substantive steps have been taken by the plaintiffs for a period in excess of three years. The third named defendant/applicant contends that, given that the events at issue in these proceedings occurred in excess of 20 years ago; that there was a substantial pre-proceedings delay before the original plenary summons issued in November 2007 and considerable periods of inactivity by the plaintiffs in the decade since then, that the delay herein is both inordinate and inexcusable. The third named defendant/applicant contends that because of the nature of the dispute between the parties, any further trial will of necessity rely heavily on witness testimony regarding conversations, undertakings, understandings and meetings dating back to the mid 1990s. It is submitted on his behalf that, apart from the inherent difficulty for a court to make findings of fact based on witnesses' recollections of events of more than 20 years ago, the third named defendant/applicant is particularly prejudiced in these proceedings by reason of the fact that he was never privy to any of these engagements.

31. On that basis it is contended by the third named defendant/applicant that the balance of justice requires that the plaintiffs' proceedings be struck out for delay. Any liability which might attach to the third named defendant/applicant arises solely from the fact that he was a partner in the firm of James G. O'Mahony & Co. between 2000 and 2005 at a time when the plaintiffs' conveyancing file was being completed by an employed solicitor in that office, the sixth named defendant/applicant Orla Deasy. He has not however, been sued in that capacity but rather in his personal capacity as principal of Carl O'Mahony & Co. Solicitors, a firm founded subsequent to the dissolution of the practice of James G. O'Mahony & Co.

32. The third named defendant/applicant submits that the legal principles applicable to a dismissal of proceedings on the grounds of delay support their application for a dismissal. They rely on the principles established in the seminal cases of Rainsford and Primor as refined in *Gilroy v. Flynn* [2005] ILRM 290, and *Comcast International Holdings Limited v. The Minister for Public Enterprise* [2012] IESC 50. The third named defendant/applicant placed particular reliance on the judgment of McKechnie J. in *Comcast* and his reference therein to the "two strands" of parallel approaches open to the courts in relation to delay, being the *Primor* principles and the courts' inherent jurisdiction. In respect of the courts' inherent jurisdiction they cited the following passage from the judgment of McKechnie J.:-

"That the courts have such an inherent jurisdiction cannot be doubted. It surfaced in O'Domhnaill, was further established in Toal (1) and Toal (2), and, since then, in several cases, has been accepted without question. It has a somewhat distinct basis and separate existence from Primor, but many of the matters relevant to its application are common to both. The test to be applied has been described variously such as, by reason of lapse of time or delay:

(i) is there a real and serious risk of an unfair trial, and/or of an unjust result;

(ii) is there a clear and patent injustice in asking the defendant to defend; or

(iii) does it place an inexcusable and unfair burden on the defendant to so defend?"

33. The third defendant/applicant also relied on the decision of Irvine J. in *Cassidy v. The Provincialate* [2015] IECA 74, where the court focused on the difference between the *Primor* and *O'Domhnaill* tests and made it clear that, in certain circumstances *O'Domhnaill* may be invoked even where delay may be excusable and a dismissal under the *Primor* test may not be available:-

"If they fail the Primor test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the Primor test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair."

34. On the application of the *Primor* test the third named defendant/applicant relied on a number of cases in which delay had been characterised as inordinate. They cited *Framus Limited v. CRH plc* [2013] IESC 23, in which Cooke J. held that *"in its ordinary meaning, delay is inordinate when it is irregular, outside normal limits, immoderate or excessive".* In that case a period of five years, during which the plaintiff took no step in the action, was held to be inordinate.

35. Citing the decision of Ní Raifeartaigh J. in *McAndrew v. Egan*, *Practising under the Style and Title of Egan Daughter and Co. Solicitors,* [2017] IEHC 346, a period of inactivity amounting to four years and one month was deemed inordinate. In *Farrell v. Arborlane Limited & Others* [2016] IECA 224, Sheehan J. found that a period of five and a half years between the service of the plenary summons and the issuing of the statement of claim was inordinate and inexcusable.

36. On the issue raised by the plaintiffs that they had had a difficulty in sourcing legal assistance and having procured such assistance in 2007, in identifying the appropriate defendants, the third defendant/applicant again relied on the decision of Ní Raifeartaigh J. in *McAndrew v. Egan*, in which she held that:-

> *"A number of authorities have indicated a reluctance to find sufficient excuse in the fact that delay can be attributed to a plaintiff's legal advisers. These authorities demonstrate the general rule that responsibility will rest with the plaintiff for failure to expedite matters in such circumstances, although the personal blameworthiness of the plaintiff is a matter which may be considered in the exercise of a court's discretion."*

37. On the difficulties in sourcing legal advise Ní Raifeartaigh J. held:-

> *"If there is an onus on plaintiffs to advance their proceedings even where he or she is legally represented, there must be a similar onus to do so where they are not, provided that they have been allowed a reasonable period of time to find a new legal team… There comes a point where he must accept that he must deal with the proceedings even without a legal team."*

38. Ní Raifeartaigh J. also cited MacMenamin J. in *McBrearty v. Northwestern Health Board* [2007] IEHC 431:-

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

Balance of Justice

39. In submitting that the balance of justice favoured the dismissal of these proceedings the third defendant/applicant relied on two decisions of Irvine J. relating to damage to a defendant's professional reputation arising from delay.

40. In *Flynn v. The Minister for Justice*, Irvine J. stated:-

> *"In my view, it is clearly material for any judge considering an application to dismiss proceedings for inordinate and inexcusable delay to have regard to the likely effect on a defendant or defendants of having proceedings such as these hanging over their personal and professional reputation for more than a decade."*

41. In *Carroll v. Kerrigan and Crawford* [2017] IECA 66, Irvine J. cited the judgment of Hamilton J. in *Primor* with regard to the matters to be considered in deciding where the balance of justice lay, including:-

> *"(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, (and)*
>
> *(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."*

42. In *Farrell v Arborlane*, Sheehan J. also held that the appellant had suffered prejudice by having an allegation of professional negligence hanging over him for this length of time. In that case the proceedings were served on the appellant in October, 2008, the statement of claim was delivered in May 2014 and the appellant issued a motion to strike out the plaintiff's proceedings for delay in February 2015.

43. The third named defendant/applicant also cited a number of cases in which the nature of the evidence to be presented at any consequent trial has been held to a relevant consideration in assessing the balance of justice. They cite *Gilroy v. Flynn* in which Hardiman J. stated:-

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

44. In *Carroll v. Kerrigan and Crawford*, even though the defendant had not asserted any particular prejudice Irvine J. found:-

> *"It would be wrong in my view, for this Court not to infer some prejudice as a result of the appellant's delay in prosecuting his claim against the respondent. First, the court will have to make findings of fact concerning the circumstances in which the appellant was allegedly injured more than 15 years ago, and in circumstances where neither his employer, nor the person who allegedly perpetrated the assault remain a party to the proceedings. Second, having regard to the pleadings wherein Mr. Carroll maintains he instructed the respondent to institute proceedings within a very short period of time after the assault on 25th January, 2001 - facts denied by the respondent - the court will have to make findings of fact as to what, if any, instructions were given by the appellant to his solicitors over 15 years ago."*

45. In *Farrell v Arborlane*, Sheehan J. held that:-

> *"If this case were now to proceed in the normal way then there would be an eighteen year gap between the completion by the appellant of his certificate of compliance with the Building Regulations of 1997 and the actual hearing of this case. It goes without saying that memories fade, recollections become blurred and the older a case becomes, the more*

difficult it is to ensure a fair trial."

46. The third defendant/applicant also relied on the decision of Hogan J. in *Quinn v. Faulkner t/a Faulkners Garage & MMC Commercials* Ltd [2011] IEHC 103, in which Hogan J. stated:-

> *"We may start our consideration of the question of inordinate delay by recalling some basic principles in this area. First, it is incumbent on a plaintiff who has waited towards the end of the limitation period to progress the litigation thereafter with some despatch."*

He went on to state:-

> *"In a case such as the present one where proceedings were commenced so late, the plaintiff must show that he took all reasonable steps to bring the case to trial within a reasonable period thereafter. While not absolving MMC in any way of responsibility for their delay, the fact is that the plaintiff cannot show he has taken all such steps, the public interest in the timely administration of justice - which, after all, is the very constitutional mandate which the courts are required to discharge - is thereby compromised."*

47. As to the submission by the plaintiffs that the fact that the third defendant/applicant had been aware of the nature of the claim since 2007 and that he had filed a defence and counterclaim in November 2013, amounted to acquiescence on his part, the third defendant/applicant relied on the decisions of *Flynn v. Minister for Justice* and *Millerick v. The Minister for* Finance [2016] IECA 206. In *Flynn v. Minister for Justice*, Irvine J. held that where delay had been found to be inordinate and inexcusable, it fell to the plaintiff:-

> *"To seek to excuse his fault by reference, if possible, to some weighty countervailing circumstances as advised by Fennelly J. in Anglo Irish Beef Processors Limited v. Montgomery."*

48. Henchy J. in *O'Domhaill v. Merrick* defined 'countervailing circumstances' as "conduct akin to acquiescence on the part of the defendant, or inability on the part of an infant plaintiff to control or terminate the delay of his or her agent." Irvine J. when on to state:-

> *"As was made clear by Fennelly J. in his judgment in Anglo Irish Beef Processors Limited, a mere failure to apply to have a claim dismissed is not to be treated as a culpable act of acquiescence"*

49. Later in the judgment Irvine J. stated:-

> *"Oftentimes a plaintiff, notwithstanding service of repeated notices of intention to proceed will not bring their proceedings on for trial, thus relieving the defendant of any further expenditure on the proceedings. It is entirely legitimate and understandable that the defendants might decide to 'let sleeping dogs lie rather than invite upon themselves litigation claiming damages' as was endorsed by Fennelly J. in Anglo Irish Beef Processors"*

50. In *Millerick v. Minister for Finance*, Irvine J. stated that "*a defendant does not have an obligation to bring the proceedings to hearing*." Regarding a defendant's culpability for delay the question, she concluded was:-

> *"Whether the defendant caused or contributed to the plaintiff's delay or in some manner gave him to understand or led the plaintiff to believe that the defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient, as that does not communicate acceptance to the plaintiff."*

And

> *"Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?"*

51. The third defendant/applicant submits that the plaintiffs have been guilty of delay that has been inordinate and inexcusable. He submits that such excuses as are offered in the affidavit of Eamonn Carey and in the affidavit of Liam Honahan, plaintiff sworn 6th November, 2017, some ten years to the day after these proceedings were first instituted, were inadequate. These excuses relate to the plaintiffs' difficulties in obtaining legal representation and later to difficulties in identifying the parties in the case notwithstanding the fact that all are practising solicitors. The third defendant/applicant points out that the courts have repeatedly stated (*McBrearty v. Northwestern Health Board, McAndrew v. Egan*) that neither delay in obtaining legal representation, nor delay on the part of the plaintiffs' solicitors absolves the plaintiff of the primary responsibility to advance his own case.

52. On the issue of the balance of justice, the third defendant/applicant submits that it is clear from the relevant authorities (*Cassidy v. The Provincialate, Millerick v. The Minister for Finance*) that where inordinate and inexcusable delay exists, even moderate prejudice may justify the dismissal of the proceedings. Relying on the "*two strand test*", (*Comcast International Holdings Limited v. The Minister for Public Enterprise and Cassidy v. The Provincialate*), the third defendant/applicant submits that even where a plaintiff's delay is excusable, the real risk of an unfair trial or an unjust result is sufficient to warrant a dismissal of his action.

53. The third defendant/applicant submitted that in the circumstances of these proceedings there is a real risk of an unfair trial and that the third named defendant/applicant's difficulties in defending his personal and professional reputation are insurmountable. They point out that the events giving rise to the alleged claim are in excess of 20 years old. The parties involved in those transactions were the plaintiffs and the sixth defendant/applicant Orla Deasy. There is significant disagreement between those parties as to advices given, understandings reached, telephone conversations conducted and the manner of resolution of a discrepancy between the site plan attached to the contract and the Approved Land Registry Scheme map which ultimately emerged. The third defendant/applicant points out that while there is documentation available in relation to the transactions the essential disagreements will require to be resolved by means of witness testimony. The third defendant/applicant relying on the precedent of *Gilroy v. Flynn* and *Farrell v. Arborlane Limit*ed submits that, the lapse of time of in excess of 20 years creates a clear difficulty for a court in making findings of fact and, in effect, is such as would put justice to the hazard.

54. It is submitted on behalf of the third named defendant/applicant that he is doubly prejudiced because he has no direct evidence in relation to the interactions between the plaintiffs and the sixth defendant/applicant Orla Deasy. Any putative liability derives from his status as a partner in James G. O'Mahony & Co., between 2000 and 2005, a capacity in which he has not in fact been sued.

55. Relying on the decisions of *Anglo Irish Beef Processors Limited v. Montgomery* and *Millerick v. The Minister for Finance* the third defendant/applicant submits that his engagement in the process by entering an appearance and serving a defence and counterclaim and his failure to move to have the case struck out prior to 2017 does not amount to culpable delay or acquiescence on his part.

56. Finally, the third defendant/applicant submitted that given that the plaintiffs' proceedings were issued at best towards the end of the limitation period and given the nature of the proceedings which allege professional misconduct on the part of the third named defendant/applicant, the plaintiffs were under an obligation to proceed with despatch and have failed to do so, which has resulted in a shadow being cast on the third defendant/applicant's reputation for more than a decade.

57. For all of these reasons, the third named defendant/applicant submits that, whether one applies the *O'Domhnaill* test or the *Primor* test, it would be unjust to permit the plaintiffs' claim to proceed against him.

Submissions of the fifth and sixth defendants/applicants

58. In their submissions, the fifth and sixth defendants/applicants raise what may be described as a preliminary issue. They submit that the proceedings as currently constituted are misconceived. It is submitted on behalf of the fifth and sixth defendants/applicants that, as a consequence of the plaintiffs' acceptance in the course of the application, that the firm of Murphy MacNamara Solicitors never acted for them, the plaintiffs have no cause of action against that firm or its principals. It follows they contend, that the proceedings as they are currently constituted against the fifth and sixth named defendants/applicants cannot proceed to trial but require to be reconstituted so as to sue the fifth and sixth named defendants/applicants other than as partners in Murphy MacNamara & Co. The effect of this they submit is that an application to amend would have to be brought, to now name the fifth defendant/applicant in his capacity as a partner in James G. O'Mahony & Co. and to name the sixth defendant/applicant as an employed solicitor in both Arthur Comyn & Co. and James G. O'Mahony & Co. These defendants/applicants submit that significant considerations against granting such an amendment are the delay in seeking it and the fact that the plaintiff's claims would now certainly be statute barred if such amendment were not allowed and they had to issue fresh proceedings. In addition there is the fact that at the time the current summons was amended in June 2011, it was a summons which had expired more that two and a half years earlier. These defendants/applicants cite the case of *Farrell v Coffey* [2009] IEHC 537 in which Dunne J stated:

> *" In all of the discussions on the point in the cases referred to above, the basic principle enunciated by Lord Esher M.R. has not been altered or changed, namely, that a plaintiff will not be allowed to amend pleadings to set up a cause of action, which, if the writ were issued in respect thereof at the date of amendment, would be statute barred, as this would allow the plaintiff to take advantage of the existing proceedings to defeat the statute and would prejudice the defendant."*

59. Moving to the *Primor* test, it is submitted on behalf of the fifth and sixth named defendants/applicants that the plaintiffs have been guilty of inordinate and inexcusable delay over the 22 years since 1995 and certainly over the 10 years since the initiation of these proceedings, and that the balance of justice favours the dismissal of their proceedings for that reason because the prejudice their continuance shall cause the fifth and sixth named defendants/applicants far outweighs the prejudice to the plaintiffs from a dismissal.

60. Counsel for the fifth and sixth named defendants/applicants having set out the *Primor* test and discussed the rationale of the judgments in that case, then set out the latest iteration of the test as set out in the Court of Appeal decision in *Flynn v Minister for Justice*. That case as already stated, helpfully updates the *Primor* test by incorporating all of the refinements and elucidations which have occurred since *Primor* was decided in 1996 and has also incorporated the *O'Domhnaill* test in the principles to be applied by the courts when assessing delay.

61. It is submitted on behalf of the fifth and sixth named defendants/applicants on the basis of the principles set out in *Flynn*, that if they establish inordinate and inexcusable delay, then the onus passes to the plaintiffs to establish countervailing circumstances which push the balance of justice in favour of refusing the application.

62. In *Flynn*, Irvine J. found that she was not satisfied that the appellant was in a position to ask to the Court to excuse his inordinate and inexcusable delay, nor was the appellant able to point to any particularly meritorious countervailing circumstances.

63. It is thus submitted on behalf of the fifth and sixth named defendants/applicants that if the plaintiffs have been guilty of inordinate and inexcusable delay herein then, in deciding where the balance of justice lies, the Court should dismiss the action unless the plaintiffs satisfy it of weighty countervailing circumstances which favour allowing them to continue.

Inordinate and inexcusable delay

64. It is submitted on behalf of the fifth and sixth defendants/applicants that the plaintiffs are guilty of inordinate delay as follows:-

> (i) The plaintiffs delayed twelve years in issuing the within proceedings in that the contract of which they complain was made in 1995 and they issued these proceedings in 2007;
>
> (ii) the plaintiffs were then guilty of a further four years and five months delay until April, 2012 in serving the proceedings; and
>
> (iii) the plaintiffs have been guilty of delay in not delivering a statement of claim since the fifth and sixth defendants/applicants entered an appearance in February, 2013, over four years and eight months before the hearing of this application.

65. It is submitted on behalf of the fifth and sixth named defendants/applicants that these periods of delay add up to over 20 years and that the entire amount of delay of which the Court must take account, being the delay from the cause of action accruing to the trial hereof, will be years longer. It is submitted that such delay is by any standards inordinate and in this regard, the fifth and sixth defendants/applicants rely on the finding in *Primor* that fourteen years between cause of action and trial was inordinate; in *Rainsford* that a five year delay was inordinate; in *Gilroy* that a four year delay was inordinate; in *Rodgers* that a five year delay was inordinate; and in *Flynn* that a four year delay was inordinate.

66. The fifth and sixth named defendants/applicants note that the second named plaintiff has sought to excuse the plaintiffs' pre-

initiation delay on the basis that they only became aware of their cause of action in September, 2005 and that thereafter their then solicitors, James G. O'Mahony & Sons, and particularly Maurice Collins of that firm, spent from September 2005 to 9th August, 2006 investigating that cause of action, at which time that firm closed and that thereafter the plaintiffs had difficulty in finding new solicitors, and did not find their present solicitors until March 2007. It is argued by the fifth and sixth named defendants/applicants that the problem with this excuse is that it contradicts the averments made by the plaintiffs' solicitor at paras. 6 and 7 of his affidavit of 17th August, 2017 wherein he avers that the plaintiffs withdrew their instructions from James G. O'Mahony & Co. in and around March 2007, and after some difficulty in finding an alternate solicitor, they first attended at his firm's offices in March 2007. The fifth and sixth defendants/applicants argue that the averment about withdrawing instructions from James G. O'Mahony & Co. must be incorrect because that firm dissolved in 2005 but note that it is concerning that it is has never been explained as to how the averment came to be made. The fifth and sixth named defendants/applicants further note that it is perplexing how the plaintiffs, in their initial plenary summons, came to sue the fifth and sixth named defendants/applicants as '*trading as James G. O'Mahony & Sons'* when they had had such close contact with Mr. Maurice Collins of that firm, as set out in the averments of the second named plaintiff and also when their current solicitors knew from Mr. Collin's letter of 17th August, 2007 the precise movement of the plaintiff's business from James G. O'Mahony & Co. to James G. O'Mahony & Sons. It is submitted on behalf of the fifth and sixth defendants/applicants therefore, that the explanations offered by the plaintiffs for the pre-initiation delay are not such as to excuse it.

67. The fifth and sixth defendants/applicants note that the second named plaintiff does not address the delay in serving the proceedings and the delivery of a statement of claim, in his affidavit of 6th November, 2017, and that his solicitor explains that delay between 2007 and 2011, as being due to difficulties in ascertaining the appropriate defendants, due to changes in business partnerships and due to difficulties in relation to service. It is argued by the fifth and sixth defendants/applicants that there is no explanation at all offered as to the delay since 2011 save that the plaintiffs' solicitor does aver to the issues the plaintiffs had with the seventh named defendant which ended with them discontinuing their proceedings against him. The sixth named defendant/applicant pointed out that the plaintiffs could have progressed the proceedings against the other defendants regardless of their issues with the seventh named defendant. The response of the plaintiffs' solicitor in his replying affidavit of 27th October, 2017 was to describe that as unrealistic because *"where a case involves multiple defendants, it makes sense to ensure each stage of the case is complete vis a vis all the Defendants before moving on to the next stage".*

68. It is submitted on behalf of the fifth and sixth named defendants/applicants that the plaintiffs have conspicuously failed to complete each stage of the case against all defendants. The fifth and sixth defendants/applicants note that it appears that the plaintiffs served the first named defendant in 2008 but no other party; that the plaintiffs then amended the plenary summons without renewing it in 2011 and that that amendment changed their proceedings, so that the fifth and sixth named defendants/applicants were no longer sued as members of a firm in which they had no involvement (James G. O'Mahony & Sons) and were now sued as members of a firm which never had any involvement with the plaintiffs (Murphy MacNamara & Co.), as the plaintiffs themselves well knew. It is submitted on behalf of the fifth and sixth named defendants/applicants, that while the plaintiffs seek to make an issue of the fact that the fifth named defendant/applicant only notified the plaintiffs' solicitors of Murphy MacNamara's lack of involvement by letter dated 9th June, 2011, the fifth named defendant/applicant has consistently done so since as appears from all the correspondence referred to at paras. 12 and 13 of his affidavit of 8th March, 2017. It is submitted on behalf of the fifth and sixth named defendants/applicants that the plaintiffs cannot justify suing a firm which should never have been sued and which they must have known should never have been sued, on the basis that that firm then did not notify them that they should not have been sued, until after they were sued. The fifth and sixth named defendants/applicants argue that persons should not sue, particularly for professional negligence, unless they are sure of their cause of action and that the plaintiffs themselves have sought to excuse their pre-litigation delay on the basis of the need to identify the correct defendants.

69. The fifth and sixth named defendants/applicants note that the plaintiffs then purported to serve the defendants, other than the first named defendant, in April 2012 by which time the first named defendant had collapsed into receivership. They further note that the plaintiffs have closed their pleadings against some defendants, and have failed to meet the fifth and sixth named defendants'/applicants' requirement for a statement of claim for a period which is now fast approaching five years.

70. It is submitted on behalf of the fifth and sixth named defendants/applicants that even if the plaintiffs' delay in initiating proceedings can be excused, the plaintiffs have been guilty of inexcusable delay since the commencement of proceedings, which delay means that professional negligence proceedings had been outstanding against the fifth and sixth named defendants/applicants for a decade, on the date this motion was called on for hearing on 6th November, 2017.

Balance of justice

71. It is submitted on behalf of the fifth and sixth named defendants/applicants that the balance of justice requires that this action be dismissed. In their written submissions, they point to the following factors:-

(i) Prejudice inevitably flows from such a delay between cause of action and a future trial (per O'Flaherty J. in *Primor*)

(ii) Grave allegations of professional negligence have to their prejudice been hanging over their heads for ten years (they identify this as a weighty factor per *Primor* and *Flynn*)

(iii) The proceedings are plainly misconceived as they are sued on the Amended Plenary Summons (the only pleading against them) as partners in Murphy MacNamara & Co when that firm never acted for the plaintiffs and when the sixth named defendant/applicant was never a partner in that firm.

(iv) Both say that it will be difficult to obtain evidence by discovery or otherwise herein, as the first named defendant went out of business in 2011, and the two firms of solicitors in which Ms. Deasy was employed at the time she acted for the plaintiffs, have both gone out of business. The sixth named defendant/applicant also says that she has limited documentation to defend her case and to corroborate her account of her dealings with the plaintiffs. The fifth and sixth named defendants/applicants note that the plaintiffs have never put the coloured map attached to the conveyance (and referred to in the architect's Declaration of Identity) in evidence at all, and it is not even clear that they have same.

(v) The fifth and sixth defendants/applicants submit that this is not at core a documents case. They say that even if full documentation were available to all sides the core claim now being made by the plaintiffs can only be resolved by oral testimony. It appears from the affidavit of the second named plaintiff of 6th November, 2017 that the plaintiffs seek to maintain that the sixth defendant/applicant did a deal with the first named defendant for extra land, without their consent, and did not tell them they could not build on it and did not adequately advise them of the presence of pipes under the property which had the effect of precluding its development. The fifth and sixth defendants/applicants argue that the effect of all of this is that this case is a case which revolves around oral evidence of events of over 20 years

ago and such oral evidence will have become less reliable by the passage of that period, noting that that was a weighty factor in the dismissal of the *Primor* case against Stokes Kennedy Crowley.

(vi) The fifth and sixth named defendants/applicants claim that they are prejudiced by the fact that parties against whom they could have raised a claim for indemnity and contribution were either never sued herein, or are no longer marks for damages, or have had the proceedings against them discontinued. The plaintiffs' subsequent solicitors James G. O'Mahony & Sons were not sued. The estate of James G. O'Mahony, the senior partner of James G. O'Mahony & Co. was not sued despite the plaintiffs' solicitors being aware of his role within 2 years of his death. The proceedings against the first named defendant who actually sold 43, Ferndale to the plaintiffs are worthless because McInerney Construction has collapsed into receivership. Finally, the fifth and sixth defendants/applicants point out that the proceedings against the seventh named defendant have been discontinued.

(vii) The plaintiff has accepted in the course of the hearing that it is unusual to sue an employed solicitor as well as the firms which employed her, who are necessarily vicariously liable for her. It is submitted that it therefore follows that the sixth named defendant/applicant was never a necessary party to these proceedings, even if they are now amended, as it is now indicated the plaintiffs wish to amend them.

72. It is submitted on behalf of the fifth and sixth named defendants/applicants that the above are strong factors in favour of granting this application and that even if the prejudice had only been modest, then the balance of justice would favour the application, in line with the eighth principle outlined by Irvine J. in *Flynn*, especially in view of the late initiation of these proceedings.

73. It is submitted that the fifth and sixth defendants/applicants have not been guilty of any delay in their case and have not acquiesced in the plaintiffs' delay. The only period of delay which can be laid at their door is the period from service of the plenary summons in April, 2012 to their putting in an appearance on 22nd February, 2013. It is submitted that this period of approximately 10 months pales into insignificance when compared to the plaintiffs' years of delay. It is furthermore submitted that delay by the defendants/applicants is a factor to which not much weight should be attached unless it is akin to acquiescence, and it is submitted that little weight should be attached to the fact that the fifth and sixth defendants/applicants were "*content to let sleeping dogs lie*" in this case, (per Fennelly J. in *Anglo-Irish Beef Processors L*td.)

74. It is submitted on behalf of the fifth and sixth defendants/applicants that the plaintiffs have failed to establish weighty countervailing factors which would justify allowing the action to continue despite their inordinate and inexcusable delay.

75. The fifth and sixth defendants/applicants note that the plaintiffs' submissions indicate that the plaintiffs may claim that the delay in the proceedings are the fault of their legal advisors, rather than themselves, however, that is a factor to which less weight should be attached (per *Gilroy* and *Rodgers*).

76. The fifth and sixth named defendants/applicants submit that they were only aware of the plaintiffs' claim from 2007, and that the plaintiffs' claim has changed over time. In their correspondence they, for a long period, maintained that fault rested with the fifth and sixth named defendants/applicants as partners in Murphy MacNamara on the basis that that firm had done work for the plaintiffs. They have sued the fifth and sixth named defendants/applicants in that capacity but have now accepted that they have no cause of action against that firm. They now seek to base their claim on the personal liability of the sixth named defendant/applicant and the liability of the fifth named defendant/applicant as a partner in James G. O'Mahony & Co., a firm which they have never sued either in their original or amended proceedings.

77. The fifth and sixth named defendants/applicants submit that there are no weighty countervailing factors which would swing the balance of justice in favour of the continuance of the proceedings. They note that the plaintiffs argue that the balance of justice favours allowing them to continue the action because they are currently unable to sell their property, and in the event that their case is unsuccessful, it is unlikely they will ever be able to sell it. This is something which if uncompensated, will have catastrophic financial consequences for them. The fifth and sixth named defendants/applicants submit that the plaintiffs have not placed sufficient evidence before the Court of this alleged inability to sell their property, in which they have lived for the last 22 years, or that any such inability was caused by any negligence on behalf of the fifth or sixth named defendants/applicants.

78. The fifth and sixth named defendants/applicants point to the fact that the plaintiffs have put in evidence an auctioneer's report from 2007, which merely recites what the plaintiffs' solicitors have told the auctioneers regarding their property. They further point out that even if the plaintiffs produced engineering evidence, that evidence would have to prove that their property is unsaleable and that it is unsaleable due to a defect which the fifth named defendant/applicant as their solicitor, should have brought to their attention, and not due to some failure of disclosure on the part of the first named defendant vendor, for which they cannot be blamed. It is submitted on behalf of the fifth and sixth named defendants/applicants that the plaintiffs have produced no such evidence and that therefore their situation is fundamentally different to that of the plaintiff in *Rainsford* who was left in a wheelchair by his accident, or the plaintiff in *Gilroy*, whose claim was to proceed as an assessment.

79. The fifth and sixth named defendants/applicants argue that this evidential lacuna as to causation is particularly glaring in that the plaintiffs have submitted that the statutory Declaration of Identity of Bill Mullen, architect obtained in or about November 2005 is incorrect. If that is so, they argue that it is difficult to see how the sixth named defendant/applicant obtaining it earlier, would have assisted the plaintiffs. They also suggest that the plaintiffs themselves admit that over time they have acquired all of the land they contracted for in 1995.

80. It is submitted on behalf of the fifth and sixth named defendants/applicants that the plaintiffs have failed to produce evidence of weighty countervailing factors such as would swing the balance of justice in favour of the continuance of the proceedings.

Submissions of the plaintiffs
81. It is the plaintiffs' case that the third named defendants'/applicants' and the fifth and sixth named defendants'/applicants' motions to strike out proceedings should be refused on the basis of their failure to meet the test in *Primor*.

Delay
82. The plaintiffs broke down the periods of delay into three sections as follows:

1. Delay prior to the issue of proceedings;

2. Delay between 2007 and 2010;

3. Delay following service of the first notice of intention to proceed.

Law in relation to striking out for delay
83. The plaintiffs accept that the relevant principles are those laid down by Hamilton C.J. in *Primor* and further refer to a number of recent cases involving applications to strike out, which they submit are highly relevant to the situation in this case. Three cases were cited;

Oliver Hughes and Fabola Limited v Michael Cusack practising under the style of Michael E. Cusack & Co. [2016] IEHC 34;

Paul Nolan v. Chadwicks Limited [2014] IEHC 542; &

Joseph Arthur and Deirdre Arthur v. Joseph Gorman and J.A. Gorman Consulting Limited [2017] IEHC 502

84. In the three cases cited by the plaintiffs, there was found to be inordinate and inexcusable delay, but the court held that the balance of justice favoured allowing the claims to proceed. In each case on the facts, the court held that the level of prejudice was not such as would warrant the dismissal of the proceedings. The first case cited, *Hughes v Cusack* is a decision of this court, which has since been overturned in an extempore decision of the Court of Appeal. One of the grounds on which the appeal appears to have succeeded, was that this court had not attached sufficient weight to the prejudice arising from reputational damage suffered by a professional, subjected to long drawn out proceedings. In any event none of the three cases cited adds anything at a level of principle to the *Primor* or *Flynn* decisions.

85. The plaintiffs helpfully summarised their position in list form as to why their delay though clearly inordinate, should not be considered inexcusable, and if deemed inexcusable why, on the balance of justice, it should not be dismissed.

86. It is submitted on behalf of the plaintiffs that they cannot be held responsible for delay prior to the issue of proceedings.

87. The plaintiffs point to the following as mitigating factors which apply to the delay subsequent to the issue of proceedings:-

(a) The desire of the plaintiffs' solicitors, out of courtesy to colleagues, to avoid personally serving solicitors with proceedings and instead to seek nomination of an instructing solicitor to receive those proceedings;

(b) The desire to reach a settlement with the first defendant which, if obtained, would have resolved the proceeding against all defendants;

(c) The economic collapse which stymied these settlement negotiations;

(d) The uncertainty regarding the transition of James G. O'Mahony & Co. to James G. O'Mahony & Sons;

(e) The complexity of the proceedings;

(f) The multiplicity of defendants;

(g) Concerns regarding the appropriate insurers for solicitors' defendants;

(h) Difficulties which needed to be resolved regarding other defendants not parties to these motions to strike out;

(i) The need to complete pleadings for each defendant before moving on to the discovery stage;

(j) The fact that the sixth defendant/applicant, being the solicitor in respect of whose actions the third and fifth defendants/applicants was vicariously liable, the case against them being based on this vicariously liability only, since they themselves had no dealings with the file, had been aware of the nature and extent of the proceedings from the outset and had obtained a copy of the file at that point;

(k) The participation of the third defendant/applicant in the proceedings by entering an appearance, raising particulars and delivering a defence, all without any allegation of delay;

(l) Difficulties serving the sixth defendant/applicant;

(m) The failure of the fifth and sixth defendants/applicants to point out, despite receipt of warning letters in respect of defence, that a statement of claim had not been served on them;

(n) The specific request of Murphy MacNamara in 2012 that matters be held back pending clarification by them of a particular issue, which they do not appear to have reverted on.

88. It is submitted on behalf of the plaintiffs that having regard to all of these matters, the delay was not inordinate and inexcusable.

89. It is submitted on behalf of the plaintiffs that if the delay was in fact inordinate and inexcusable, the balance of justice is against the granting of the relief sought, having regard to (a) to (l) above, in particular, the delay on the part of the third, fifth and sixth defendants/applicants and/or their waiver of any delay on the part of the plaintiffs as set out at (k) to (n) above; the absence of any prejudice on the part of the defendants having regard to (j); and the nature of the case and the fact that it relates to the plaintiffs' family home.

Decision
On the basis of the facts set out at paragraphs 13 to 27 of this judgment there is no doubt that the delay in prosecuting this claim has been inordinate. Leaving aside for the moment the pre-proceedings delay, a delay of ten years in prosecuting what is now, in effect, a professional negligence suit is simply unacceptable. Notwithstanding the passage of ten years since the proceedings were first issued, this claim is far from ready for hearing. If permitted to proceed the plenary summons will have to be further amended to name the proper defendants in their proper capacities. Thereafter a statement of claim will have to be served on the fifth and sixth defendants/applicants and their defences filed. The issue of discovery would then have to be addressed. That is likely to be a

complex issue in circumstances where the party with primary liability to the plaintiffs, McInerney Construction Limited, no longer exists. Even with rigorous case management this claim is unlikely to be ready for hearing for many, many months, if not years.

Excusable or inexcusable delay?
90. Given that the delay is clearly inordinate, the next matter which the court has to consider is whether that inordinate delay is excusable in the circumstances of this case. The case law in this area is of limited assistance because each case turns on its own particular facts. The plaintiffs have helpfully set out, in a list format, reasons why the court should not hold the delays which have occurred to be "inexcusable". In respect of the pre-proceedings delay, they contend that in the circumstances of this claim, that delay is excusable. On their evidence, they first realised that there was an issue in respect of their title and the potential to develop their property in May 2005, when Cork County Council refused them planning permission for an extension. They immediately sought the assistance of Maurice O'Connor, solicitor in the newly established firm of James G. O'Mahony & Sons to investigate the issue and it was he who finally secured a statutory Declaration of Identity from McInerney Construction Limited. When the firm of James G. O'Mahony & Son also ceased practice following the death of James G. O'Mahony, Mr. O'Connor ceased to act for them, but did give them a copy of the file. On their evidence they experienced considerable difficulty in obtaining legal advice in the Cork area. On their evidence, they approached four solicitors firms to be told that each was unwilling to act either because of conflicts of interest, or because of an unwillingness to sue colleagues in the same area. Once they had retained solicitors in March 2007, it seems to the court not unreasonable that it took the new firm three to four months to master the file, to make appropriate inquiries and to seek the advice of counsel before issuing initiating letters of claim. Those letters were sent to five parties, being the first defendant McInerney Construction Limited, the second defendant Arthur Comyn & Co., the firm which acted for the plaintiffs in the original contract and conveyance, the sixth defendant/applicant Orla Deasy who dealt with the plaintiffs' business from 1995 to 2000 while an employed solicitor in Arthur Comyn & Co. and thereafter from 2000 to 2005 as an employed solicitor in James G. O'Mahony & Co., and James G. O'Mahony & Co., employers of Orla Deasy from 2000 to 2005, and William Boland of Julian O'Brien & Boland who acted for McInerney Construction Limited in the original transaction and conveyance. All of those letters were sent in early August 2007. A plenary summons issued three months later on 6th November, 2007. In the circumstances, it appears to the court that the pre-proceedings delay was not inordinate and even if deemed inordinate was in the circumstances of this case excusable.

91. In respect of the delay post issuing of the plenary summons, the plaintiffs advance twelve grounds which they submit mitigates, or excuses, the inordinate delay which has occurred. These grounds are set out earlier in this judgment, but for ease of reference the court repeats them here. They are:-

> *(a) The desire of the plaintiffs' solicitors, out of courtesy to colleagues, to avoid personally serving solicitors with proceedings and instead to seek nomination of an instructing solicitor to receive those proceedings;*
>
> *(b) The desire to reach a settlement with the first named defendant, which, if obtained, would have resolved the proceedings against all defendants;*
>
> *(c) The economic collapse of 2008, which stymied the settlement negotiations;*
>
> *(d) The uncertainty regarding the transition from James G. O'Mahony & Co. to James G. O'Mahony & Sons;*
>
> *(e) The complexity of the proceedings;*
>
> *(f) The multiplicity of defendants;*
>
> *(g) Concerns, regarding the appropriate insurers for solicitor defendants;*
>
> *(h) Difficulties which needed to be resolved regarding other defendants not parties to these motions to strike out;*
>
> *(i) The need to complete pleadings for each defendants before moving on to the discovery stage;*
>
> *(j) The fact that the sixth defendant/applicant, being the solicitor in respect of who's actions the third and fifth defendants/applicants were vicariously liable, the case against them being based on this vicariously liability only, since they themselves had no dealings with the file, had been aware of the nature and extent of the proceedings from the outset and had obtained a copy of the file at the outset;*
>
> *(k) The participation of the third defendant/applicant in the proceedings by entering an appearance, rising particulars and delivering a defence, all without any allegation of delay;*
>
> *(l) Difficulties, serving the sixth defendant/applicant;*
>
> *(m) The failure of the fifth and sixth defendants/applicants to point out, despite receipt of warning letters in respect of their defence, that a statement of claim had not been served on them;*
>
> *(n) The specific request of Murphy MacNamara, in 2012 that matters be held back pending clarification by them of a particular issue relating to insurance, which they according to the plaintiffs, do not appear to be reverted on.*

92. Dealing with each of those in turn, in respect of points "a", "b" and "c", the court is not persuaded that an excess of professional courtesy either justifies or indeed explains the delay in service of the plenary summons issued in November 2007. While copies of the summons were sent to the fourteen original defendants named, there was no real attempt made to effect service on anyone other than McInerney Construction Limited. Matters were let lie in respect of these defendants/applicants while the plaintiffs pursued a settlement with the first named defendant, McInerney Construction Limited. Knowing, as they must have, that the statute was likely to be an issue in these proceedings, it appears to the court that it was incumbent on the plaintiffs to progress their claim against all defendants with despatch. The court can see no good reason why the plaintiffs could not have adopted a twin track approach of negotiating with the first defendant while simultaneously progressing their claim against all of the other defendants. In July 2010, following the collapse of McInerney Construction Limited into receivership and ultimately liquidation, the plaintiffs served a notice of intention to proceed on the remaining defendants numbering at that stage thirteen. The economic collapse, which the plaintiffs allege stymied the settlement negotiations with McInerney Construction Limited, is no excuse for the failure to proceed against the remaining defendants. In fact, the court takes the contrary view that the economic collapse of 2008 should have added to the urgency of progressing these proceedings, yet no substantive step was taken until 2011 when an application was made to amend the plenary summons.

93. On points "d", "e", "f" and "g", the plaintiffs cite alleged uncertainty regarding the transition from James G. O'Mahony & Co. to James G. O'Mahony & Sons; the complexity of the proceedings; and the multiplicity of defendants and concerns regarding appropriate insurers as grounds which excuse their delay in these proceedings. The court rejects these submissions. In their initiating letters of claim sent in early August 2007, the plaintiffs' solicitors clearly identified the parties who in their view had a potential liability to the plaintiffs being McInerney Construction Limited, Arthur Comyn & Co. who acted on behalf of the plaintiffs in relation to the contract and conveyance, Orla Deasy, an employed solicitor in Arthur Comyn & Co., who took that file with her when she moved to James G. O'Mahony Co. in 2000, and William Boland solicitor who had acted for McInerney Construction Limited. These are the people they should have sued, but they chose not to. The multiplicity of defendants, who at one stage numbered 14, is a direct result of the plaintiff's strategy of following the insurance instead of the liability.

94. There was no uncertainty regarding the transition from James G. O'Mahony & Co. to James G. O'Mahony & Sons. The initiating letter sent to James G. O'Mahony & Co. found its way to James G. O'Mahony & Sons, a firm established by James G. O'Mahony after his previous practice dissolved. The plaintiffs' solicitor's initiating letter of 2nd August, was replied to by Maurice O'Connor solicitor of James G. O'Mahony & Sons, on 17th August 2007. That letter clearly informed the plaintiffs' solicitors of the dissolution of James G. O'Mahony & Co. in May 2005, the death of the eponymous partner in that firm, James G. O'Mahony in 2006, and the names of the former partners in that firm, namely Adrian MacNamara, Bernard Murphy and Carl O'Mahony. The addresses and phone numbers of the three former partners were also given to the plaintiffs' solicitors. Notwithstanding this clear information as to the identity of the former partners, and notice that they might have to join the executor of the deceased partner James G. O'Mahony, the plaintiffs chose to issue proceedings in November 2007 naming nine partners in the firm of Comyn Kelleher & Tobin, a firm which Arthur Comyn had joined in 2004 and naming these applicants and the fourth named defendant as persons trading as James G. O'Mahony & Sons. They did so at a time when they had clear, explicit information that these parties had no involvement in the firm of James G. O'Mahony & Sons. The court is satisfied that there was no confusion or uncertainty regarding the transition from James G. O'Mahony & Co. to James G. O'Mahony & Sons, nor was there any confusion as to the correct identity of potential defendants. They had all been identified at the time the initiating letter was sent, in August 2007. The court also rejects the submission that the proceedings were particularly complex. At core it is a breach of contract claim arising from a conveyancing transaction.

95. When the plaintiff amended the unrenewed summons in May 2011 they compounded their original error of suing the wrong defendants by suing the third, fifth and sixth defendants/applicants, not as former partners, and in respect of the sixth defendant/applicant employee, of James G. O'Mahony & Co. but rather as principals in the new firms established by them following the dissolution of James G. O'Mahony & Co., being, in respect of the third defendant/applicant, Carl O'Mahony & Co. and in respect of the fifth defendant/applicant Murphy MacNamara & Co. a firm in which the sixth defendant/applicant was an employee up until 2011.

96. The explanation proffered by the plaintiffs for this erroneous course of action of suing the third to fifth defendants/applicants as trading as the firms with which they were associated at the date of the amendment, instead of as partners in the firm of James G. O'Mahony & Co., against whom negligence was alleged, was because of a belief on the part of the plaintiffs' solicitors that any liability was to be covered by the insurance cover applicable to their current firms, and that accordingly, they should be named by reference to those firms. Simply put, from the outset of these proceedings, the plaintiffs' solicitors have chosen to follow the money rather than the liability. In the course of this hearing they have accepted that, in order to proceed further, their proceedings will have to be amended in order to sue the parties who they should have sued back in 2007.

97. At points "h" and "i", the plaintiffs suggest that their delay post service of the amended summons is excusable by virtue of the need to resolve the issue raised by the seventh defendant William Boland and the need to complete pleadings for each defendant before moving on to the discovery stage. This submission is somewhat at odds with the fact that having issued proceedings against fourteen defendants, in 2007 they only served one defendant before 2012. In any event, the court observes again that there was nothing to prevent the plaintiff from progressing the claim against these defendants while dealing with the seventh defendant's motion to set aside the renewal of the plenary summons against him in 2015. The third defendant/applicant had filed his defence and counterclaim in November 2013. The fifth and sixth named defendants/applicants had entered appearances and had sought statements of claim by the same year. Despite issuing repeated warning letters the plaintiffs took no substantive steps to compel delivery of a defence by either the fifth or sixth named defendants/applicants. Had they done so, their failure to serve those defendants/applicants with a statement of claim would immediately have become manifest.

98. At "m" in their list, the plaintiffs seek to blame the fifth and sixth defendants/applicants for the failure to progress matters because the fifth and sixth defendants/applicants did not point out that they were still awaiting a statement of claim, when the plaintiffs were pressing them in correspondence for a defence. It appears to the court that the defendants/applicants were under no obligation to do so. In our adversarial system of civil law, it is for the plaintiffs to bring their claim on for hearing and the failure to point out what should have been obvious to the plaintiffs, does not amount to acquiescence in their delay.

99. At "n" the plaintiffs seek to excuse their delay in respect of the fifth and sixth defendants/applicants by pointing to the fact that, in June 2012, the fifth defendant/applicant specifically requested the plaintiffs to hold matters while he sought clarification of the insurance position. This might have availed the plaintiffs, were there any evidence that in fact they did hold off, pending receipt by Adrian MacNamara of clarification of his insurance position. There is no such evidence. There is no further correspondence on the issue from either side. In fact, whatever issue may have arisen as of June 2012 was terminated by a letter of 25th January 2013, in which the Murphy MacNamara & Co. indicated that it had authority to accept proceedings on behalf of Orla Deasy and would enter an appearance on her behalf and on behalf of Adrian MacNamara. Accordingly, as of that date, any potential suspension of the delay clock ended.

100. For the foregoing reasons, the court concludes that the inordinate delay in this case was of the plaintiffs' own making and that there is nothing in the third, fifth or sixth defendants'/applicants' conduct which could be characterised as acquiescence by them in the plaintiffs' delay. The complexities and difficulties within the proceedings were of the plaintiffs' making and resulted from their strategy of pursuing the deep pocket of the insurer instead of those who had a potential liability to the plaintiff, all of whom they had clearly identified in August, 2007. The court therefore holds that the inordinate delay is also inexcusable.

Balance of justice

101. Given that it is now more than twenty years since the events giving rise to this claim, and more than ten years since proceedings commenced, a certain level of prejudice can be inferred. In addition, the defendants/applicants assert what might be termed as the usual type of prejudice arising in cases of inordinate delay involving professionals. They allege prejudice in the form of damage to their reputation and business which has been a regular feature of the jurisprudence in this area since the decision in *Primor* and they rely on one of the principles enunciated by Irvine J. in *Flynn v. The Minister for Justice* at item 10 where she states:

> *"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."*

The prejudice to reputation is particularly acute in this case because the third, fifth and sixth defendants/applicants have been sued, not in the capacity in which any potential liability would arise, but rather in the case of the third and fifth defendants/applicants, in their current professional roles in which, as has been repeatedly stated, they have absolutely no liability to the plaintiffs, and in the case of the sixth defendant/applicant, in a role which she has never occupied. This appears to the court to be a well-founded complaint.

102. The defendants/applicants also assert actual prejudice. They point to the fact that the first named defendant, who always carried the primary liability for any defect in the contract, has now collapsed into receivership and that that is likely to have consequences for the proper conduct of any trial and further denies them an indemnity to which they might well have been entitled had the case been conducted with reasonable despatch.

103. While much of the evidence in the case will be documentary, consisting of contract and title documents and contemporaneous correspondence (in this regard the court notes that the full file appears to be available), the nub of the case will depend on witness testimony of the plaintiffs and Orla Deasy concerning discussions, conversations and representations made during the resolution of the issue of the discrepancy between the site on the contract and the site as emerged in the Land Registry Approved scheme map. A court trying this action would have to determine the facts based on oral witness testimony of conversations which occurred more than twenty years ago. This does, in the court's view, put justice to the hazard. The delay in bringing the matter to trial casts doubt on the reliability of any witness account given to the court of trial. It is human nature to recall events in a manner favourable to the account which the witness now seeks to promote. The third and fifth defendants/applicants are particularly disadvantaged, in that they had no dealings with or knowledge of the plaintiffs' file, and their capacity to mount any meaningful defence to the claim has been significantly impaired by the delays which have occurred.

104. Another factor to be weighed in the balance of justice is the need, ten years after the proceedings issued, to amend the title of the action. During the course of argument, plaintiffs' counsel accepted that, if the plaintiffs' claim is to proceed, further amendment of the proceedings will be necessary to allow the third and fifth named defendants/applicants to be sued in their capacity as partners in the firm of James G. O'Mahony & Co. and to sue the sixth named defendant/applicant in her personal capacity as an employed solicitor in Arthur Comyn & Co. and later in James G. O'Mahony & Co. It seems to the court that to permit such a course of action would be unfair and unjust, first and foremost because, at the time the proceedings were issued, the plaintiffs' lawyers were fully aware of the identity of the proper defendants but chose not to sue them for strategic reasons related to insurance. While there is currently no application before this court to amend or reconstitute these proceedings the court is confident that any such application at this stage would be rejected. Relying on the principle enunciated by Lord Esher M.R. cited by Dunne J. in *Farrell v. Co*ffey at 10 where she stated:-

> *"In all of the discussions on the point in the cases referred to above, the basic principle enunciated by Lord Esher M.R. has not been altered or changed, namely, that a plaintiff will not be allowed to amend pleadings to set up a cause of action, which, if the writ were issued in respect thereof at the date of amendment, would be statute barred, as this would allow the plaintiff to take advantage of the existing proceedings to defeat the statute and would prejudice the defendant."*

The fact that the pleadings in their current form are misconceived as respect the three defendant/applicants is in the circumstances of this case a weighty factor to be placed on the defendants' side of the scales in balancing the justice of allowing the claim to proceed. The court also takes into account, in this respect, the fact that the original summons was never in fact renewed and expired in 2008.

105. The plaintiffs reply to these submissions is not convincing. They assert that there is no real prejudice to any of the defendants because they have been aware since 2007 of the nature and substance of the plaintiffs' claim and presumably therefore, have had an opportunity to garner such evidence as will meet the claim, if such there be. This approach fails to take into account the fact that the determination of this claim will depend ultimately on oral evidence of meetings and conversations had in the mid to late 1990s. Also it does not take into account the fact that subsequent to the issuing of the proceedings the party primarily liable to the plaintiff being McInerney Construction Limited, has collapsed which may have negative consequences by reason of the absence of witnesses and documentation germane to the defence of the claim.

106. The main countervailing factor relied on by the plaintiffs, in submitting that the balance of justice favours allowing them to proceed with their action, is their assertion that they are currently unable to sell their property and that in the event that their case is unsuccessful, it is unlikely that they will ever be able to sell it, something they say, if uncompensated, will have catastrophic financial consequences for them. The only evidence put before the court in this regard is a valuation report prepared in 2006 and which is dated the 19th September, 2007 by an auctioneer. The report is premised on the truth of the plaintiffs' claim that (1) there is a main sewer pipe running under the driveway and through the garden of the subject property at a depth of approximately twelve feet and that there is a way leave for inspection and maintenance purposes and (2) there is a mains water pipe running parallel to the above at a similar depth. The report comments that the presence of the pipes have a threefold negative effect and sets them out as follows:-

> *"1. An owner/owners of the property would have to live with the possibility that he/she could be deprived of the quiet enjoyment of the property as there is always a chance that either (or both) pipes may need to be inspected or repaired. This may entail major excavation and other works.*
>
> *2. An owner/owners will not be able to extend the property as they will be prevented from doing so because of the presence of the way leaves.*
>
> *3. Should a fault develop in the mains water pipe then there is the possibility that considerable amounts of water could seep into the property and affect the integrity of the foundations over a period of time."*

107. Notwithstanding these problems the open market capital value as of June 2006 was declared to be €160,000, almost three times what the plaintiffs had paid for it ten years earlier. While the court is cognisant of the existence of a property price bubble which only burst in the year following the report dated the 19th September, 2007, the report does not, it appears to the court, support a conclusion that the property is unsaleable, nor that a failure to allow the plaintiffs to proceed with their claim would result in catastrophic financial consequences for them. It appears to the court on their own evidence, that even if they were successful in establishing that the third, fifth and sixth defendants/applicants were negligent in failing to ascertain the presence of mains water pipes and a main sewer pipe in a garden which they have acquired by adverse possession, then it seems to the court, their claim at its height, would be for a diminution in the value of their property and not a claim that the property is unsaleable. In these circumstances the court does not have evidence of such weighty countervailing factors as might swing the balance of justice in

favour of allowing the plaintiffs continue with these proceedings.

Conclusion

108. On the basis of the foregoing it appears to the court that the fundamental flaw in these proceedings, from which all other difficulties, including the inordinate and inexcusable delay have ensued, is that the plaintiffs' claim was deliberately launched for strategic purposes against entities which in fact had no liability to the plaintiffs. This error arose not because the plaintiffs' lawyers were unable to identify the correct defendants, they had clearly done so in their initiating letter of August 2007. The error arose because the plaintiffs' lawyers decided to follow the insurance rather than the liability. The plaintiffs had an opportunity to mend their hand when in 2011 they applied to amend a summons which had in fact expired, but, rather than curing the original error, they compounded it by failing to name the solicitor defendants in their capacities as partners and/or employee of James G. O'Mahony & Co. Instead they were sued in their then capacities as principals in their respective firms, neither of which had had any dealings with the plaintiffs.

109. The sixth defendant/applicant was sued in her capacity as a partner in Murphy MacNamara when, in fact, at the time of amendment, she had moved to become solicitor to Cork County Council and in any event had always been an employee of Murphy MacNamara & Co.

110. The Court is satisfied that the balance of justice in this particular case lies in favour of dismissal. Having regard to that finding the court does not need to go further and consider the *O'Domhnaill v Merrick* type principles set out at item 7 of the consolidated principles contained in *Flynn v Minister* for Justice decision. However, the court chooses to observe that, even if the court had found the inordinate delays which have occurred in this case to be excusable, the court would still conclude that, having regard to the fact that this is a case which can only be resolved on the basis of witness testimony of conversations, interactions and meetings, all of which took place more than twenty years ago, that justice would be put to the hazard by allowing this claim to proceed.