APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL

Appeal Number: 2021/245
High Court Record Number: 2017/5599P

Collins J.
Haughton J.
Butler J.

Neutral Citation Number [2023] IECA 49

BETWEEN/

DIAMREM LIMITED

PLAINTIFF/APPELLANT

-AND-

CLARE COUNTY COUNCIL

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 6th day of March, 2023

Introduction:

1. This is an appeal against the decision of the High Court (Twomey J. [2021] IEHC 408) dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay in the prosecution of the action. Twomey J. did not determine a further motion brought by the plaintiff seeking leave to amend its plenary summons which would necessitate joining additional parties (both as a co-plaintiff and as a co-defendant) on the basis that it was moot in light of his conclusion that the proceeding should be dismissed on the grounds of delay. On the opening of this appeal, counsel for the plaintiff indicated that he was withdrawing his

cross motion against this finding so the only issue before the court on the appeal was that of delay.

2. The delay in issue between the last step taken in the proceedings (the filing of an appearance on behalf of the respondent on 17 July 2017) and the issuing of the respondent's motion on 15 May 2019 is a period of just under 22 months. There is some dispute, which cannot be resolved on this appeal, as to when the cause of action arose and consequently the interval between the relevant events and any likely trial date. The plaintiff contends the cause of action arose in 2016 and that it was well within the permitted 6 year limitation period when it issued its proceedings on 20 June 2017. The defendant disagrees saying that the 2016 accrual date was artificially created by the plaintiff and that in reality the cause of action, if any, had already accrued in 2007. That issue does not fall for determination here. A similar plea was successfully advanced in related s.160 proceedings which are discussed further below. The period prior to the institution of the proceedings is not directly relevant to the respondent's motion which is based on the court's inherent jurisdiction in respect of delay in prosecuting its claim and on a default in pleading under O. 27 of the Rules of the Superior Courts.

3. In order to consider the issues raised in this appeal I propose to outline firstly the nature of the dispute between the parties and secondly the progress of the litigation and of related litigation to date. I will then briefly address the relevant legal principles which, with one exception, were not really in dispute between the parties and I will look at how these were applied by the trial judge. Finally, I will consider how these principles should be applied on the facts of this case.

Dispute Between the Parties

4. The dispute between the parties has its origin in the substantial re-development of a visitor centre at the Cliffs of Moher in County Clare. The respondent incorporated a company, wholly owned by it, which applied for and was granted planning permission for the development, ultimately by decision of An Bord Pleanála in December 2002. Apart from the structures comprising the visitor centre itself, the planning permission included 2 car parks. The visitor centre lies to the west of a roadway (the R478) which runs in a north/south direction along the coast at the location of the Cliffs of Moher. Under the planning permission a permanent car park with a capacity of approximately 250 spaces was to be built on the west side of the road immediately adjacent to the visitor centre. The planning permission also provided for a temporary car park on the eastern side of the road to be used in connection with the construction works and, until the completion of the western car park, by the general public. Significantly, the capacity of the eastern car park is almost double that of the western car park at approximately 480 spaces.

5. Whilst the visitor centre was under construction, the plaintiff claims that the respondent's then Director of Services engaged in discussions with it both in 2004 and 2006 in respect of the provision of Park and Ride facilities. Broadly speaking, the Park and Ride scheme envisaged that members of the public would park in designated car parks at some remove from the Cliffs of Moher and be transported to the visitor centre in buses to be operated by the plaintiff. It is also claimed that at a meeting in 2010 the Director of Services indicated that a Park and Ride contract would be entered into by the respondent once the relevant sites were developed for that purpose. As a result, the plaintiff claims that a company associated with it purchased land at two locations (at Doolin and Liscannor), obtained planning permission for the development of Park and Ride facilities, developed the

sites, entered into a contract with the respondent and obtained the necessary licenses to operate the buses along these routes.

6. However, the plaintiff claims that it is unable to operate its Park and Ride business on an economic basis because, contrary to what the plaintiff claims is required by the planning permission and agreed by the respondent, the respondent and/or the operator of the visitor centre decided not to build the western car park and instead continued to use the larger eastern car park. There is some lack of clarity as to whether the plaintiff is claiming that its Park and Ride facility was to be provided alongside the smaller western car park or, alternatively, that when the respondent decided not to proceed with the construction of the western car park, all public access would be through the Park and Ride facilities with only limited parking for coaches and staff on-site. Either way the central complaint is that the continued use of the eastern car park with its capacity for 480 vehicles reduces the demand for Park and Ride facilities to the extent that it is uneconomic to provide them. Legally, the plaintiff argues that the continued use of the eastern car park is unauthorised and in breach of the 2002 planning permission.

7. Needless to say, the respondent does not agree with this characterisation of events. Crucially, the respondent contends that the provision of Park and Ride facilities was not a condition of the 2002 grant of planning permission. Although the Board's planning inspector had recommended the inclusion of such a condition, the actual condition imposed by the Board was that a *"mobility management plan"* was to be agreed with the planning authority i.e. the respondent. Further, insofar as the retention of the eastern car park was a change to the 2002 planning permission, this modification was authorised as a result of a decision made by the respondent consequent on a public consultation procedure under s.179 of the Planning and Development Act 2000 and Part 8 of the Planning and Development Regulations 2001 (S.I. 600/2001). In fact, it seems there has been three such Part 8 processes

in respect of this development. Although the respondent relies on the first one conducted in 2003/2004 as authorising modification of the car parking arrangements at the site, a further process was commenced in 2017 to authorise the use of the eastern car park in perpetuity. Finally, the respondent claims that the grant of planning permission to the plaintiff for the development of Park and Ride facilities was not linked to the cessation of use of the eastern car park.

8. The dispute between the parties as to when the cause of action accrued arises because the plaintiff claims that it was agreed between the parties, or alternatively that the plaintiff was led to understand, that the eastern, temporary car park would continue to be used until the Park and Ride facilities were fully operational and that it only realised the respondent did not intend to close it in 2016 when it was in a position to provide a complete Park and Ride service. The respondent on the other hand contends that it was or should have been apparent when the new visitor centre opened in 2007 both that the western car park had not been constructed and that the eastern car park was still operational.

The Litigation

9. These disputed facts have already given rise to three sets of litigation. In July 2016 the plaintiff issued proceedings under s.160 of the Planning and Development Act 2000 seeking injunctive relief against both the respondent and the company established by it to build and operate the Visitors Centre. The progress of the s.160 proceedings is heavily relied on by the plaintiff as a reason for its failure to progress these related proceedings. The key issue in the s.160 proceedings was whether the continued existence and use of the eastern car park was unauthorised. Obviously, the facts as outlined above (acknowledging that they are disputed) raise a potentially serious issue as to the propriety and/or legality of the use by the respondent of the Part 8 process to modify the terms of a planning permission granted by

An Bord Pleanála to a company established and wholly owned by the respondent. Unfortunately, this issue was not actually determined in the proceedings which were ultimately dismissed on appeal on the basis that they had not been instituted within the 7 year limitation period allowed under s.160(6)(a) of the 2000 Act.

10. Faherty J. in the High Court [2018] IEHC 654 found that the 2002 planning permission did include permission for permanent car parking at the site and did not stipulate that access to the visitor centre was to be solely by way of Park and Ride facility. She also accepted that the first Part 8 process allowed for the continued use of the eastern car park beyond the construction period, albeit that she described the language used in the process as giving rise to some ambiguity. Consequently, she held that the plaintiff, as applicant in the proceedings, had not discharged the onus of showing that the use of the car park was unauthorised. This finding may be somewhat more nuanced than a positive finding that it was authorised. She then went on to consider whether the application for a statutory injunction was time barred and found that it was. An appeal to the Court of Appeal was dismissed solely on the basis that the application was out of time and the substantive issues concerning the authorised or unauthorised nature of the development were not addressed (see [2021] IECA 291 per Woulfe J., Whelan and Pilkington JJ agreeing.)

11. The s.160 proceedings were issued on 21 July 2016. The respondent brought an application for security for costs which was dismissed by Noonan J. on 27 March 2017 [2017] IEHC 191. These proceedings where then issued by the plaintiff on 20 June 2017. The s.160 proceedings were listed for hearing very shortly after issue of the plenary proceedings, on 11 July 2017, but did not proceed as no judge was available to hear the case. Instead, they were heard over a four day period in December 2017 and January 2018. Judgment was delivered by Faherty J. on 20 November 2018. Shortly after this, the plaintiff

served a Notice of Change of Solicitor in the s.160 proceedings in January 2019 and, on 18 February 2019, a Notice of Appeal was filed in the Court of Appeal.

12. Reverting for a moment to these proceedings, the Plenary Summons served in June 2017 is premised on many of the same assertions as were raised in the s.160 proceedings, namely that the planning permission does not authorise car parking at the site and that the continued use of the eastern car park is unauthorised. In addition, the plaintiff claims that the continued operation of the eastern car park renders the Park and Ride scheme uneconomic, and that the respondent has deliberately and consciously frustrated its implementation whilst receiving a significant financial gain from the operation of the car park thereby causing the plaintiff loss and damage. The actions of the respondent, and separately those of unnamed officers of the respondent, are said to amount to misfeasance in public office. The reliefs sought include damages, declarations that the acts of the respondent amount to an interference with the plaintiff's constitutional rights and an injunction to restrain the continued use of the car park.

13. On 17 July 2017 the respondent entered an appearance to these proceedings. On the same date its solicitors wrote to the plaintiff noting the unusual level of detail in the Plenary Summons and asking whether the plaintiff intended to serve a Statement of Claim. This question was put because the respondent proposed raising particulars. On 28 July 2017 the plaintiff's solicitors replied stating that *"Pursuant to the Court Rules the Statement of Claim will be filed in the matter which will be delivered in the short term."* As the Rules then allowed a period of 21 days for delivery of a Statement of Claim from either the entry of an appearance or the service of a notice requiring delivery of a Statement of Claim, the trial judge regarded this letter as a commitment by the plaintiff to deliver its Statement of Claim within 21 days. The Rules have since been amended to allow a period of 8 weeks for the delivery of Statement of Claim, but nothing turns on this.

14. As the Statement of Claim was not delivered, the respondent followed up this correspondence with a 28 day warning letter on 25 August 2017. It did not, however, follow up the warning letter with the threatened motion. There matters rested for another 20 months until 15 May 2019 when the respondent issued this motion to dismiss the plaintiff's proceedings. This prompted a flurry of activity on the plaintiff's part which included the service of a Notice of Intention to Proceed and of a Notice of Change of Solicitor on 25 June 2019. The plaintiff's new solicitor then issued correspondence in August 2019 looking for the respondent's consent to the amendment of the Plenary Summons. This consent was refused in light of the respondent's outstanding motion to dismiss the process. There are two versions of the intended amended Plenary Summons in the papers provided to this court. Essentially, the proposed amendments included the addition of pleas based on legitimate expectations and on malicious falsehood. The plaintiff subsequently indicated in correspondence that it did not intend to proceed with allegations of malicious falsehood and, on the opening of this appeal, the motion seeking to amend the Plenary Summons was withdrawn in its entirety.

15. Whilst nothing happened in the misfeasance proceedings between July 2017 and May 2019, matters continued apace in the s.160 proceedings. As previously noted, the s.160 proceedings were heard in December 2017 – January 2018 and judgment was delivered in November 2018. The plaintiff changed its solicitor at the end of January 2019 and filed an appeal against the High Court judgment in February 2019. It seems that the respondent issued correspondence threatening a further motion for security for costs in respect of the appeal but did not proceed to issue such a motion.

16. Matters continued to progress in the s.160 appeal subsequent to the filing of the motion to dismiss now before this court on appeal. An application was made to the Court to Appeal for leave to admit new evidence which was refused in March 2021 (see Costello J. [2021]

IECA 63). The appeal itself was heard on 14 and 15 April 2021. The judgment, referred to above, was delivered in November 2021. This means that the respondent's motion in these proceedings was heard in the High Court, commencing on 28 April 2021, less than two weeks after the appeal in the s.160 proceedings had been heard in the Court of Appeal. The judgment of the Court of Appeal, delivered in November 2021, was not available to Twomey J. when he delivered his judgment on this motion in June of 2021.

17. In addition to the litigation, over roughly the same timeframe (starting on 7 November 2017) the plaintiff made a series of four Freedom of Information ("FOI") requests to the respondent. Broadly speaking, these requests were designed to elicit information in respect of the respondent's operation of the visitor centre with a view to estimating the likely profit made by the respondent from the eastern car park and also the loss caused to the plaintiff. The respondent refused all of these requests, both initially and on internal review, on the basis that the information was commercially sensitive and/or that its release would be prejudicial to the conduct or outcome of negotiations. In each case the plaintiff sought a further review from the Office of the Information Commissioner; in each case that review was successful and the respondent was directed to grant access to the records. Somewhat surprisingly, notwithstanding the decision of the Commissioner on the first review on 14 June 2018, the respondent continued to refuse subsequent requests made in July 2018, August 2018 and February 2019 on the same grounds. The respondent launched an appeal to the High Court against the first decision of the Commissioner but withdrew that appeal before it was heard in January 2019.

18. Finally, on 5 August 2021, further proceedings were instituted by a director of the plaintiff in his own name and on behalf of a related company which owns the lands at Doolin and Liscannor and whom it had been intended to join as a co-plaintiff if the Plenary Summons were amended. These proceedings were instituted against the respondent, its

Chief Executive Office and the company which operates the visitor centre. The new proceedings are based on similar complaints to those made in this case, allege that the continued use of the car park is not just authorised but unlawful as a breach of *"EU Directives and environmental law"* and seek relief for misfeasance in public office and for breach of legitimate expectation.

Applicable Legal Principles

19. The current appeal has to be determined in light of this factual and procedural history. Both parties agree that the decision to be made by the Court is one governed by the principles set out by Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 495 as follows:

> *"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
>
> *(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
>
> *(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
>
> *(d) in considering this latter obligation the court is entitled to take into consideration and have regard to*
>
> *(i) the implied constitutional principles of basic fairness of procedures,*
>
> *(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,*

(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

These principles have been approved and applied in a large number of subsequent cases including, recently, by this Court in *Gibbons v. N6 (Construction) Limited* [2022] IECA 112 (Barnville J.) and *Cave Project Limited v. Gilhooley* [2022] IECA 245 (Collins J.).

20. Although the factors set out at para (d) above are intended to guide a court in determining where the balance of justice lies, they are not an exhaustive list of all the factors that a court is permitted to consider. Equally, some of the factors may not be relevant in the particular circumstances of a given case. Each case will vary depending on its individual facts and the matters to which the court should have regard will likewise vary in tandem with

those facts. However, the fundamental principle remains that in circumstances where a court has found that there has been inordinate and inexcusable delay in the prosecution of proceedings, it then tries to ascertain where the balance of justice lies as between the parties in order to decide if the case should be permitted to proceed. Procedural justice and the possibility of ultimately having a fair trial are central in this regard. The issue of prejudice is also a central consideration.

21. In looking at what constitutes inordinate delay, the parties referred to a number of cases for the purposes of arguing that periods equivalent to, or sometimes longer than, 22 months were or were not regarded by a court as being inordinate. Referring to the periods of time that are the subject of other judicial decisions is not particularly helpful unless it can be established that the factual circumstances giving rise to that period are similar to the facts of this case. For example, the approach to be taken to a period of delay comprising the cumulative total of a number of shorter periods might be different to a single period of delay of the same length. Delay at the outset of proceedings may bring to bear different considerations than an equivalent period of delay at a later stage in the proceedings where the parties have already invested a significant amount of time and effort in the litigation. Therefore, there is no fixed rule that a given period of delay will automatically be regarded as inordinate, although obviously the longer the period the more likely a court is to reach that conclusion.

22. The main point of disagreement between the parties was as to the effect of the decision of the Supreme Court in *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50 ("*Comcast*"). That judgment concerned proceedings taken by unsuccessful tenderers in 2001 and 2002 challenging a decision made in 1995 in the tender process for a mobile telephone licence. No step was taken apart from the service of a Plenary Summons in any of the proceedings until in May 2006 when the defendant brought a motion

seeking to strike out the proceedings for delay and want of prosecution. One of the reasons advanced by the plaintiffs for not proceeding with their litigation was that the award of the mobile telephone license the subject of the litigation was also the subject matter of a public inquiry by a Tribunal of Inquiry. The plaintiffs had anticipated, incorrectly as it transpired, that the work of the Tribunal in respect of this issue would be completed shortly after the issuing of the Plenary Summonses. The plaintiffs argued that it was reasonable for them to await the outcome of the Tribunal's investigations into the granting of the license. The defendant was aware of the position being adopted by the plaintiffs, although it had not expressly consented to it. The case is clearly relevant to the present one as it looks at circumstances in which a litigant might be justified in postponing active prosecution of proceedings whilst awaiting the outcome of other proceedings.

23. Having found the appellants to be responsible for inordinate and inexcusable delay, the High Court concluded that in circumstances of presumed prejudice of a moderate nature to the State defendants, the balance of justice favoured the dismissal of the proceedings. The Supreme Court allowed the appeal with all 5 judges delivering separate judgments. Although there was a significant measure of agreement as between the Supreme Court judges on the key issues, it is noteworthy that 4 of the 5 judges held that the circumstances excused the delay and allowed the appeal on that basis. The majority of the *Comcast* judgments agreed that in the light of the significant overlap between the Tribunal's investigations and the plaintiff's proceedings it was reasonable, albeit exceptionally so, for the plaintiff to delay the prosecution of its proceedings. The State was aware of this approach as a result of a series of conversations between solicitors, albeit that the level of those exchanges did not amount to acquiescence on the State's behalf. Other factors that were regarded as relevant, and which went to the uniqueness of the circumstances, included the covert nature of the

actions underlying the plaintiff's allegations and the wide-ranging powers available to the Tribunal that were not available to ordinary litigants.

24. Clarke J. was in a minority in concluding that the delay was not fully excused by the circumstances. He went on to conclude that as the generalised prejudice relied on by the State should be characterised as mild rather than moderate and because there was a significant public interest in having the subject of the litigation determined by a court, the balance of justice favoured allowing the proceedings to continue. Thus, all five judges agreed as to the outcome of the appeal.

25. This nuanced difference between the approaches of Clarke J. on the one hand and the majority on the other possibly explains why the plaintiff placed reliance on lengthy passages from the decision of McKechnie J. (looking at *"inactivity"* on the part of a defendant) whereas the respondent relied on the decision of Clarke J. (suggesting that a plaintiff cannot delay prosecuting a case whilst awaiting the outcome of other proceedings without, at a minimum, informing the other party that this approach is been adopted). The trial judge relied on the decision of Clarke J. to say that this plaintiff could not unilaterally decide to put the misfeasance proceedings on hold without a contemporaneous disclosure both of this fact and of the reasons for it.

26. In rejecting the plaintiff's explanation that it was awaiting the outcome of the s.160 proceedings, the trial judge relied in particular on the comments of Clarke J. at paras. 5.8 and 5.9 of his judgment. These, in effect, posited as a precondition to the parking of one set of proceedings pending the conclusion of another, a requirement that the party doing so *"place on record with all other parties to the litigation, that that course of action is been adopted"*. In decrying the adoption of such an approach on a unilateral basis, Clarke J. emphasised, and the trial judge echoed, a need to provide a contemporaneous explanation for such action. In my view, the extent to which such an approach is identified at the time it

is adopted is undoubtedly relevant to the weight to be attached to it as an excuse to delay, but the absence of such notification does not automatically preclude reliance on it in all circumstances.

27. It is notable that the majority judgments in *Comcast* do not treat a failure to give express notice of the adoption of this approach as precluding subsequent reliance on it. Denham J. regarded it as important that the State defendants were on notice of the appellant's approach without deciding conclusively whether such notice was express or implied. Fennelly J., in a short concurring judgment, held that the evidence suggested that the defendants were *"fully aware and conscious of the fact that the plaintiffs were awaiting the investigations of the Tribunal"* without making any finding that the plaintiffs had notified them of that fact. Having held that the State defendants were *"affirmatively aware of what the plaintiffs were doing"* as a result of a conversation between solicitors, Hardiman J. did not consider it necessary to consider whether the plaintiffs should have put their position in writing. Thus, for the majority judges the decisive factor was that the defendants were actually aware of the approach the plaintiffs were taken and yet took no procedural step to require the plaintiffs to proceed with their litigation. How the defendant became so aware was of less significance and certainly the majority did not regard it as imperative that the plaintiffs should have formally notified the defendants of their position.

28. Finally, in considering the relevant legal principles it should be acknowledged that in cases where there has been inordinate and inexcusable delay, the High Court is then *"exercising a high degree of discretion"* under the third limb of the *Primor* test in deciding whether the balance of justice is in favour of or against the case proceedings (*per* McMenamin J. in *Lismore Homes Limited v. Bank of Ireland Finance* [2013] IESC 6). Consequently, although this court as an appellate court must show great deference to the views of the trial judge, it retains the jurisdiction to exercise its discretion in a different

manner in an appropriate case. Of course, the High Court's conclusions as to the inordinate and inexcusable delay are not discretionary ones and the need to show the same degree of deference does not arise.

Inordinate Delay

29. There was relatively little dispute between the parties as to whether a delay of 22 months should be regarded as inordinate, with the plaintiff implicitly accepting that it was although not formally conceding the point.

30. The trial judge assessed the delay of over 600 days by comparing it with the 21 days then allowed under the Rules for delivery of a Statement of Claim. Whilst the difference in this case was very stark, it does not automatically follow that non-compliance with time limits fixed by the Rules will result in a delay which can be characterised as *"inordinate"*. The length of the delay must be considered in light of the facts and circumstances of the particular case. This may include, for example, whether the delay is a single period or an accumulation of a number of shorter periods and the stage of the litigation at which the delay occurs. However, on the facts of this case the litigation was in its very early stages and depended on the delivery of a Statement of Claim by the plaintiff in order to progress. A delay of 22 months in delivery that Statement of Claim was, by any standards, inordinate.

Inexcusable Delay

31. The plaintiff relies on four factors to excuse the delay, all of which were rejected by the trial judge. In its Notice of Appeal the plaintiff takes issue with the trial judge's approach contending that each factor was considered separately and in reference to the entire 22 month period of delay rather than being examined both separately and cumulatively and asking whether, singularly or cumulatively, they could excuse any portion of the delay. In principle,

the plaintiff is correct in that a factor may serve to excuse some but not all of a longer period of delay. If that is so, then the Court must re-examine the unexcused period of delay to determine whether it is still *"inordinate"*. It is also appropriate that a court should take account of the cumulative effect of a number of factors if the combined effect might serve to excuse the plaintiff's delay in a way that would not occur when they are considered individually.

32. That said, it is not immediately evident that the trial judge erred by failing to do either of these things save, perhaps, to a limited extent (considered below). In fact, the trial judge considered in some detail discreet periods during which it might be said that the parallel s.160 proceedings were or were not capable of hindering the plaintiff's progression of these proceedings. The plaintiff has not identified shorter periods which might have been excused by any of the factors relied on nor identified how the cumulative effect of a combination of factors impacted upon its ability to progress the litigation differently than they each did individually. If a plaintiff wishes to rely on a factor as excusing some but not all of a period of delay or wishes to rely on the cumulative effect of various factors, the primary onus is on the plaintiff to specifically identify these, which was not done in this case.

33. The plaintiff relied on four factors as follows:

(1) the Freedom of Information requests;

(2) the s.160 proceedings;

(3) the change of legal team;

(4) the receipt of legal advice to amend the Plenary Summons after judgment in the s.160 proceedings.

34. Counsel who appeared on behalf of the plaintiff on the appeal adopted a different approach to the Freedom of Information requests than did counsel who appeared on its behalf at the hearing of the motion before Twomey J. At the hearing of the motion, counsel

indicated that the plaintiff was going to *"place very limited reliance upon the FOI requests"* largely because they related to the damages element of the claim and, therefore, did not preclude the drafting and delivery of the Statement of Claim, albeit one in which the damages element would be largely left over for further particulars. Counsel appearing on the appeal acknowledged the approach that had been taken in the High Court but expressly relied on the FOI requests for the purposes of the appeal.

35. It is unsurprising that when counsel did not seek to place significant reliance on the FOI requests, the trial judge found that they did not provide a good excuse for the delay. However, as they have been squarely put in issue on the appeal, it is necessary to reconsider that conclusion. In my view whilst it was technically possible for the plaintiff to draft and deliver a Statement of Claim without having access to the information the subject of the FOI requests, that information was undoubtedly relevant to and was sought for the purposes of the proceedings.

36. Apart from pointing out that the information does not feature in the draft Statement of Claim exhibited on affidavit, counsel for the respondent was unable to explain the rationale for the respondent's approach in repeatedly refusing access to information of a kind which the Information Commissioner had held in respect of the first request, should be released. This meant that on each subsequent request the plaintiff had to go through the process of internal and then external review before gaining sight of material to which it had a confirmed statutory right of access. It is difficult to regard the respondent's approach, certainly after the Commissioner had dealt with the first request, as anything other than deliberately obstructive of a party with whom it was engaged in litigation.

37. In all of the circumstances I think that the repeated refusal of FOI requests made by the plaintiff relevant to the litigation, thus embroiling the plaintiff in the process of internal and external review, does have some bearing in explaining the plaintiff's delay. Whilst this

is a factor which might not of itself excuse the entire period or which might have required express linkage to the proceedings (e.g. by way of solicitor's letter) in order to do so, it is something which, in my view, ought to carry some weight when considered in conjunction with the effect of the plaintiff's involvement in the parallel s.160 proceedings.

38. The replying affidavit sworn on behalf of the plaintiff by its director, Mr. Flanagan, makes a very specific case in respect of the s.160 proceedings namely that "*the plaintiff's resources were focussed on the prosecution of*" them. Thus, the argument made on affidavit is not that the plaintiff was awaiting the outcome of the s.160 proceedings, but that it was unable to deal effectively with both sets of proceedings at the same time notwithstanding that it had issued both and, on its own case, had issued these proceedings well in advance of the expiration of the relevant time limit. The argument is presumably framed in this way because by the time the respondent brought its motion judgment had already been delivered in the s.160 proceedings, which the plaintiff had lost. Notably, counsel for the plaintiff acknowledged in argument that the real reason was that the plaintiff was awaiting the outcome of the s.160 proceedings.

39. Logically if a party to litigation puts one set of proceedings on hold in order to await the outcome of another, it is because the outcome of the other proceedings is likely to be determinative of the first. That being so, having failed in his s.160 proceedings, it might have been expected that the plaintiff would review its position in these proceedings and, presumably, withdraw them. Manifestly, that has not occurred. However, because the Court of Appeal dealt with the s.160 appeal on the basis that it was statute barred, the plaintiff maintains that the substantive issue concerning the authorised or unauthorised nature of the car park development has not been determined in those proceedings and remains live in these. Naturally, the respondent disagrees and contends that the continuation of these proceedings is a collateral attack on the judgments in the s.160 proceedings. The issue of

whether the plaintiff's proceedings can properly be pursued in light of the s.160 proceedings or whether any of its claims are now *res judicata* or the subject of issue estoppel or the rule in *Henderson v Henderson* was not argued before this Court and will, if raised by the respondent, be a matter for the High Court to determine in due course.

40. The trial judge's treatment of the s.160 issue focuses on the periods during which the s.160 proceedings were active or inactive and the consequential impact that might have had on the availability of resources to the plaintiff to pursue these proceedings. Resources in this context bears its broader meaning encompassing personnel and time and not simply financial resources. He identified periods, particularly those between when the s.160 proceedings were first listed for hearing in July 2017 and when they were actually heard in December 2017 and between the conclusion of the trial in 2018 and the delivery of judgment in November 2018, as ones during which the plaintiff's resources were available to it to deal with these proceedings.

41. However, if it is accepted that in reality the plaintiff was awaiting the outcome of the s.160 proceedings rather than being precluded from acting because its resources were exhaustively deployed in the s.160 proceedings, these periods are of less relevance. The question then becomes firstly whether it was reasonable for the plaintiff to await the outcome of the s.160 proceedings and, secondly, having chosen to do so, whether it was obliged to formally notify the respondent of this fact.

42. In looking at whether it was reasonable for the plaintiff to await the outcome of the s.160 proceedings, the court is considering circumstances analogous to but not identical to those in *Comcast*. Clearly, the s.160 proceedings are not in any way equivalent to an investigation conducted by a Tribunal of Inquiry with statutory powers to obtain evidence greatly in excess of those available to private litigants. Equally, the subject matter of the s.160 proceedings does not have the level of public significance which the subject of the

Tribunal's enquiries did – a factor which weighed heavily on Hardiman J. in particular. That said, the issues were of some public importance concerning, as they did, the appropriateness of a planning authority modifying a planning permission which had been granted by An Bord Pleanála to a company wholly owned by it by way of Part 8 procedure.

43. On the other hand, all of the parties to these proceedings were actively involved in the s.160 proceedings and thus, the connection is closer than was the case in *Comcast*. There is a considerable degree of overlap between the two sets of proceedings although the remedy sought in each is materially different. I have already observed that the plaintiff has not withdrawn these proceedings in light of the outcome of the s.160 proceedings. However, it is certainly conceivable that had the court in the s.160 proceedings found in the plaintiff's favour and held the use of the car park to be unauthorised development, whilst this alone would not amount to a misfeasance in public office, it may well have been determinative of these proceedings. Further, the fact that the respondent is a public authority with access to resources, including legal resources, which are unavailable to the plaintiff provides some additional justification for the plaintiff's attempt to deal with matters in stages.

44. On balance I am inclined to the view that the approach taking by the plaintiff was reasonable and is, in principle, capable of providing some justification for the delay in prosecuting these proceedings. The outcome of the s.160 proceedings was potentially relevant to these. The plaintiff had to devote a considerable amount of the resources available to it to those proceedings which involved three separate court hearings during the period complained of. Further, when the court takes account of the four FOI requests which were made by the plaintiff during the same period – and the respondent's response to those requests as discussed above – it is clear in a general sense that the plaintiff was continuing to actively pursue the issues between it and the respondent notwithstanding the formal lack

of progress in these proceedings. The s.160 proceedings and the FOI requests combined must have absorbed a very significant portion of the resources available to the plaintiff.

45. Accepting, as I do, that it was reasonable for the plaintiff to await the outcome of the s.160 proceedings, it is then necessary to consider whether it was entitled to take this approach without formally notifying the respondent of its intention to do so. The trial judge, relying on the decision of Clarke J. in *Comcast*, held that it was not. However, as I have observed above, Clarke J. was in a minority in *Comcast* in holding that the delay complained of was inexcusable. All of the other Supreme Court judges held that the delay was excusable by reference to the on-going work of the Tribunal and did not regard the absence of formal notification of the plaintiffs' intention to *"park"* the legal proceedings as precluding reliance on this fact as an excuse justifying the delay that inevitably followed. Instead, it was material that the defendant was actually aware of the plaintiff's approach. Thus, the real issue appears to be whether the respondent was aware of the approach being adopted by the plaintiff as opposed to how the respondent became so aware.

46. In this regard the plaintiff relies on the affidavit sworn by the respondent's solicitor to ground the application to dismiss the plaintiff's claim. At para. 10 of his affidavit Mr. Shaw makes the following averment:

> *"The plaintiff has refrained from providing the defendant herein with a Statement of Claim pending the outcome of the Section 160 procedures which are under appeal."*

The plaintiff relies on this averment to make the case that the respondent was aware that it was awaiting the outcome of the s.160 proceedings.

47. Notwithstanding the clear terms of this averment, counsel for the respondent characterises it as the deponent developing a view as to what he thinks might have been the case and speculating as to what it looks like to him but asserted that, in the absence of

communication on the matter, the deponent could not actually know what the plaintiff was doing.

48. There is an air of unreality to this submission. I have no difficulty in finding that this was not mere speculation on Mr Shaw's part but reflects the respondent's accurate understanding of what the plaintiff was doing in circumstances well known to and directly involving both parties. Both parties were very actively involved in the s.160 proceedings which were strenuously contested by both sides to the extent that they have generated four written judgments. Given the relevance of the unauthorised development issue to the pleas made by the plaintiff in these proceedings, it is unsurprising that Mr. Shaw understood, correctly, that the plaintiff was awaiting the outcome of the s.160 proceedings before progressing these proceedings. Indeed, the absence of any follow up to the correspondence sent by the respondent in August 2017 begs the question as to whether the respondent was also of the view that it would be pragmatic to allow the s.160 proceedings to run their course first.

49. The last two factors relied on by the plaintiff are linked and can be considered together. The first of these is the change in the plaintiff's legal team and the second is the need to take legal advice from the new lawyers on the amendment of the Plenary Summons in light of evolving matters, especially the High Court judgment in the s.160 proceedings.

50. The original firm of solicitors engaged by the plaintiff for the purposes of the s.160 proceedings also issued these proceedings on its behalf in June 2017. The plaintiff served a Notice of Change of Solicitor in the s.160 proceedings on 31 January 2019 shortly before filing a Notice of Appeal from the judgment of Faherty J. At this point the new solicitors had carriage of the appeal whereas the old solicitors remained on record in these proceedings, albeit that no active steps were being taken at the time. A Notice of Change of Solicitor in these proceedings was only served in June 2019 (after the respondent had brought this

motion in May 2019) with the result that the new solicitor was now on record in both cases – although further changes have since taken place. Mr. Flanagan, on behalf of the plaintiff, states on affidavit that in March 2019 the plaintiff sought legal advice from the solicitor newly on record in the s.160 proceedings on the amendment of the Plenary Summons in this case in light of matters that had occurred since it was issued, especially the High Court judgment in the s.160 proceedings.

51. The Court accepts that the proceedings are complex as are the relationships between these proceedings and the s.160 proceedings, the FOI requests and indeed a further Part 8 procedure in respect of the development of the car park which was initiated by the respondent in January 2019. However, it is not clear that the change of solicitor nor the request for legal advice subsequent to the s.160 judgment added materially to the delay complained of because, insofar as they are relevant to that delay, these events are mostly compressed into a four month period between the end of January 2019 and the respondent's motion being issued in May 2019.

52. Indeed, there was a flurry of activity after the new solicitors came on record in these proceedings with the service of a Notice of Intention to Proceed (June 2019), a request for consent to the amendment of the Plenary Summons (August 2019) and a motion brought on the refusal of such consent (November 2019). It is unclear precisely how much of the activity undertaken by the plaintiff's new legal team occurred during rather than after the period of delay with which the court is concerned. Even allowing that each step will take some time, it is difficult to see more than a few weeks being specifically attributable to the change in solicitors or the taking of updated legal advice. However, this is an area in which in my view the trial judge erred in examining and dismissing these excuses by reference to the entire 22 month period of delay. Manifestly steps which were only taken at the end of that period cannot justify the entire delay. However, if in themselves they are valid excuses

they may excuse a portion of the period and, thus, reduce the overall delay with which the court is concerned. This possibility was not considered by the trial judge. If the overall period of delay were reduced below a certain level, the delay might cease to be inordinate. Even if the delay continues to be inordinate, the balance of justice might be affected by a lesser period of delay.

53. Further, I would like to sound a note of caution in respect of the comments made by the trial judge at paras. 89 and 90 of his judgment. In these paragraphs he expresses the view that the ease with which a litigant can seek legal advice and then have the legal advice withdrawn militates against the weight to be attached to any excuse based on the getting of legal advice. As the trial judge appeared to accept that the legal advice in this case was entirely *bone fide*, it seems to me inappropriate to cast doubt on the *bone fides* of the taking of similar steps by other litigants and other lawyers in other cases. Litigation can be a complex business, especially when the factual and/or legal situation is an evolving one. Thus, it may be prudent for litigants to spend time seeking and considering legal advice even if in so doing they fail to adhere to time limits set by the Rules of Court. The extent to which that will excuse resulting delay will depend on the facts and circumstances of each individual case and consideration of whether the taking of legal advice affords an excuse for delay should not start from the perspective that the exercise is likely to be a deliberately artificial one designed to waste time or to provide a baseless excuse for delay which has already occurred.

54. Looking at all of these factors, especially when they are considered cumulatively, I think the trial judge erred in concluding that the delay was inexcusable. The overall picture is more complex than might be suggested by the dismissal of each factor individually. Because this conclusion is a relatively finely balanced one, it is worth observing that this is a case in which there is a very significant overlap between the excuses offered by the plaintiff

for the delay and the matters the court should take into account in any balance of justice assessment that would follow a finding that the delay was inexcusable. Thus if, contrary to the conclusion which I have reached, the excuses themselves were not to be regarded as sufficient to justify the delay, much the same considerations would tip the balance of justice towards permitting the proceedings to proceed.

55. I do not place significant reliance on the change of legal team or the need to take legal advice simply because these largely occurred or were acted on after the period of delay with which the court is concerned. Nonetheless I do accept that cumulatively they slowed the plaintiff down but probably only by a few weeks at the end of an already long period of delay.

56. I regard as more significant the fact of the ongoing s.160 proceedings in light of their obvious potential relevance to the issues raised in these proceedings. As it happens, the outcome of the s.160 proceedings was not as helpful as either side might have hoped because they were decided on the basis of a limitation point rather than on the substantive issues. That, however, is something which could not have been definitively known in advance. Although, as the trial judge found, there were gaps during which the s.160 proceedings were not active before the Courts, nonetheless it was not unreasonable for the plaintiff to await their conclusion which did not finally occur until after this motion was issued.

57. The weakest element of the plaintiff's case regarding the s.160 proceedings is the fact that it adopted a unilateral course of action and did not expressly place the defendant on notice of its intention to do so. In some instances that fact alone might be sufficient to prevent a plaintiff from treating its decision to park proceedings as a justification for the delay which will inevitably arise from doing so. It is more likely to do so where the parties to the two sets of proceedings are not identical such that the defendant in the parked proceedings has no reason to be aware of what is occurring in the other set (e.g. *Millerick v*

Minister for Finance [2016] IECA 206). However, the evidence in this case establishes that the respondent understood the plaintiff was awaiting the outcome of the s.160 proceedings. Whilst the respondent did not acquiesce in the plaintiff's course of action - and indeed was not asked to do so - the fact that it was aware of what the plaintiff was doing and took no step, even by way of correspondence, to challenge it must also carry some weight.

58. It is evident that the s.160 proceedings consumed a lot of the time, effort and resources available to the plaintiff. So too did the need to repeatedly seek reviews of the refusals of FOI requests for information to which the plaintiff was ultimately held to have a statutory right of access. This information was relevant to the quantum of the claim the plaintiff wished to make, and whilst not strictly essential for the purposes of drafting the Statement of Claim, it was not unreasonable for the plaintiff to seek that information before finalising its pleadings. When the making of four FOI requests is taken in conjunction with the active progression of the s.160 proceedings, including the appeal, the respondent could have been in no doubt as to the plaintiff's intention to actively pursue its case. Consequently, this is not a case where litigation has lain fallow for many years in circumstances where a defendant might reasonably have assumed that the plaintiff no longer intended to pursue it.

59. The same could be said of the plaintiff's response to the respondent's third Part 8 process initiated in January 2019 which sought to authorise the further development of the car park. The plaintiff made two submissions, one through a planning consultant and one through its solicitor before the process was subsequently withdrawn by the respondent. Whilst counsel for the respondent dismissed the relevance of this to the litigation and contended that there was no evidence of the process before the court, I note that Mr. Flanagan's averments as to these matters (in paras. 8 and 10 of 19 November 2019) are not disputed by the respondent. The court has no information as to why the process was withdrawn but it was certainly foreseeable that its initiation at a time when the plaintiff had

two sets of *extant* legal proceedings against the respondent regarding the same car park was likely to involve the plaintiff in committing time, effort and expense to participating in the process and making submissions.

60. In light of these considerations I am inclined, on balance, to treat the delay in this case as being excusable. In those circumstances, as the second limb of the *Primor* test is not satisfied it is not strictly necessary for the Court to go on and consider the balance of justice. However, lest the matter be pursued further, I propose to outline briefly my views on where the balance of justice lies in this particular case.

Balance of Justice

61. In any case where a court has found there to be inordinate and inexcusable delay, the subsequent decision to permit to allow or to refuse to allow the case to proceed will be prejudicial to one or other of the parties. If the proceedings are not allowed to continue, the plaintiff is deprived of the right to pursue a cause of action otherwise available to it. On the other hand, if the proceedings are permitted to continue the defendant is required to defend proceedings which are, by definition, stale. Delay of itself is likely to lead to prejudice in terms of the availability of witnesses and the ability of those witnesses to recall events at some remove. This will impact not just on the ability of the parties to present their case but also on the ability of the court to administer justice.

62. The assessment of these matters in this case is made more complex by a number of factors. Firstly, the plaintiff has already taken (and lost) s.160 proceedings in relation to the same development. Secondly, the court was informed that further proceedings have now been instituted against the respondent by a director of and a company associated with the plaintiff concerning much the same subject matter. Therefore, the loss to the plaintiff of these proceedings is not as catastrophic as it might be in other circumstances. As against

this, the existence of the s.160 proceedings means that much of the evidence potentially relevant to this case has already been marshalled by the parties and potential witnesses have already had to revisit their involvement with the underlying events. Undoubtedly this will minimise the difficulties likely to arise as a result of the delay in the context of a plenary trial.

63. As noted at the outset, there is some dispute between the parties as to when the course of action accrued which is potentially relevant to an assessment of the extent of the prejudice likely to be caused to the respondent in the defence of the action. If the plaintiff is correct in stating that the cause of action accrued in 2016 it would be somewhat unusual for the proceedings to be struck out on the grounds of delay before the limitation period for initiating the proceedings had expired. If the respondent is correct and the cause of action accrued in 2007 then the plaintiff was already out of time when the proceedings were instituted in 2017 and that defence remains open to the respondent. Of course, the real concern is that the events underlying the plaintiff's complaints appear to be meetings which took place in 2004, 2006 and 2010 and the passage of time will undoubtedly have an effect on the ability of witnesses to recall what occurred at these meetings. Because the proceedings are at such an early stage the Court does not know whether there is likely to be documentary evidence available to support the position adopted by either side. However, in considering the balance of justice under the *Primor* test the court should only take account of the difficulties arising from the particular period of culpable delay and not the more general difficulties which might arise for other reasons. Thus, in this case it is only the additional delay (i.e. from 2017 to 2019) which falls to be weighed in the balance and not the entire period from 2004. The court can however take into account when the proceedings are likely to come to trial. Because the statement of claim has not yet been served, it is reasonable to assume that this would not be for at least two years.

64. The trial judge accepted the respondent's argument that a specific prejudice had been created because one of the key individuals involved in those meetings and in the company established by the respondent for the purposes of operating the visitor centre, namely its former Director of Service, left the Council's employment on 10 September 2017 to take up another position. He accepted that the delivery of its Statement of Claim would now involve the respondent incurring additional expense to arrange for this person to deal with the proceedings as a former employee. However, in the course of exchanges with the court, counsel for the respondent conceded that there was no causal connection between the plaintiff's delay and the absence of this witness given that he left the respondent's employment less than three months after the proceedings were issued. Counsel also agreed that in the absence of a causal connection between the prejudice caused to the respondent through the absence of this witness and the plaintiff's delay, he could not rely on it as an element of specific prejudice to be taken into account in the Court's assessment of the balance of justice. Therefore, the only prejudice on which the respondent could rely is the general prejudice caused by an additional 22 month delay in the prosecution of the proceedings. In all of circumstances, there is little real prejudice to the respondent from the plaintiff's delay.

65. In this regard the Court is cognisant of the fact that the respondent did not take any steps to ensure the advancement of the proceedings by the plaintiff during the period complained of. Accepting that at all times the legal onus was on the plaintiff to act and there was no specific obligation on the respondent to compel the plaintiff to act, it was nonetheless open to the respondent to take steps to ameliorate the prejudice which was allegedly being caused to it and it failed to do so. Whilst this might not be a relevant factor in a case concerning a longer period of delay or a case in which the defendant had no real understanding of why the plaintiff had not progressed the proceedings or even a case in

which there was no other interaction between the parties during the relevant period, it seems to be a factor of some relevance on the facts of this case. In particular, as the plenary summons had been served on the defendant, it was open to the respondent to being a motion under Order 27 in order to procure the delivery of a statement of claim. The respondent said in correspondence that it intended to bring a motion and then it did not do so. The respondent understood why the plaintiff had not progressed the proceedings. The parties and their solicitors were in continuous, intermittent contact in relation to the s.160 proceedings. The period of delay, although inordinate, was still one calculated in months rather than years.

66. Consequently, were I not minded to treat the plaintiff's delay as excusable, I would in any event decline to strike out the proceedings on the basis that the balance of justice did not warrant doing so.

67. In light of the contents of this judgment and the conclusions drawn herein, I am of the view that the plaintiff's appeal should be allowed. However, given the delay that has already occurred it is imperative that the matter now be progressed with all reasonable expedition and that the plaintiff serve a Statement of Claim promptly and in any event within three weeks of the delivery of this judgment. It goes without saying that if there is any further material delay on the plaintiff's part, the respondent is at liberty to bring a further application to dismiss the proceedings.

68. As the plaintiff has been entirely successful in his appeal, my provisional view is that it should be entitled to the costs of the appeal. As the proceedings are no longer being struck out, it would seem to follow that the order made in the respondent's favour for the costs of the proceedings should be set aside.

69. The costs position is somewhat more complicated in relation to the other aspects of this case. The plaintiff also appealed against the costs orders made by the High Court in respect of both of the plaintiff's motions and the joinder of Diamrem Equity Holdings

Limited a co-plaintiff to the motion to amend the proceedings for the purposes of making a costs order against it. Whilst in principle my provisional view is that the plaintiff should also be entitled to have these costs orders set aside, it is less clear that this is the appropriate order to make in respect of the plaintiff's own motions. This is particularly so in respect of the motion seeking liberty to amend the Plenary Summons which counsel informed the Court on the opening of the appeal was no longer being pursued by the plaintiff.

70. Therefore, the order I propose making is an Order for the plaintiff's costs of the appeal to include the costs of the High Court and an Order setting aside all of the other Costs Orders made by the High Court. If either party wishes to contend for a different Order they may contact the Office of the Court of Appeal within fourteen days of the delivery of this judgment and request a short hearing. It should be borne in mind if a hearing is requested and the proposed Order is not varied, the party requesting the hearing may be required to pay the additional costs thereby incurred.

71. Collins and Haughton JJ have authorised me to indicate that they have read this judgment in draft and agree with the Order proposed.