

THE HIGH COURT

[2021] IEHC 857

[Record No. 2011/6564 P]

BETWEEN

FRANCIS DOOLEY

PLAINTIFF

AND

PATTERSON BANNON ARCHITECTS LIMITED (IN LIQUIDATION), P.H. MCCARTHY CONSULTING ENGINEERS LIMITED, MULCAHY MCDONAGH & PARTNERS LIMITED, CMPTNR CONSULTANCY LIMITED T/A CALLAN MAGUIRE PARTNERSHIP and CLANCY PROJECT MANAGEMENT LIMITED T/A CLANCY CONSTRUCTION

DEFENDANTS

THE HIGH COURT

[Record No. 2014/7827 P]

BETWEEN

OCEAN POINT DEVELOPMENT COMPANY LIMITED (IN RECEIVERSHIP)

PLAINTIFF

AND

PATTERSON BANNON ARCHITECTS LIMITED (IN LIQUIDATION), P.H. MCCARTHY CONSULTING ENGINEERS LIMITED, MULCAHY MCDONAGH & PARTNERS LIMITED, CMPTNR CONSULTANCY LIMITED T/A CALLAN MAGUIRE PARTNERSHIP and CLANCY PROJECT MANAGEMENT LIMITED T/A CLANCY CONSTRUCTION

DEFENDANTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the day 20th day of December, 2021

1. The backdrop to the present applications concerns a commercial development initiated by Mr. Francis Dooley at Courtown, Co. Wexford in 2006 and legal proceedings arising therefrom. The matter comes before the Court in circumstances where, on 6th August, 2019, Messrs. Ronan Daly Jermyn ("RDJ"), solicitors for the third named defendant, Mulcahy McDonagh & Partners Ltd., issued a motion, which was initially returnable for 18th November, 2019 seeking, *inter alia*, the following relief:-

"(1) *An order pursuant to the inherent jurisdiction of This Honourable Court dismissing the plaintiff's claim for inexcusable and/or inordinate delay;*

(2) *Further, and/or in the alternative, an order pursuant to Order 122, rule 11 of the Rules of the Superior Courts (as amended) dismissing the plaintiff's claim for want of prosecution."*

Motions seeking similar reliefs were issued on behalf of the third named defendant in two sets of proceedings. The first bears Record No. 2011/6564P, wherein Mr. Francis Dooley is the plaintiff. The second set of proceedings, bearing Record No. 2014/7827P are brought against the same five defendants, and the plaintiff is Ocean Point Development Company Ltd. (In Receivership) ("Ocean Point"). Mr. Dooley is the director and shareholder of Ocean Point, a company incorporated in or around 16th August, 2006, which company went into receivership on 5th March, 2009. It is averred by Mr. Dooley that, in separate proceedings, he is challenging the relevant receivership but, for present purposes, it is also averred by

Mr. Dooley that he is authorised to bring the proceedings under Record No. 2014/7827P by the relevant receiver, Mr. Martin Ferris. Both of the foregoing motions were listed together for hearing. At the outset, Ms. O'Connell BL for the third named defendant and moving party indicated that, by agreement with Mr. Donelon BL for the relevant plaintiffs/respondents, it was appropriate that the motion in respect of proceedings under Record No. 2011/6564P be dealt with first and, for the purposes of this judgment, I propose to begin by looking at the application in respect of those proceedings. Reference in this judgment to "the Dooley proceedings" is a reference to the proceedings under Record No. 2011/6564P and reference to "the Ocean Point proceedings" is a reference to proceedings under Record No. 2014/7827P. Counsel for the third named defendant also indicated that, in circumstances where there is a dispute between the parties regarding the sending of a particular letter in November 2018, the relief pursued by the third named defendant is that at para. (1) of the relevant motion.

The length of this judgment

2. The present applications took three days to hear (two days in February and a third day in November 2021). They concern two different sets of legal proceedings brought by two different plaintiffs. A range of diverse submissions were made with skill and no little ingenuity by the relevant counsel. In order to deal adequately with same, this judgment is, therefore, a very lengthy one. It seemed to me, however, that given the importance of the issues at play, it was necessary to set out in considerable detail the reasons for this Court's decision. In circumstances where there are great similarities between the pleas made in both sets of proceedings, this judgment also contains, of necessity, a certain amount of repetition. With apologies for that, I propose to look first at the Dooley proceedings and, for ease of reference, I propose to look at relevant events in chronological order.

2011

3. The plenary summons issued on 19th July, 2011 and the record number of the proceedings bought by Mr. Dooley is 2011/6564P. The endorsement of claim states the following:-

"The plaintiff's claim is for:

- (1) Damages for loss, damage, inconvenience, distress, interest and costs occasioned to the plaintiff by reason of any or all of the following; breach of contract, and/or negligence and/or breach of duty to include breach of statutory duty on the part of the defendants or each, either or all of them, their respective servants and agents.*
- (2) Interest pursuant to statute.*
- (3) Such further or other order as This Honourable Court shall deem fit and appropriate.*
- (4) The costs of and incidental to these proceedings."*

4. Although a range of pleas are made in the foregoing manner, it is fair to say that the plenary summons does not contain specific details in relation to what is alleged to constitute the wrong on the part of the third named defendant. It is clear that a notice of appearance was filed, promptly, in response to service of the plenary summons. The pleadings contain a copy of the 11th August, 2011 appearance entered by RDJ Solicitors for the third named defendant. It is not in dispute that appearances were filed on the 26th, 28th and 29th July, 2011 by the fifth, first and second named defendants respectively. The filing of an appearance by a defendant is obviously not a step taken by a plaintiff to progress his claim.

2012

5. Other than serving the plenary summons in July 2011, the plaintiff does not appear to have taken any step whatsoever to progress the case. The same comment applies throughout 2012 with the exception

of a notice of change of solicitor, dated 1st November, 2012 which gave notice that Messrs. Manus Brady & Co. Solicitors had come on record, whereas Messrs. Maples and Calder had previously been on record for the plaintiff. On 22nd November, 2012, a notice of change of solicitor was served on behalf of the fifth named defendant, giving notice that Messrs. Tormeys Solicitors had come on record instead of Messrs. McCann Fitzgerald. The foregoing appears to be the only activity which took place in 2012. Thus, as a matter of fact, other than serving the plenary summons in July 2011, in response to which appearances were delivered promptly, the plaintiff took no meaningful action to progress his claim throughout the remainder of 2011 and throughout the entire of 2012 and that was the *status quo* as the year turned.

2013

6. On 3rd April, 2013, the first named defendant raised a notice for particulars. This was obviously not a step taken by the plaintiff to progress his claim. Whether it was this which prompted the plaintiff into action or not, it is a matter of fact that on 23rd May, 2013, the plaintiff issued a notice of intention to proceed and, on 4th June, 2013, the plaintiff furnished replies to the first named defendant's notice for particulars. To reply to the first named defendant's particulars was not, however, to progress the plaintiff's claim against the third named defendant in any way. On 8th August, 2013, a defence was delivered by the second named defendant. On 19th September, 2013, a further notice for particulars was raised by the first named defendant and, on 26th September, 2013, the plaintiff raised a notice for particulars in relation to the defence delivered by the second named defendant.

5th November, 2013 - statement of claim delivered on third named defendant

7. It is appropriate to observe that two years, three months and two weeks elapsed between the plenary summons being issued on 19th July, 2011 and the service, on 5th November, 2013 of the plaintiff's statement of claim on the third named defendant. Later in this judgment, I will examine the plaintiff's affidavits in some detail but nowhere does the plaintiff offer any reason to explain this significant period of delay prior to service of the statement of claim on the third named defendant. As I observed earlier, it is fair to say that, until service of the 5th November, 2013 statement of claim, the third named defendant did not have specific details of the nature of the claim being made against it by the plaintiff. Although it is no function of this Court, in the context of this application, to make any findings in respect of the underlying proceedings, it is necessary to have an understanding of their nature and the relevant timescale involved insofar as the dispute is concerned. That requires an analysis of the pleaded claim and I now turn to look at the statement of claim, following which I will resume looking at the progress of the proceedings.

The statement of claim in the Dooley proceedings

8. A reading of the statement of claim indicates that the proceedings concern a development undertaken by the plaintiff in Courtown, Co. Wexford. The plaintiff pleads that the first named defendant provides architectural services; the second named defendant carries on the business of consulting engineers; the third named defendant carries on business of project managers; the fourth named defendant carries on the business of quantity surveying; and the fifth named defendant is a firm of building contractors. The plaintiff pleads that he is the registered owner of a public house, nightclub and fast food complex known as the Courtown Entertainment Complex which he purchased in or around May 2003. The plaintiff pleads that, in early 2004, he began to look at alternative business opportunities for the complex and the site generally and that, in mid-2004, he retained the services of Conroy Crowe Kelly Architects to carry out a design for the redevelopment of the site. The plaintiff pleads that in or around

11th May, 2005, he received planning permission for 34 apartments; a new fast food outlet; an off licence and a convenience store together with the renovation of the public house and development of seven retail units at the site ("the Development"). The plaintiff also pleads that he set about engaging a team of professional advisors and started looking for a building contractor to construct the Development on a design and build contract basis, based on advice he received. The plaintiff goes on to plead that his advisor identified a number of potential contractors, namely, Cleary Doyle Contracting and Developments of Wexford and CLG Developments Ltd. of Dublin. The plaintiff pleads that, during the discussions regarding the construction of the Development with CLG, they introduced the plaintiff to an architect called Mark Bannon in the first named defendant. The plaintiff also pleads that discussions with CLG broke down on the issue of cost and that discussions proceeded further with Cleary Doyle.

Pleas in the statement of claim concerning the third defendant

9. The third named defendant features in the plaintiff's statement of claim, in particular, from para. 14 onwards and to understand the timeline in respect of events which are relevant to the underlying proceedings as well as the nature of the claim asserted against the third named defendant, it is appropriate to quote the following, verbatim, from the 5th November, 2013 statement of claim:-

"14. ...subsequent to the break-down of the discussions with CLG, and being mindful of his inexperience with the supervision of complex multimillion euro construction contracts, the Plaintiff decided to further copper fasten his position as regards the Development through the appointment of a Project Management company.

15. The Plaintiff approached Mulcahy McDonagh & Partners Ltd ("the Third Named Defendant") to this end and, on or about 23rd May 2006, he met Mr. Pat Walsh of the Third Named Defendant to discuss his requirement. As a result of that meeting, the Third Named Defendant was appointed as project managers to the project. At all stages, the Third Named Defendant were to act as project managers for the entire Development and to monitor progress and costs and effectively manage the various parties carrying out the design and construction of the Development on behalf of the Plaintiff personally...

16. On foot of the advices received from the First and Third Named Defendants, the Plaintiff issued a Letter of Intent (via the Third Named Defendant) to Cleary Doyle Contracting Ltd, on 22nd June 2006 for the construction of the Development. The price which Cleary Doyle had proposed for the whole Development was €10,537,943.00 plus VAT, on the basis of a design and build contract. Insofar as the contents of the Letter of Intent was concerned, the Plaintiff relied entirely on the advices of his advisors. The understanding of the Plaintiff was that the Letter of Intent which issued to Cleary Doyle Contracting Ltd was in respect of a design and build contract for the entire Development, and Cleary Doyle commenced work on site to that end on 20th August 2006.

17. Problems arose however, at a Site Meeting attended by the Plaintiff in or around the end of August 2006, held in the offices of the Second Named Defendant. At this meeting, Cleary Doyle questioned the scope of works for which they had contracted. At a subsequent meeting a few days later, Cleary Doyle contended that the price offered by them related only to the construction of the new building on site, and did not include the renovation of the existing public house, as had been the impression given to the Plaintiff by the First and Third Named Defendants. Based on the above meeting, Cleary Doyle were now effectively demanding €12,100,000 to complete what the Plaintiff (based on the advice of the First and Third Named Defendants) understood had already been agreed

for more than €1,600,000 less. Furthermore, this understanding of the Plaintiff had formed the basis of his borrowings from the bank to fund the Development, meaning that there were not further funds readily accessible to make up the difference.

18. Once it became obvious that Cleary Doyle were refusing to proceed with the works until the dispute in relation to the public house was resolved, however, the Plaintiff was faced with an impasse. He was informed by Pat Walsh of the Third Named Defendant that as Cleary Doyle were in possession of the site on foot of a Letter of Intent which did not include any dispute resolution clause, there was no straightforward of resolving the dispute, and that works could be held up indefinitely while the issue was resolved.

19. In order to advance the works, and to clear the impasse with which he was faced, the Plaintiff, based on the advice of the First and Third Named Defendants, negotiated a commercial settlement with Cleary Doyle in respect of works carried out to date. Although the amount paid to Cleary Doyle €285,000.00 was in some way referable to works carried out to that date in the course of the two weeks that Cleary Doyle were on site, the amount paid reflected the fact that the Plaintiff was effectively being held to ransom by Cleary Doyle. Given the amounts being demanded by Cleary Doyle at this juncture, and given the fact that the Plaintiff had ceded possession of the site to them with no remedy, the Plaintiff was left with no choice but to buy them out and again regain possession of the site.

20. Following this payment, Cleary Doyle quit site by agreement in or around 30th September 2006 leaving the Plaintiff where he had begun, but delayed by a number of months, and out of pocket in the amount of €285,000 paid to Cleary Doyle, together with approximately €200,000 in associated costs, including professional fees. Moreover, the Plaintiff was now back to square one as far as the Development was concerned.

21. Also at this time, a planning application for the alterations referred to above was made to Wexford County Council on or about 14th August 2006. However, this was refused on 29th September 2006. The Plaintiff immediately raised this issue with Mark Bannon of the First Named Defendant. At the time, Mr. Bannon's advices were to the effect that this was only a formality due to a technical issue and that the Plaintiff should proceed as envisaged despite the Development not being in compliance with planning. The Third Named Defendant was also involved in these discussions as Project Manager and, given that both were extremely experienced in the construction industry, the Plaintiff took comfort from what they were saying and relied on their advices and proceeded as advised, to his significant detriment."

Oral evidence

10. It is clear from the statement of claim that the events giving rise to the dispute go back to mid-2006. It is also very clear, given the pleaded claim, that for the matter to be properly determined at trial will inevitably require a considerable amount of oral evidence. The extracts from the statement of claim to which I have referred contain references to "advices received from" the third named defendant as well as the "understanding of the Plaintiff" having regard to the "advices of his advisors". The pleas refer, *inter alia*, to "the impression given to the Plaintiff" by the third named defendant as well as what the plaintiff "understood" based on "the advice" of, *inter alia*, the third named defendant. It is also pleaded that "this understanding of the Plaintiff's had formed the basis of his borrowing". Furthermore, the plaintiff pleads that he negotiated a commercial settlement with Cleary Doyle "based on the advice of", *inter alia*, the

third named defendant. The plaintiff also pleads that he was "*informed by Pat Walsh of the Third Named Defendant*" of certain things. The plaintiff pleads, with regard to the Development proceeding without being in compliance with planning, that the third named defendant "*was also involved in these discussions as Project Manager*" and that the plaintiff "*took comfort*" from what his architect and the third named defendant "*were saying*" and that he "*relied on their advices*".

11. In view of these pleas, it seems inevitable that to properly determine the issues in dispute, oral evidence would be required at any future trial i.e., witnesses would need to give an account of events going back to mid-2006 including with regard to advices allegedly given; understandings allegedly formed; discussions allegedly had; things allegedly said; impressions allegedly given; and advices said to have been acted upon. It is also clear from the defence delivered by the third named defendant that oral evidence at a future trial in respect of events going back to 2006 is likely to be in dispute. In the defence delivered, it is denied that the third named defendant had any involvement with the Development in question and it is denied that the third named defendant was appointed as project manager to the Development. It is specifically pleaded that a different entity, called "MMP Project Management Ltd" ("MMP-PM") was appointed as project manager in respect of the Development and that MMP-PM entered into a contract with Ocean Point, and not with Mr. Dooley, to act as Ocean Point's project manager for the relevant project. In these circumstances, it seems clear that what was allegedly said in 2006 is in controversy; is relevant to a determination of the matters in dispute; and that any such determination would involve disputed oral evidence.

Special purpose vehicle

12. It is not necessary for the purposes of this application to refer to every paragraph of the statement of claim but to better understand the nature of the underlying proceedings it is appropriate to refer to certain of them. In para. 22 of the plaintiff's statement of claim, it is pleaded that, beginning in early 2006, the plaintiff sought tax advice as to how to properly structure the Development, in the context of ongoing discussions between the plaintiff and ACC Bank and that it was decided that the Development would be executed through a special purpose vehicle company for tax and contractual reasons, being Ocean Point, which company was incorporated in or about 16th August, 2006. It is pleaded that the first and third named defendants were aware of the motives behind this decision and it is also pleaded that, at all material times, the defendants were aware that the incorporation of Ocean Point was a means for the plaintiff to personally manage the tax implications of the Development; that the Development was taking place on land owned personally by the plaintiff; and that the plaintiff was, to all intents and purposes, the beneficiary and employer of the Development. It is also pleaded that, prior to the incorporation of Ocean Point, the first and third named defendants acted for the plaintiff in his personal capacity and that, once Ocean Point was appointed, there was no novation of the existing contract between the plaintiff and the first and third named defendants and that they continued to owe him a duty of care. At para. 27, it is pleaded that the first, second, third and fourth named defendants were acting on behalf of and owed a duty to both the plaintiff personally and to Ocean Point which was ultimately to become the employer under the construction contract.

31st March, 2008 completion date

13. In para. 32 of the statement of claim it is pleaded that on 2nd April, 2007, a contract between Ocean Point and the fifth named defendant was entered into providing for a completion date for the works of 31st March, 2008, in the standard RIA contract form. In para. 33 it is pleaded that the plaintiff had a

legitimate expectation, on foot of his pre-existing contractual relationship with the first and third named defendants and on foot of the proximity of the relationship between him personally and the first, second, third, fourth and fifth named defendants, that they would collectively take all reasonable steps to protect his position as landowner in relation to the Development, in particular with regard to the collateral warranty to be provided and the provision of insurances. It is pleaded that in breach of the duty of care owed to him personally, the defendants failed to do so. In para. 34 pleas are made with regard to alleged failures on the part of the first, third and fourth named defendants to address what are referred to as key issues which demanded to be addressed in order to protect the plaintiff's position as landowner and beneficiary. Para. 35 appears in the following terms:-

"35. In or around 1 week after the fifth named defendant began work on site, all work stopped, because of the presence of a high voltage cable traversing the site. This was notwithstanding the fact that the plaintiff was being advised by a Project Architect and a Project Manager and the fifth named defendant had allegedly inspected the site before commencing works. The first and third named defendants failed to take any or adequate steps to address this work stoppage which eventually required a personal intervention by the plaintiff to advance matters. The progress of the works was significantly hampered as a result of this delay, for which the plaintiff holds the first, third and fifth named defendants responsible."

14. The statement of claim is not explicit as to precisely when the works on site commenced. It will be recalled, however, that it is pleaded in para. 32 that the relevant contract with the fifth named defendant was entered into on or about 2nd April, 2007. From para. 36 onwards, it is pleaded that the quality of the fifth named defendant's works was wholly inadequate and a list of defects is pleaded. In para. 37 it is pleaded that the list of defects is based on inspections completed on behalf of the plaintiff in 2008 and 2009. The plaintiff goes on to plead that, since that time, the plaintiff has been limited in access which he has been able to gain to the Development and has not had full unhindered access to correspondence relating to the Development and the construction drawings of same. In para. 7 of the plaintiff's supplemental affidavit sworn 9th November, 2020, he avers that Clancy Construction Ltd., the fifth named defendant, *"abandoned and walked off the site in or around October 2008"*. The plaintiff also avers, in para. 11 of the same affidavit that *"a receiver was later appointed to the development site on 5 March 2009, after which this deponent no longer had access to the development site"*. In para. 38 of the statement of claim, the plaintiff pleads that he is not aware, in light of his limited access, of the extent to which the defects in the Development are attributable to poor workmanship on the part of the fifth named defendant, poor contract supervision by the first, third and fourth named defendants, or poor design by the first and second named defendants but he maintains that the defendants, whether together or separately, are responsible for the defects.

Site meetings

15. In the statement of claim, the plaintiff pleads, *inter alia*, that he highlighted defects in the works to the defendants at every site meeting but his concerns were brushed off. He pleads that the progress of the works was wholly unsatisfactory and that he raised this as a concern at site meetings with the defendants, particularly the first and third named defendants and was repeatedly assured that the progress of works would improve but this was not the case. The plaintiff pleads that, in or around October 2007, he appointed Michael Morrissey of MJ Morrissey and Associates to assist him in his interactions with the defendants and to advise him on the merits of terminating the fifth named defendant's contract, which

option was ultimately not exercised. The plaintiff pleads that, because of the negligence and breach of contract of the defendants, the scheduled completion of 31st March, 2008 was not achievable. The plaintiff makes pleas with regard to a meeting in or around 31st January, 2008 when he raised a number of items of concern. The plaintiff refers to a revised completion date at the end of July 2008 in para. 44 of the statement of claim, pleading that this date passed without completion being achieved. It is pleaded that the fifth named defendant neither rectified outstanding defects nor increased the progress of the works, despite the first named defendant issuing two notices to the fifth named defendant threatening termination of their contract. The plaintiff pleads that he and the first named defendant agreed between them that no further monies would be paid to the fifth named defendant unless and until specified defects had been rectified. In para. 46 it is pleaded that it was agreed between the plaintiff, the first named defendant, and the fifth named defendant that the fifth named defendant would attend to the identified defects once the payment of Certificate 15 took place and, in breach of this agreement, the remedial works were not carried out, although Certificate 15 was paid in full. In para. 47 it is pleaded that the fifth named defendant presented application for payment no. 16 and that, contrary to an agreement with the first named defendant, the latter issued Certificate no. 16 in favour of the fifth named defendant while the plaintiff was on holidays. It is pleaded that the said certificate issued on foot of the fifth named defendant's promise to attend to the defects once payment was made.

8th October, 2008 – site abandoned

16. It is pleaded that the plaintiff declined to pay the amounts certified and that the fifth named defendant purported to suspend the works under Clause 34 of the relevant contract on 6th October, 2008 and, two days later, the fifth named defendant abandoned the site. Para. 48 contains a list of what are said to be further significant structural defects discovered by the plaintiff's experts, of which the plaintiff was not aware when the fifth named defendant quit the site. Paras. 50 – 59 comprise pleas relating to the first named defendant's conduct.

The claim against the third named defendant

17. Paras. 60 (a) – (f) comprise pleas in relation to the alleged wrongs of the third named defendant. It is appropriate to set out para. 61, verbatim, as follows: -

"PARTICULARS OF NEGLIGENCE, BREACH OF CONTRACT AND BREACH OF DUTY, INCLUDING STATUTORY DUTY OF THE THIRD NAMED DEFENDANT

61. The third named defendant has caused the plaintiff loss and damage through their negligence, breach of contract, and breach of statutory duty in that they, inter alia: -

- (a) Misrepresented to the plaintiff the importance and significance or (sic) proceeding with a development which was not in compliance with planning.*
- (b) Negligently failed to inform the plaintiff of the risks which he ran as a consequence of same.*
- (c) Failed to ensure that Cleary Doyle did not enter into possession of the site without there being an effective dispute resolution clause (and/or agreement as to price/scope of works) in place.*
- (d) Failed to properly supervise the works or at all.*
- (e) Failed to ensure that the overhead line traversing the site was not a source of delay before the commencement of the works.*
- (f) Failed to ensure that the works proceeded in a workmanlike fashion.*
- (g) Failed to properly oversee the quality of the fifth named defendant's works."*

18. Para. 62 relates to particulars of the alleged wrongs of the fourth named defendant, whereas para. 63 relates to the alleged wrongs of the fifth named defendant.

The plaintiff's loss

19. It is appropriate to set out verbatim paras. 65 – 74 in which the plaintiff gives particulars of his loss, as follows: -

"PARTICULARS OF THE PLAINTIFF'S LOSS

65. Loss of €285,000 paid to Cleary Doyle Construction Ltd. in respect of the abortive design build contract.

66. Loss of €200,000 expended by the plaintiff on professional fees in relation to the abortive design build contract.

67. Loss of €3,257,000 being the amount incurred by the plaintiff on extended financing as a result of this issue.

68. Loss of €20,000,000 being the profits which the plaintiff stood to make from the sale of the development, were it not for the aforementioned negligence, breach of contract and breach of duty of the defendants.

AND THE PLAINTIFF CLAIMS:

69. Damages for loss, damage, inconvenience, distress, interest and costs occasioned to the plaintiff by reason of any or all of the foregoing: - breach of contract, and/or negligence and/or breach of duty to include breach of statutory duty on the part of the defendants or each, either or all of them, their respective servants and agents.

70. Damages for breach of legitimate expectation.

71. All necessary and consequential orders, enquiries, accounts and directions.

72. Interest pursuant to statute.

73. Such further or other order as this Honourable Court shall deem fit and appropriate.

74. The costs of and incidental to these proceedings."

September 2006 - accrual of certain causes of action

20. It is clear from the foregoing that certain causes of action accrued, according to the plaintiff's pleaded case, no later than 30th September, 2006. The first and second items with regard to the plaintiff's pleaded particulars of loss relate to €285,000 paid to Cleary Doyle Construction Ltd. and the loss of €200,000 expended by the plaintiff on professional fees, both being in relation to the abortive design build contract. It will be recalled that, in para. 16 of the plaintiff's statement of claim, it is pleaded that Cleary Doyle commenced work on site on 20th August, 2006, whereas it is pleaded in para. 19 that Cleary Doyle were paid €285,000, having been on site for two weeks. In para. 20 it is pleaded that, following this payment, Cleary Doyle quit the site by agreement in or around 30th September, 2006, leaving the plaintiff out of pocket in the amount of €285,000 paid to Cleary Doyle together with approximately €200,000 in associated costs, including professional fees. Thus, the foregoing loss 'crystallised', according to the pleaded case, no later than 30th September, 2006.

Late start

21. The foregoing is of some relevance because it seems uncontroversial to say that a plenary summons which was not issued until 19th July, 2011, but which relates to a cause of action going back to September 2006, almost five years earlier, constitutes a claim which can fairly be described as a "late start". It is also fair to say that a number of the pleas contained in para. 61 relate to events of 2006 including 61 (a), 61

(b) and 61 (c). Furthermore, a plea that the third named defendant failed to supervise the works, being the plea at 61 (d), cannot relate to events *later* than 6th October, 2008 (being the date when, according to para. 47 of the plaintiff's statement of claim, the fifth named defendant purported to suspend the works, abandoning the site two days later). Similar comments apply in relation to the pleas at 61 (f) and 61 (g), whereas the plea at 61 (e) concerning the overhead line traversing the site, would clearly appear to relate to a period in mid-2007 (having regard to the plea made at para. 35 of the statement of claim to the effect that, one week after the fifth named defendant began working on site, all work stopped because of the presence of a high voltage cable traversing the site). As previously noted, the relevant contract with the fifth named defendant was entered on or about 2nd April, 2007.

23rd May, 2006 – 8th October, 2008

22. In light of the foregoing, it seems clear that at any future trial, evidence, including oral evidence, would be required in respect of disputed events, including meetings, discussions and advices, which allegedly took place between 23rd May, 2006 (when the plaintiff pleads that he met Mr. Pat Walsh of the third named defendant to discuss his requirements) and 8th October, 2008 (when the fifth named defendant allegedly abandoned the site and ceased to carry out works which, according to the plaintiff, the third named defendant failed to supervise adequately). Despite this, it was not until 5th November, 2013 that the plaintiff served a statement of claim on the applicant in this motion, and it was this which detailed the plaintiff's claim concerning events between May 2006 and October 2008, including, *inter alia*, alleged discussions, advices and understandings. Being satisfied that the plaintiff made a late start in respect of his claim and having looked in some detail at the pleaded case in the statement of claim, it is appropriate to return to an analysis of the chronology of relevant events.

2013

23. Insofar as progressing the claim against the third named defendant is concerned, the only step taken by the plaintiff in 2013, apart from serving a notice of intention to proceed dated 23rd May, 2013, was to deliver the statement of claim which I have just looked at in some detail. I am satisfied that, as a matter of fact, the said statement of claim was delivered on or about, but not before, 5th November, 2013. I take this view because the 5th November, 2013 is the date which appears on the face of the statement of claim itself. It appears in manuscript, the first sentence in the statement of claim being "*DELIVERED on the 5th day of November 2013 by Manus Bray & Co., Church Road, Greystones, Solicitors for the plaintiff*". One can see that the foregoing has been handwritten over what was there previously, being a typed sentence which stated "*DELIVERED on the [] day of July, 2012 by Maples and Calder, 75 St. Stephen's Green, Dublin 2, Solicitors for the plaintiff*". It will be recalled that Maples and Calder were previously on record for the plaintiff until the service, on 1st November, 2012, of a notice of change of solicitors, confirming that Manus Bray & Co. had come on record. Thus, slightly in excess of one year elapsed between the notice of change of solicitor, on 1st November, 2012, and the service, on 5th November, 2013, of a statement of claim which clearly appears to have been prepared in July 2012 (i.e. some fourteen months prior to service). No reason or explanation is proffered by the plaintiff in relation to this delay. The receipt by the third named defendant of the 5th November, 2013 statement of claim was, as I say, the first time the nature and detail of the claim was made known to the third named defendant and, in the manner examined earlier in this judgment, it concerned events between May 2006 and October 2008.

2014

24. On 2nd January, 2014, the second named defendant furnished replies to the notice for particulars which the plaintiff had raised. On 3rd January, 2014, the third named defendant raised a notice for particulars. This was raised by the third named defendant just less than two months from the date of the 5th November, 2013 statement of claim (which period obviously included Christmas and New Year). Thus, it is fair to say that the third named defendant acted promptly upon receipt of the statement of claim, with regard to the raising of particulars. On 31st January, 2014, a notice of change of solicitors was served on behalf of the fifth named defendant.

25. On 16th April, 2014, the plaintiff furnished replies to the third named defendant's notice for particulars. These replies were furnished three and a half months after the relevant particulars were raised. On 9th May, 2014, the fifth named defendant raised a notice for particulars. On 16th September, 2014, a notice of change of solicitors was served in respect of the plaintiff, confirming that John P. O'Donohoe Solicitors had been appointed to act as solicitors for the plaintiff.

26. On 27th August, 2014, a liquidator was appointed to the first named defendant. Exhibit "LM1" referred to in the affidavit of Ms. Lisa Mansfield, solicitor, of 2nd August, 2019, grounding the third named defendant's motion, comprises a printout from the Companies Registration Office confirming the appointment of Mr. Eddie Kelly as liquidator of Patterson Bannon Architects Ltd., the date of appointment being 27th August, 2014. On 3rd October, 2014, the plaintiff furnished replies to the fifth named defendant's notice for particulars.

The third named defendant's defence

27. On 9th October, 2014, the plaintiff's solicitors wrote to the third named defendant's solicitors seeking a defence. On 10th November, 2014, RDJ Solicitors wrote to John P. O'Donohoe Solicitors confirming that the defence was being finalised and that it would be served by close of business on Wednesday, 12th November, 2014 at the latest. On 10th November, 2014, the defence of the third named defendant was delivered. The first paragraph of the said defence comprises the following plea:-

"1. It is denied that the third named defendant had any involvement with the project the subject matter of these proceedings either as is alleged or at all and all other pleas are expressly made without prejudice to this plea."

The defence contains, *inter alia*, a denial that the third named defendant was appointed as project manager and a plea that MMP-PM was appointed as project manager and that MMP-PM entered into a contract with Ocean Point and not with the plaintiff. Among other things, it is pleaded that the plaintiff has no cause of action against the third named defendant as alleged or at all and that if the plaintiff suffered any loss or damage (which is denied) it was not caused by the third named defendant. It is also denied that the third named defendant was aware of the purpose of the incorporation of Ocean Point. It is also, *inter alia*, denied that the plaintiff is entitled to use the vehicle of a company, i.e. Ocean Point, for his own benefit and then to "*simply discard*" the legal consequences of same when it suits the plaintiff. Among other pleas made, the plaintiff is placed on full proof that the third named defendant gave advices in relation to the fifth named defendant and it is, *inter alia*, denied that the award of a contract to Clancy Construction was based upon any advices by the third named defendant. It is fair to say that the pleas in the defence of 10th November, 2014 constitute a full denial of the plaintiff's claim and include specific denials that the plaintiff highlighted defects in the work to the third named defendant at site meetings as alleged or at all, or that his concerns were brushed aside as alleged or at all. It is also, *inter alia*, denied that the third named defendant assured the plaintiff that the progress of works would improve and it is

denied that the third named defendant had an obligation to supervise the works or is guilty of poor contract supervision. The third named defendant denies any legal liability and denies that the plaintiff suffered the alleged or any loss or damage. The contents of the said defence also make it very clear that a determination of the matter at trial would require oral evidence in relation to disputed events going back to 2006, 2007 and 2008.

28. On 25th December, 2014, the second named defendant was dissolved. Exhibit "LM1" to Ms. Mansfield's 2nd August, 2019 affidavit also includes a printout from the Companies Registration Office which confirms that P.H. McCarthy Consulting Engineers Ltd. was, in August 2012, "*Strike Off Listed*" and that its description as of November 2012 was "*liquidation*", whereas its current designation was "*Dissolved*" with effect from 25th December, 2014.

2015

29. It will be recalled that on 9th October, 2014, the plaintiff's solicitors called upon the third named defendant to deliver a defence and a defence was served within one month of that letter. Over ten months later, the plaintiff amended the statement of claim. The amendments made comprise the following. In para. 3 of the statement of claim, reference is made to the second named defendant having been taken over by Byrne Looby Partners and now trading under the business name of Byrne Looby P.H. McCarthy. No amendments were made concerning the third named defendant. Para. 63 was amended by the addition of a range of further pleas (h) to (f) in respect of the plaintiff's claim against the fifth named defendant. The amended statement of claim is dated 28th September, 2015. By order made on 7th December, 2015 (Haughton J.), the plaintiff was granted liberty to amend the plenary summons by the deletion of "*Patterson Bannon Architects Ltd*" and the insertion of "*Patterson Bannon Architects Ltd (In Liquidation)*" and the plaintiff was granted judgment against the first named defendant with relevant assessment before a judge to be set down for hearing accordingly. In a second order made on 7th December, 2015 (Haughton J.), the court granted an extension of time to amend the plenary summons by the deletion of "*CALLAN MAGUIRE PARTNERSHIP*" which appeared as the title of the fourth named defendant and the insertion of "*CMPTNR Consultancy Ltd t/a Callan Maguire Partnership*". The foregoing relates to the title of the fourth named defendant. On 16th December, 2015, the plenary summons was amended as permitted by the aforesaid orders.

Amended statement of claim sent to third named defendant

30. On 16th December, 2015, the plaintiff wrote to the third named defendant enclosing the amended statement of claim. A number of comments arise at this juncture. Firstly, thirteen months had elapsed between the service by the third named defendant of its defence, dated 10th November, 2014 and the delivery by the plaintiff of the 16th December, 2015 amended statement of claim. Secondly, none of the amendments related to the claim against the third named defendant. Thus, to the extent that this was a "step" in the proceedings taken by the plaintiff in respect of his claim against the third named defendant, in reality it did not alter or progress the plaintiff's claim against the third named defendant in any way whatsoever. It is also true to say that this was the only communication between the plaintiff's solicitors and the third named defendant throughout 2015.

2016

31. On 12th May, 2016, the plaintiff's solicitors wrote to RDJ, solicitors for the third named defendant in relation to the Dooley proceedings (Record No. 2011/6564P), and it is appropriate to set out the contents of that letter *verbatim* and in full, as follows:-

"Dear Sirs,

We refer to the above matter. As you are aware, we act for Francis Dooley in the above proceedings. You may be aware that there are a number of extant proceedings relating to our client's development in Courtown, Co. Wexford. We hereby enclose copies of the statement of claim for the following sets of proceedings:

1. ACC Loan Management Ltd v. Francis Dooley; and **High Court Record No. 2010/5004S**;
2. Francis Dooley v. Patterson Bannon Architects Ltd, PH McCarthy Consulting Engineers Ltd, Mulcahy McDonagh & Partners Ltd, Callan Maguire Partnership, Clancy Project Management Ltd, t/a Clancy Construction; **High Court Record No. 2011/6564P**;
3. Francis Dooley v. Clancy Project Management Ltd, t/a Clancy Construction and Mulcahy McDonagh & Partners Ltd; High Court Record No. 2011/5235P;
4. Francis Dooley v. Construction Property Services Ltd and Brendan Buck and Anthony Buck, t/a BPS Planning Consultants; **High Court Record No. 2011/6552P**;
5. Francis Dooley v. Denis McSweeney practising under the style and title of Denis McSweeney Solicitors; **High Court Record No. 2013/5199P**;
6. Francis Dooley v. Martin Ferris; **High Court Record No. 2015/6310P**;

No statement of claim has been delivered yet in the proceedings against Martin Ferris and to that end, we enclose a copy of the plenary summons for your attention.

We intend instructing counsel to draft a motion and affidavit seeking an order linking the above sets of proceedings and for an order directing that all proceedings be listed and heard together for the purpose of saving time and costs.

We would be obliged if you would revert with your consent to our application.

We look forward to hearing from you at your earliest convenience.

Yours faithfully"

Third named defendant declines the request to consolidate six sets of proceedings

32. On 14th June, 2016, RDJ, solicitors for the third named defendant, furnished a response in the following terms:-

"Dear Sirs,

We refer to your letter of 12 May 2016.

Having considered the matter, it is not clear to us that these matters are appropriate for consolidation and our client will not be consenting to any such application. The cases your client is involved in vary between what appear to be debt collection proceedings by ACC Loan Management Ltd against your client to proceedings alleging professional negligence against your client's former solicitor.

Yours faithfully"

33. Other than the foregoing exchange of correspondence, the plaintiff did nothing to progress his claim against the third named defendant in 2016. In other words, the single letter dated 12th May, 2016 comprises the only activity by the plaintiff in relation to his claim against the third named defendant during the entire of that year. Thus, by the end of December 2016, over two years had elapsed since the delivery of the third named defendant's defence and, during that period of over two years, the plaintiff's activity with regard to the third named defendant was to send a copy, on 16th December, 2015, of an amended statement of claim (which did not amend the claim against the third named defendant in any

way) and to seek consent, on 12th May, 2016, to the consolidation of six separate sets of High Court proceedings, which request was declined shortly thereafter.

2017

34. The plaintiff in the Dooley proceedings took no step to progress his claim against the third named defendant in 2017.

2018

35. In 2018, no step was taken by the plaintiff to progress his claim against the third named defendant until, by letter of 14th September, 2018, John P. O'Donohoe, solicitors for the plaintiff, wrote to RDJ, solicitors for the third named defendant, enclosing a notice of intention to proceed. The said letter dated 14th September, 2018 comprises Exhibit "LM1" referred to in the affidavit of Ms. Mansfield, sworn 15th December, 2020. It was a letter sent to the following address: - "*Ronan Daly Jermyn, Solicitors, 2 Park Place, City Gate Park, Mahon Point, Cork*". The plaintiff avers that, on 16th November, 2018, a letter seeking voluntary discovery was sent by the plaintiff's solicitors to RDJ, solicitors for the third named defendant. Exhibit "FD4" to the plaintiff's affidavit sworn on 2nd December, 2019 comprises a copy of a letter seeking voluntary discovery. It is clear from the face of that letter that it was sent to a *different* address, namely to: "*Ronan Daly Jermyn, 12 South Mall, Cork*". I will presently look at the various affidavits sworn in these proceedings but, for present purposes, it is appropriate to point out that there is a very significant dispute, as to fact, in relation to this letter. In short, the third named defendant's solicitors aver that the letter was never received at 12 South Mall, Cork. It is not in dispute, however, that 12 South Mall was not the then-current address for the third named defendant's solicitors. An uncontroverted averment is made by Ms. Mansfield, solicitor for the third named defendant, to the effect that: "*Since our firm vacated its offices at 12 South Mall Cork, a mail forwarding system has been in place so that mail posted to 12 South Mall is redirected to our current premises in City Gate Park, Mahon Point, Cork*". Ms. Mansfield goes on to aver *inter alia* that: "*We have no record of this letter being received and no letter was scanned into our system. I say that I have also conducted checks on the hard copy of the file and once again, no letter can be found. I say and believe that if a letter was sent to 12 South Mall in November 2018, it would have been forwarded to our City Gate Park office . . .*", something which, according to her averments, did not occur. The plaintiff, however, avers that "*It is not credible that the third named defendant and/or its servants or agents did not receive the voluntary discovery request dated 16 November 2018*".

36. It is appropriate for me to emphasise that this is not a dispute which this Court can resolve in the present application. It is, however, clear that when serving a notice of intention to proceed on 12th September, 2018, the plaintiff's solicitors wrote to the *current* address of the solicitors for the third named defendant but, when writing some two months later in relation to seeking voluntary discovery, the letter was addressed to the *former* address of the third named defendant's solicitors. It is also uncontroversial to say that, as of 14th September, 2018, the plaintiff's solicitors were in possession of the current address of the solicitors for the third named defendant and no explanation has been given as to why the 16th November, 2018 voluntary discovery request was addressed to that firm's former address. To make the foregoing observation is not to suggest that this Court can make any determination as to whether or not the letter was in fact received. It cannot be disputed, however, that the plaintiff took no step to follow-up on the voluntary discovery request even if he believed at the time that it had been safely received and even if this Court were to assume that to be the case.

37. It is uncontroversial to say that, during the normal course of the progress of litigation, parties engage in correspondence on the question of voluntary discovery and, where a request has been made but not responded to, one would expect some follow-up, particularly if the party seeking discovery was determined to progress the relevant case by bringing a motion to seek an order to compel compliance with the discovery request in question. There was no follow-up correspondence whatsoever sent on behalf the plaintiff, nor did the plaintiff issue any motion seeking an order for discovery at that juncture. Nothing else was done on behalf of the plaintiff for the remainder of 2018 and, with the exception of the notice of intention to proceed and the disputed letter for voluntary discovery, nothing at all was done throughout 2018 insofar as the claim against the third named defendant was concerned, with nothing whatsoever done during the entire of 2017, as I have previously explained.

2019

38. The first step taken in 2019 regarding the claim against the third named defendant was the third named defendant's motion to dismiss the plaintiff's claim for want of prosecution, which motion issued on 6th August, 2019, grounded on the affidavit of Ms. Mansfield sworn on 2nd August, 2019. Prior to that point, there was complete inactivity, throughout 2019, on the part of the plaintiff with regard to progressing the case against the third named defendant. On 8th October, 2019, a defence was filed by the fifth named defendant, the plaintiff's solicitors having apparently requested same on 3rd July, 2019.

2020

39. On 16th December, 2020, the plaintiff issued a motion which was initially returnable for 25th January, 2021 seeking an order for discovery as against the third named defendant. The relevant grounding affidavit was sworn by the plaintiff's solicitor on 16th December, 2020. It refers to the 16th November, 2018 letter seeking voluntary discovery, which comprises the only exhibit to the affidavit grounding the discovery motion. In other words, no other correspondence on the discovery issue is referred to or relied upon by the plaintiff.

40. With regard to the foregoing motion, several things can be said. Firstly, it was issued two years and one month after the 16th November, 2018 letter seeking voluntary discovery (being a letter directed to the former address of the solicitors for the third named defendant, who assert that the letter was never received). No explanation is proffered for this delay of over two years. Furthermore, it is a motion which was plainly issued *after* the third named defendant's motion to strike out the plaintiff's claim. Similar comments apply in relation to a second motion issued by the plaintiff, on 16th December, 2020, which seeks to join the present proceedings to those under Record No. 2014/7827P (i.e. the Ocean Point proceedings) and to admit the matters to case management. Having looked at the progress of the Dooley proceedings, I now turn to an examination of the affidavits filed in respect of the present motion.

Affidavit of Lisa Mansfield sworn in the Dooley proceedings

41. On 2nd August, 2019, Ms. Lisa Mansfield, solicitor for the third named defendant, swore an affidavit to ground the motion before this Court in the Dooley proceedings. After making the usual averments, Ms. Mansfield refers to the Courtown, Co. Wexford Development at a site purchased by the plaintiff in or around May 2003 and she refers to the planning application submitted by the plaintiff in or around 2004. At para. 5 of her affidavit she refers to the plea, at para. 15 of the statement of claim, that the plaintiff approached the third defendant on 23rd May, 2006 and appointed the third defendant as project manager. Ms. Mansfield refers to the defence which denies that the third named defendant was appointed as project manager, wherein it is pleaded that a different entity, namely MMP-PM, was appointed and entered into

a contract with Ocean Point, not with the plaintiff personally as alleged in the statement of claim. At para. 6, Ms. Mansfield refers to the progress of the proceedings and at para. 7 she avers that, with the exception of a notice of intention to proceed dated 13th September, 2018, the last proceeding furnished by the plaintiff was an amended statement of claim dated 28th September, 2015. At para. 8 she avers that the plaintiff is now unduly prejudiced in the defence of the claim. She refers to the effect on the passage of time on the availability of witnesses and of the parties to defend the proceedings. She avers, *inter alia*, that the liquidator of the first named defendant is unlikely to participate in the defence of the proceedings or that former employees of that company will be available to give evidence. She also avers that the second named defendant was dissolved in 2014 and she refers to the relevant CRO printouts. At para. 9 Ms. Mansfield avers that the plaintiff's failure to prosecute the proceedings in a timely manner has prejudiced the third named defendant's right to a fair trial and ability to defend same in circumstances where the issues in dispute occurred approximately thirteen years prior to the date of the swearing of her affidavit. She avers that it is self-evident that witness memories will be compromised due to this passage of time and what she describes as the inordinate and inexcusable delay on the part of the plaintiff. At para. 10 she avers that the plaintiff's delay violates the third named defendant's right to have a fair trial within a reasonable time pursuant to Article 6 of the European Convention on Human Rights and Fundamental Freedoms. At para. 11, Ms. Mansfield avers that a serious consequence of the plaintiff's delay is that outstanding claims interfere with the third named defendant's reputation and has an ongoing effect on its professional indemnity insurance. At para. 12, she avers that the proceedings relate back to the development of a site which commenced in 2004 and that, where proceedings only issued in 2011, there was a particular onus on the plaintiff to expedite the prosecution of the proceedings and, at para. 13, Ms. Mansfield prays for orders in terms of the notice of motion.

Replying affidavit of the plaintiff in the Dooley proceedings sworn 2nd December, 2019

42. On 2nd December, 2019, the plaintiff swore a replying affidavit for the purposes of opposing the third named defendant's application. After making the usual averments and indicating that he did not purport to respond to each and every allegation made in the allegation of Ms. Mansfield, the plaintiff proceeds to set out what he describes as "*a more fuller background to the factual matters in these proceedings*". At para. 6 he refers to the development site in his ownership and to his claim for damages for loss, damage, inconvenience, distress, interest and costs occasioned by the breach of contract and/or negligence, to include breach of statutory duty on the part of each and all of the defendants arising out of the failure of the development site. At para. 7, the plaintiff identifies each of the defendants. There is a second paragraph no. 7 in his affidavit where reference is made to the Ocean Point proceedings. At para. 8, Ocean Point is described as a special purpose vehicle company set up by the plaintiff on 16th August, 2006 to execute the development of the relevant project and the plaintiff avers that, despite the incorporation of Ocean Point, he remains the landowner of and the person beneficially entitled to the lands comprising the development site. At para. 9, the plaintiff avers that he personally borrowed €6,112,500.00 from ACC Bank plc ("ACC") in June 2006 to fund the relevant development and he avers that Ocean Point, subsequent to its incorporation, borrowed a further €11,717,000.00 from ACC on 24th July, 2007. The plaintiff avers that, upon the failure of the Development, ACC appointed Mr. Martin Ferris as receiver on 5th March, 2009 and, thereafter, instituted High Court proceedings against him entitled *ACC Loan Management Ltd. v. Dooley* (High Court Record No. 2010/5004 P). At para. 10, the plaintiff avers that, in the proceedings brought by ACC, he is sued in respect of his personal borrowings and/or

as alleged guarantor (which is denied) for the borrowings of Ocean Point and the plaintiff avers that these proceedings were remitted to plenary hearing on 12th May, 2011 and are ongoing. At para. 11, the plaintiff avers that the third named defendant was appointed as project manager in or around 23rd May, 2006. With regard to Ms. Mansfield's averment that MMP-PM, not the third named defendant, was appointed as project manager, the plaintiff avers *inter alia* that this is incorrect and/or that he is advised that it is a matter for the trial of the action.

The "gravamen" of the plaintiff's claim against the third named defendant

43. In para. 12, the plaintiff refers to what he describes as the "gravamen" of his claim against the third named defendant in the Dooley proceedings and he avers that this comprises three elements. It is appropriate to look at these three elements in some detail.

The first element (dispute resolution clause)

44. The first element, referred to at para. 12 (i) of the plaintiff's affidavit, is described as the failure to ensure that Cleary Doyle did not enter into possession of the development site without there being an effective dispute resolution clause, and the plaintiff refers to paras. 16 – 22 of the statement of claim in this regard. If one looks at those paragraphs, one will see pleas to the effect that the plaintiff claims that, on foot of "advice received" from the first and third named defendants, the plaintiff issued a letter of intent to Cleary Doyle, via the third defendant, on 22nd June, 2006 for the construction of the Development. The plaintiff also makes pleas as to his "understanding" of the letter. It is pleaded at para. 17 of the statement of claim that problems arose and reference is made to a site meeting in August 2006. It is pleaded that Cleary Doyle were demanding €12,100,000.00 to complete what the plaintiff "understood" had been agreed for €1,600,000.00 less, based on the advice of the first and third named defendants. It is pleaded that the plaintiff's understanding had formed the basis of his borrowings from ACC to fund the Development, meaning there were no other funds readily accessible. At para. 18 of the statement of claim the plaintiff pleads that he was informed by Mr. Walsh, of the third named defendant that, as Cleary Doyle were in possession of the site on foot of a letter of intent which did not include a dispute resolution clause, there was no straightforward way of resolving the dispute and that works could be held up indefinitely while the issue was resolved. At para. 19 of the statement of claim, it is pleaded that, to clear the impasse with which he was faced, the plaintiff, based on advice from the first and third defendants, reached a settlement with Cleary Doyle involving a payment of €285,000.00. It is pleaded that, although this amount was in some way referable to works carried out, the plaintiff had no choice other than to buy out Cleary Doyle and regain possession. The timing of the foregoing is made clear in para. 20 of the statement of claim, wherein it is pleaded that, following the payment of €285,000.00, Cleary Doyle quit the site by agreement in or around 30th September, 2006, leaving the plaintiff where he had begun but delayed by a number of months and out of pocket in the sum of €285,000.00 paid to Cleary Doyle, together with approximately €200,000.00 in associated costs, including professional fees.

€485,000.00 – June to September 2006

45. Thus, it is very clear that the first aspect of the gravamen of the plaintiff's claim against the third named defendant relates to events of 2006. In circumstances where it is pleaded at para. 15 of the statement of claim that the plaintiff first met Mr. Walsh of the third named defendant on or about 23rd May, 2006 to discuss his requirement, the relevant events are said to have occurred between June 2006 (when the relevant letter of intent is said to have issued) and September 2006 (when Cleary Doyle are

said to have quit the site by agreement, having been paid €285,000.00 by the plaintiff, who also claims to have incurred fees of €200,000.00).

The second element (compliance with planning)

46. The second element of the gravamen of the plaintiff's claim against the third named defendant is dealt with at para. 12 (ii) of Mr. Dooley's affidavit sworn on 2nd December, 2019. This he describes as the failure to advise the plaintiff in respect of compliance with planning matters and Mr. Dooley refers to paras. 21 and 50 – 56 of the statement of claim in that regard.

Para. 21: 2006

47. Para. 21 of the statement of claim refers to a planning application made to Wexford County Council on 14th August, 2006, which was refused on 29th September, 2006. The plaintiff pleads that the issue was immediately raised with a Mr. Bannon of the first named defendant who advised that this was only a formality due to a technical issue and that the plaintiff should proceed as envisaged, despite the Development not being in compliance with planning. It is pleaded at para. 21 of the statement of claim that the third named defendant was also involved in these discussions as project manager and that the plaintiff *"took comfort from what they were saying and relied upon their advices and proceeded as advised, to his significant detriment"*.

Paras. 50 – 56: 2006 – 2008

48. Paras. 50 – 56 appear in the statement of claim under the heading of *"conduct of the first named defendant"*. Para. 50 refers to works which it is pleaded should have been completed within the extended contract period of mid-April 2008 and to losses allegedly incurred by the plaintiff in that regard. Para. 51 pleads that the planning application for the amended development which had been rejected in September 2006 was approved in August 2008, but that approval was given for 37 apartments rather than the 38 apartments which had been built under the supervision, guidance and design of the first named defendant, resulting in the plaintiff having a fundamentally non-compliant development. At para. 52 it is pleaded that the Development as constructed was not in fact in compliance with the revised planning application approved in August 2008 and, at para. 53, pleas are made in respect of the consequence of same for the plaintiff. Para. 54 refers to monies which the plaintiff says the first named defendant wrongfully certified in favour of the fifth named defendant as well as to a number of written opinions in respect of substantial compliance. At para. 55 it is pleaded that the foregoing opinions were required by the plaintiff's bank as a precondition for the continuing release of funds and it is pleaded that statements provided by the first named defendant to the plaintiff's bank were materially incorrect. At para. 56, it is pleaded that the first named defendant issued a certificate of partial possession in relation to a portion of the Development to facilitate the completion of the plaintiff's contract for sale for one of the commercial units and it is pleaded that there was no provision within the contract for such a certificate. It is also pleaded that, in September 2008, the first named defendant issued a certificate of substantial completion under the contract despite there being no provision in the contract for same and despite the fact that the works were not substantially complete at the time. It is also pleaded that the first named defendant issued certificates of compliance with planning and building regulations to facilitate the sale of a unit despite knowing that the building was not in fact compliant and it is also pleaded that the second defendant knowingly issued incorrect certification for similar purposes.

49. The third named defendant is not referred to anywhere in paras. 50 – 56 inclusive. It is clear, however, that insofar as the second aspect of the gravamen of the plaintiff's claim is concerned, this

element relates to events between 2006 and 2008 and, as regards the third named defendant, the relevant plea (para. 21 of the statement of claim) concerns alleged wrongs in 2006.

The third element (supervision)

50. The third element of the gravamen of the plaintiff's claim against the third named defendant is the alleged failure to properly supervise the main contractor and specific reference is made to paras. 34-49 and 61 of the statement of claim. Para. 34 refers to a contract with the fifth defendant in respect of the Development works. It is clear from para. 32 that the said contract is dated 2nd April, 2007. Para. 35 refers to work stopping on site around one week after the fifth named defendant began work on site. No specific date is pleaded as to when that work began but it is safe to assume that this was in 2007. In para. 36, a non-exhaustive list of defects in respect of the fifth named defendant's works is set out. In para. 37, it is pleaded that the list of defects was based on inspections completed on behalf of the plaintiff in 2008 and 2009. In para. 38 it is pleaded that the plaintiff is not aware of the extent to which the defects are attributable to poor workmanship by the fifth named defendant, poor contract supervision by the first, third and fourth named defendants or poor design by the first and second named defendants. In paras. 39 and 40, it is pleaded that the plaintiff highlighted defects in the works and raised concerns at site meetings with the defendants. It is plain that such site meetings occurred no later than the point at which the defendant ceased work on site being 6th October, 2008. Para. 41 refers to the plaintiff appointing Michael Morrissey of MJ Morrissey & Associates in October 2007 to assist him in interactions with the defendants. Para. 42 refers to the works scheduled to complete on 31st March, 2008 and to the plaintiff raising concerns in a meeting in or around 31st January, 2008. Para. 43 refers to the project being very far from complete by the proposed date of completion and also refers to the relevant contract providing for liquidated damages of €20,000 in the event of delay through the fault of the contractor. In para. 44 it is pleaded that the defendants provided a revised completion date of the end of July 2008 which was not achieved and reference is made to completion notices. In para. 45, it is pleaded that the said notices were defective. Para. 46 refers to an agreement between the plaintiff and the first named defendant that no further monies would be paid to the fifth named defendant unless specified defects had been rectified and that payment of Certificate no. 15 was made on the basis that the fifth named defendant would attend to the identified defects upon such payment. In para. 47, it is pleaded that, in breach of his agreement with the first named defendant, Certificate no. 16 was issued in favour of the fifth named defendant. It is pleaded that the plaintiff declined to pay this and the fifth named defendant suspended works on 6th October 2008 and, two days later, abandoned the site. Para. 48 contains a list of further structural defects which the plaintiff says he was not aware of when the fifth named defendant quit the site and, in para. 49, it is said that the plaintiff's ability to identify full details of the existing deficiencies with the Development has been hampered by the first named defendant's refusal to allow the plaintiff access to project documents and drawings. Para. 61 comprises specific pleas made against the third named defendant of alleged negligent breach of contract and breach of duty (a) to (g).

2006-2008

51. It is clear from the contents of para. 34 to 49, inclusive, and from para. 61 of the statement of claim that they concern issues said to have arisen in 2006, 2007 and 2008, in particular, the alleged failure of the third named defendant to supervise works carried out between 2nd April, 2007 (the date of the contract between Ocean Point and the fifth named defendant, *per* para. 32) and 6th October, 2008 (the date the fifth named defendant abandoned the site, *per* para. 47).

The gravamen of the plaintiff's claim and the relevant time period

52. Having examined what the plaintiff says is the gravamen of his claim against the third named defendant, it is clear that the relevant time period during which the plaintiff claims that the third named defendant committed legal wrongs is the period between 23rd May, 2006 (when the plaintiff pleads that he met Mr. Pat Walsh of the third named defendant to discuss his requirement, *per* para. 15 of the statement of claim) and 6th October, 2008 (when works were suspended on site, *per* para. 47). It is a matter of fact that the plaintiff's plenary summons did not issue until 19th July, 2011. It will be recalled that the pleaded loss of €285,000 (para. 66 of the statement of claim) and the pleaded loss of €200,000 (para. 67) comprise losses which, according to paras. 19 and 20 of the statement of claim, were incurred by 30th September, 2006. Recovery of the foregoing losses constitutes that first aspect of the gravamen of the plaintiff's claim, according to para. 12 of his 2nd December, 2019 affidavit. The plenary summons was issued some four years and ten months after the said losses were incurred by the plaintiff. The plenary summons was issued over two years and nine months after work on site ceased and the fifth named defendant abandoned the Development. Nowhere in the plaintiff's replying affidavit sworn 2nd December, 2019 does he make any comment whatsoever about this delay with respect to issuing the plenary summons, despite identifying the gravamen of his claim in para. 12 and going on, in para. 13 of his affidavit, to refer to the sums he seeks to recover, namely the €285,000 paid to Cleary Doyle in respect to what is described as the "*abortive design and bill contract*" as well as the sum of approximately €200,000 "*expended in associated costs, including professional fees*" and the sum of €3,257,000 which the plaintiff avers constitutes losses "*in relation to extended financing caused by the issues with Cleary Doyle*". In para. 14 of his affidavit, the plaintiff avers that he is also seeking loss of profits from the defendants including the third named defendant.

53. In para. 15 of his affidavit, the plaintiff sets out a chronology of what he describes as "*procedural matters*". This comprises a list of dates opposite which are entries in respect of "*Proceedings/pleadings/correspondence*". The plaintiff has highlighted, in bold, those matters which relate to his claim against the third named defendant. Two entries deserve comment. Firstly, the plaintiff's chronology gives a date for the statement of claim of 11th February, 2013. It is not at all clear where this date comes from and no explanation is given, on affidavit, by the plaintiff. It is plain, however, from the face of the statement of claim itself that it bears a date (in manuscript) of 5th November, 2013, which was written over a typed date of July 2012. I am satisfied that the statement of claim was, in fact, delivered as of 5th November, 2013, not on 11th February, 2013. The other item meriting comment is the 16th November, 2018 voluntary discovery letter which, elsewhere in this judgment, I refer to in more detail, being a letter which the third named defendant's solicitor avers was never received.

Delay disputed

54. In para. 16 of his 2nd December, 2019 affidavit, the plaintiff disputes that he has delayed, or materially delayed, in the prosecution of the proceedings such that any delay is inordinate and inexcusable and he avers that he wishes to make certain "*points*". The first of these is set out under the heading "*The Role of the Fifth Named Defendant/Clancy Construction*". In para. 17, the plaintiff avers that the fifth named defendant, who was the main contractor for the project, has only just delivered its defence on or about 8th October, 2019 and the plaintiff avers that the "*proceedings would clearly not be in a position to proceed to trial, unless and until said defendant, being the main contractor, had filed their Defence*". In para. 18, the plaintiff avers that the third named defendant would know that this was the position and

could not realistically wish to proceed to trial without the fifth named defendant. In para. 19, the plaintiff avers that his solicitors sought a defence from the fifth named defendant on or about 3rd July, 2019 and he exhibits the relevant letter.

The fifth named defendant

55. A number of things can be said in relation to these averments, as follows. The first time the plaintiff seeks a defence from the fifth named defendant is by letter dated 3rd July, 2019. This is despite the fact that the plenary summons issued eight years earlier on 19th July, 2011 and the fifth named defendant filed an appearance on 26th July, 2011. The plaintiff emphasises the importance of the fifth named defendant, indeed avers that the third named defendant could not realistically wish to proceed to trial without the fifth named defendant, yet nowhere does the plaintiff explain the reason why it was not until July 2019 that the main contractor was asked for a defence in respect of legal proceedings issued eight years earlier.

The plaintiff's 3rd July, 2019 letter requesting the fifth defendant's defence

56. In this regard, the relevant letter was one dated 3rd July, 2019, sent by the plaintiff's solicitor to Messrs. McCann Fitzgerald, solicitors for the fifth named defendant, and it states, *inter alia*, that:-

"On pursuing (sic) of the file we note that no defence to these proceedings has been delivered on behalf of your Client within the time limit set out in the Rules of the Superior Courts. We hereby request that you deliver a defence to these proceedings. We confirm that we consent to the late delivery of a defence within twenty-one days of the date of this letter. Please further note that if no defence is delivered within 21 days of today's date, we will proceed to issue a motion for final judgment against your Client and will use this letter in any application for costs."

Nowhere does the plaintiff explain why such a letter could not have been sent at an earlier date and why a motion of the type referred to in the 3rd July, 2019 letter could not have been issued at an earlier date, had same been required. Para. 20 of the plaintiff's affidavit goes on to state the following:-

"I say and believe that the primary reason for the delay in the fifth named defendant filing their defence is likely to have arisen from the fact that the said Party also brought a motion in the context of the (separate) Ocean Point proceedings seeking to stay those proceedings as against their company pursuant to an arbitration clause in the contract between Ocean Point and Clancy. I say that this motion was heard in April 2019 and on 10 May 2019, Barniville J. placed a stay on the Ocean Point proceedings as against the fifth named defendant."

Fifth defendant's 27th March, 2018 motion in the Ocean Point proceedings

57. Several observations can be made in relation to the foregoing averment. The third named defendant plainly has no role with regard to any motion which the fifth named defendant may decide to bring in the present proceedings, still less with regard to any motion brought by the fifth named defendant in *separate* proceedings brought by Ocean Point. Although the plaintiff speculates as to the reason why the fifth named defendant did not file a defence in the present proceedings until 3rd July, 2019, the plaintiff makes no averment in relation to his delay, nor does he proffer any reason in relation to such delay. Later in this decision, I will refer to the pleadings in the Ocean Point proceedings under Record No. 2014/7827P. It is a motion in those proceedings to which para. 20 of Mr. Dooley's Affidavit refers. It is a matter of fact that the fifth named defendant's motion in the Ocean Point proceedings was issued on 27th March, 2018 and, in a judgment delivered by this Court on 10th May, 2019 (Barniville J.), the proceedings by Ocean Point against the fifth named defendant were stayed. Despite this, nowhere in the plaintiff's 2nd December,

2019 affidavit in the present proceedings does the plaintiff refer to the delay on his part up to 27th March, 2018, being the date when the fifth named defendant issued the motion seeking to stay the Ocean Point proceedings.

58. In other words, nowhere does the plaintiff claim that, *prior* to 27th March, 2018, there was any impediment to the plaintiff progressing his claim in the present proceedings against the third named defendant or, for that matter, against the fifth named defendant. Quite apart from being a motion in a *different* set of proceedings, and quite apart from being a motion brought by the *fifth* named defendant in those other proceedings, it was a motion which was only brought in March 2018 and, thus, cannot conceivably account for delay which occurred *prior* to the said motion being issued. To say the foregoing is not, however, to suggest that it accounts for any delay in the prosecution of the plaintiff's case against the *third* named defendant in the proceedings by Mr. Dooley. I now return to an examination of the averments made by the plaintiff.

Crystallisation of the plaintiff's losses

59. Paras. 21 to 29, inclusive, appear in the plaintiff's affidavit under the heading "*The Crystallisation of your Deponent's Losses*". This is a second "*point*" which the plaintiff raises in the context of disputing *any* delay on his part and also averring that any such delay is neither inordinate, nor inexcusable. In para. 21 it is averred that the plaintiff's losses have failed to fully crystallise, as of yet, in circumstances where the Bank is seeking judgment against him in the sum of €19,993,793.50. In para. 22, the plaintiff avers that his solicitor wrote to the solicitor for the third named defendant on 12th May, 2016 proposing that the present proceedings and a number of other proceedings including those brought by the Bank be consolidated. It is averred in para. 23 that this offer was rejected by means of a letter from the third named defendant's solicitors of 14th June, 2016 and both of the aforesaid letters are exhibited.

60. Earlier in this judgment, I looked at both letters. It is a matter of fact that the request to consolidate proceedings did not merely involve the present proceedings and those brought by ACC Bank. Rather, the third named defendant was also asked to agree to the consolidation of legal proceedings by the plaintiff against his former solicitor; proceedings against the receiver appointed to Ocean Point; and what appear to be professional negligence actions. It is also a matter of fact that, after the solicitors for the third named defendant declined the said proposal, by means of the 14th June, 2016 letter, the plaintiff made no application to court to consolidate *any* proceedings, whatsoever.

The particular losses pleaded by the plaintiff

61. Furthermore, it is not averred by the plaintiff that his solicitors ever wrote to the third named defendant, at any stage after 19th July, 2011 (the date the plenary summons was issued) to suggest that the plaintiff's losses had *not* fully crystallised and that the plaintiff's claim could not proceed to trial until those alleged losses fully crystallised. Moreover, no such plea is contained in the 5th November, 2013 statement of claim which was served on the third named defendant or, for that matter, in the amended statement of claim, dated 28th September, 2015, a copy of which was sent to the third named defendant's solicitors on 16th December, 2015. On the contrary, the plaintiff particularises his loss at paras. 66-69 of the statement of claim, namely: €285,000 paid to Cleary Doyle Construction Ltd. (para. 66); €200,000 expended by the plaintiff on professional fees in relation to the abortive contract (para. 67); €3,257,000 incurred by the plaintiff on extended financing (para. 68); and €20,000,000 in lost profits which the plaintiff pleads that he stood to make from the sale of the Development were it not for the negligence, breach of contract and breach of duty of the defendants (para. 69).

16th November, 2018 voluntary discovery letter

62. In para. 24 of his 2nd December, 2019 affidavit the plaintiff refers to the third named defendant not having responded to his voluntary discovery letter sent in or around 16th November, 2018, a copy of which he exhibits. I have referred to this letter earlier in this judgment. This is a letter addressed to the *former* address of the third named defendant's solicitors, even though the plaintiff's solicitors had previously corresponded with the third named defendant's solicitors at their *current* address and it is averred by the third named defendant's solicitors that this letter was never received. I cannot determine whether or not the letter was, in fact, received given the dispute. What is clear, however, is that even if the plaintiff understood that, as of 16th November, 2018, the voluntary discovery request had been safely received, the plaintiff did nothing afterwards. In other words, despite receiving no reply, the plaintiff did not follow up with a further letter seeking a response to the 16th November, 2018 request. Nor did the plaintiff cause any motion for discovery to be issued. Given the fact that the pleadings "*closed*" with the delivery, by the third named defendant, of its defence on 10th November, 2014, the plaintiff provides no explanation whatsoever in his 2nd December, 2019 affidavit as to why voluntary discovery was not sought at the end of 2014, or at any stage in 2015, 2016, 2017 or at any point prior to the 16th November, 2018 letter, being a letter which was sent just over four years *after* the third named defendant delivered a defence. Furthermore, nowhere does the plaintiff aver that there was anything which prevented the plaintiff from issuing a motion for discovery as soon as it became apparent to the plaintiff's solicitors that no response was forthcoming in respect of the 16th November, 2018 letter. It is a matter of fact that it was not until 16th December, 2020 that the plaintiff caused a motion for discovery to be issued. This was over two years *after* the 16th November, 2018 voluntary discovery request (the receipt of which the third named defendant's solicitors dispute) and this comprised a motion issued over six years after the delivery by the third named defendant of a defence. Such a motion for discovery also issued *after* the present motion to dismiss the plaintiff's claim against the third named defendant.

63. In para. 26, the plaintiff avers that a statement of claim was served on the third named defendant on or around 11th February, 2013 and that the third named defendant did not serve what is described as an "*extensive*" notice for particulars until 3rd January, 2014, nearly eleven months later. The plaintiff also avers that, despite the deponent providing replies to particulars on 16th April, 2014, the third named defendant did not file a defence until 10th November, 2014, nearly six months later.

64. With regard to the foregoing averments, there is simply no evidence before the Court that the statement of claim was served on 11th February, 2013 and I am satisfied that, as a matter of fact, the statement of claim was *not* served then. On the contrary, the date on the face of the statement of claim is 5th November, 2013. It is a matter of fact that just less than two months later, the third named defendant raised a detailed notice for particulars, which ran to some 92 items. Given that Christmas and the New Year holiday period intervened, and having regard to the contents of the document, this could hardly be said to constitute significant delay on the part of the third named defendant. The said notice for particulars was replied to by the defendant some three and a half months later, on 16th April, 2014. It is a matter of fact that, at no stage prior to delivering replies to particulars, dated 16th April, 2014, did the plaintiff call upon the third named defendant to file a defence. Such a call was made by letter dated 9th October, 2014 and, one month and one day later, a defence was delivered on behalf of the third named defendant, dated 10th November, 2014.

The "reasons" proffered by Mr. Dooley

65. As well as denying that the plaintiff has delayed at all in the prosecution of his claim against the third named defendant, it is fair to say that Mr. Dooley's averments between paras. 17 to 28, inclusive, of his 2nd December, 2019 affidavit, comprise the entirety of the "reasons" proffered by the plaintiff in support of the proposition that there was no delay whatsoever on his part and, *if there was any delay, it was neither inordinate nor inexcusable*. That is clear from his averments in para. 28 in which the plaintiff states *"In light of the foregoing, I say and believe that your deponent has not delayed in the prosecution of the said proceedings, and/or that any such delays (if found) are inordinate and inexcusable"*. In para. 29, the plaintiff avers that, as a consequence, *"it is not strictly necessary to consider the balance of justice"*. He goes on to aver that, to the extent that the foregoing is necessary, he wishes to emphasise a number of matters and these are set out under two headings, the first of which is *"The Availability of Witnesses and Parties"*.

Witnesses

66. Between paras. 30 and 38, inclusive, the plaintiff makes a number of averments to the effect that the third named defendant has not identified any specific witness who is unavailable. The plaintiff avers that Mr. Pat Walsh, Mr. Michael Ferry and Mr. Cornelius O'Sullivan *"should be available to give evidence on behalf of the third named defendant"* (para. 31). The plaintiff also asserts that the involvement of the first and second named defendants is *"irrelevant"* to the third named defendant's application. It is averred that the title of the proceedings was amended, by order made on 7th December, 2015, to reflect the fact that Patterson Bannon Architects Ltd. are *"In Liquidation"*. Reference is also made to the plaintiff having obtained judgment in default of defence against the first named defendant on 7th December, 2015. Issue was taken with Ms. Mansfield's suggestion that *"it is unlikely that the liquidator of that entity will participate in the defence of these proceedings or that former employees"* will be available to give evidence. This averment is described by the plaintiff as *"hearsay"* and the plaintiff goes on to aver that Ms. Mansfield has not referred to any particular employee or employees of the first and/or second named defendant who is fundamental to the third named defendant's defence and who was not available to give evidence or who could not be subpoenaed (para. 37).

Oral evidence will be necessary at trial

67. In para. 38, it is averred that *"although oral evidence will, of course, be necessary for the trial of the action, a significant majority of the claim will be assessed by reference to documentary evidence and/or expert evidence"*. As regards the foregoing averment, it is appropriate to make the point, as I do more than once in this judgment, that, in light of the nature of the issues in dispute which emerge from an analysis of the pleadings in this case, a court tasked with hearing this case at a future trial would inevitably have to make findings of fact based on oral evidence concerning disputed matters, including what was or was not said and what did or did not take place, between mid-2006 and October 2008, including alleged meetings, discussions, and advices. This is not a case where all issues in dispute hinge, for example, on the interpretation of a clause in a contract. In other words, in order for a trial judge to determine the issues in dispute, she or he will have to rely to a material extent, on disputed oral evidence as to fact, not merely on documentary or expert evidence.

Professional reputation

68. In para. 39, under the heading *"Professional Reputation"*, the plaintiff refers to para. 11 of Ms. Mansfield's affidavit wherein she averred that a serious consequence of the plaintiff's delay is that outstanding claims interfere with the third named defendant's reputation and has an ongoing effect on its

professional indemnity insurance. In response, the plaintiff sets out five points, the first being that the fifth named defendant has only just delivered a defence to the proceedings in October 2019; the second being that the third named defendant has failed to respond to the voluntary discovery letter of 16th November, 2018; the third being that no issue of delay or *laches* was raised in the defence filed by the third named defendant in November 2014; the fourth being that the plaintiff's losses are yet to fully crystallise in light of the ongoing Bank proceedings; and the fifth being that the third named defendant did not raise the issue of delay or damage to its reputation prior to issuing the current motion.

69. In para. 40, it is asserted that, in light of these five points, there has been no prejudice suffered by the third named defendant. In para. 41, it is averred that further, or in the alternative, to the extent that there is any prejudice suffered (which is denied), the plaintiff avers that the balance of justice does not favour the dismissal of his claim against the third named defendant for the reasons averred.

70. In para. 42 of his affidavit, the plaintiff again avers that he has not delayed in prosecuting the proceedings and/or any such delays (*if found*) are neither inordinate, nor inexcusable. In para. 43, it is again asserted that the third named defendant has not been prejudiced, or materially prejudiced, and that if there has been any prejudice, the balance of justice favours the refusal of the application to dismiss the plaintiff's claim against the third named defendant. In para. 44, the plaintiff asks that the relief sought by the third named defendant be refused.

Replying affidavit Kevin Porter, sworn 9th June, 2020

71. Mr. Kevin Porter is a director of the third named defendant and he swore an affidavit on 9th June, 2020 in response to the plaintiff's affidavit. In para. 4, Mr. Porter avers that the events in dispute date back to 2008, when the fifth named defendant pulled off site due to the non-payment of architect's certificates. The substance of that averment does not appear to be in dispute. Mr. Porter goes on to aver that proceedings were commenced in 2011 and it was not until 2013 that the plaintiff delivered its statement of claim, some five years after the project was abandoned. Again, the substance of the foregoing averment does not appear to be in dispute. Mr. Porter avers, *inter alia*, that no step was taken by the plaintiff in the proceedings between September 2015 and November 2018 and that the plaintiff has failed to account for this delay in prosecuting his claim. Once more, the foregoing averment appears to be entirely consistent with the evidence before the Court, in that the only things which occurred between 28th September, 2015 (the date of the amended statement of claim, a copy of which was sent to the third named defendant's solicitors by letter dated 16th December, 2015) and 16th November, 2018 (the date of a letter seeking voluntary discovery, addressed to the former address of the third named defendant's solicitors, the receipt of which is dispute) comprises a single letter written to the third named defendant on 12th May, 2016 proposing that six different sets proceedings be consolidated (which proposal was declined relatively promptly, by means of a letter dated 16th June, 2016 sent by the third named defendant's solicitors).

Diminished memories

72. Mr. Porter's affidavit was sworn in June 2020, almost twelve years after work on site ceased and, in para. 5 of his affidavit, Mr. Porter makes reference to the twelve years which have elapsed, averring, *inter alia*, that "*inevitably documentation is no longer available and memories will have diminished with the passage of time*" resulting in what he describes as "*inevitable prejudice to the third named defendant in the Defence of these proceedings*". In para. 6, Mr. Porter avers that a motion which issued in separate proceedings (being in the proceedings under Record No. 2014/7827P in which Ocean Point is a plaintiff)

cannot explain the plaintiff's failure to prosecute these proceedings against the third named defendant, nor can it be used as a reasonable excuse for the inevitable prejudice now facing the third named defendant.

73. In para. 7 of Mr. Porter's replying affidavit, it is averred that the plaintiff has taken no step in the proceedings against the third named defendant since the discovery request of November 2018. It is further averred that the said request was never received by the third named defendant's solicitors and that the first sight of it was when the letter was exhibited by the plaintiff. It is averred that the request was sent to the "*former offices*" of the third named defendant's solicitors which offices had been vacated in 2013, five years prior to the request being sent. The fact that the third named defendant's solicitors vacated the office in question at that time is not in dispute. Mr. Porter goes on to aver that no follow-up correspondence had been received and no motion for discovery had been issued. As already explained in this judgment, this Court cannot make any determination as to whether the disputed November 2018 letter was received or not. It is not in dispute, however, that no follow-up correspondence was sent on behalf of the plaintiff and no motion for discovery was issued on the plaintiff's behalf. That was the position when Mr. Porter swore his affidavit in June 2020, approximately one year and seven months *after* the disputed voluntary discovery request.

74. In para. 8 of Mr. Porter's affidavit, he refers to the plea in the defence of the third named defendant to the effect that a separate entity, namely MMP-PM, was appointed as project manager of the Ocean Point development and he avers that the third named defendant was incorrectly joined. In para. 9, Mr. Porter avers that the third named defendant in the present proceedings, namely Mulcahy McDonagh & Partners Ltd., was incorporated in 2007 as "Mulcahy McDonagh Consultancy Services" and was re-registered as a limited company in 2008 and changed its name to "Mulcahy McDonagh & Partners Ltd" on 4th March, 2009. It is averred that the company had no involvement whatsoever in the management of the relevant site. In para. 10, Mr. Porter goes on to aver that both MMP-PM and the third named defendant are owned by the same parent company, "Mulcahy McDonagh Consultancy Services Unlimited Company", but that they remain separate legal entities. It is further averred that MMP-PM was slowly wound down from 2011 and has not traded since 2015 and that this project is the only outstanding issue in respect of which MMP-PM has any involvement; and Mr. Porter exhibits a September 2019 annual return filed in respect of MMP-PM.

75. From paras. 11 to 15, inclusive, Mr. Porter takes issue with averments made by the plaintiff in relation to the availability of parties and witnesses. Mr. Porter avers, *inter alia*, that Mr. Pat Walsh left MMP-PM on secondment in mid-2011 and that he left permanently in February 2012 to take up other employment. It is averred that, since that time, Mr. Walsh has had no connection with either MMP-PM or the third named defendant or any related company, Mr. Walsh being described as a "*critical witness as he was the MMP-PM director in charge of the Ocean Point Project and was the client contact person*". In para. 14, Mr. Porter avers that Mr. Michael Ferry left MMP-PM in or around 2008 and has had no contact with either MMP-PM or the third named defendant or any related company, Mr. Ferry being described as "*the senior project manager on the project and carried out the week to week management*". In para. 15, Mr. Porter avers that Mr. Cornelius O'Sullivan ceased his directorship with MMP-PM in June 2015 and retired at the time. It is averred, *inter alia*, that, having reached age 70 in December, Mr. O'Sullivan planned to move to Portugal this year but the pandemic has put a temporary hold on this and it is averred that Mr. O'Sullivan would clearly have very serious difficulties in taking part in any proceedings when

based in Portugal. In para. 16, Mr. Porter avers that, due to the passage of time, *"there are going to be serious difficulties in witnesses giving evidence and also in having the necessary documentation available"*.

Files thinned out / disposed of

76. He goes on to aver, in para. 16, *inter alia*, that the MMP-PM files on the jobs *"were thinned out and many files disposed of before the current proceedings were launched in 2011"*. He also avers, *inter alia*, that a consultancy firm called Watts UK Multi-Disciplinary Consultancy ("Watts") was engaged by the receiver appointed to the plaintiff in order to review the Ocean Point project and reference is made to a March 2009 interview conducted by Watts, with MMP-PM, on behalf of the receiver:-

"...after which MMP-PM was given the clear impression that there was no case to answer, which resulted in the further thinning out of the files. It was assumed when Watts, acting on behalf of the Receiver who had stepped into the shoes of the plaintiff, expressed satisfaction with the services provided by MMP-PM that this was the end of the matter and subsequently there was no further contact from the Receiver or Watts."

Later in this judgment, I will refer in some detail to the contents of an August 2009 report, prepared by Watts, which the plaintiff has exhibited.

77. The final paragraph of Mr. Porter's affidavit is one in which he avers that the passage of time has had a devastating impact on the ability of the third named defendant to defend the proceedings and he avers that the plaintiff's delay is inordinate and inexcusable.

Supplemental affidavit of Francis Dooley, sworn 9th November, 2020

78. The plaintiff swore an affidavit on 9th November, 2020 in response to Mr. Porter's affidavit. After certain uncontroversial averments, the plaintiff takes issue, in paras. 6-11, inclusive, with Mr. Porter's suggestion that the plaintiff abandoned the development site. The plaintiff avers that it was Clancy Construction Ltd., the fifth named defendant, who abandoned and walked off the site in October 2008. I am satisfied that nothing turns on this issue for the purposes of what this Court has to decide. It is not in dispute, however, that the fifth named defendant, according to the plaintiff's statement of claim, ceased work as of 6th October, 2008 and abandoned the site two days later.

79. In paras. 12 to 22, inclusive, the plaintiff makes averments with regard to what he describes as *"The credibility of the third named defendant's position regarding voluntary discovery letter dated November 2018"*. The thrust of these averments is to suggest that it is not credible that the third named defendant and their solicitors did not receive the voluntary discovery request dated 16th November, 2018. I have previously explained that this Court cannot determine whether the said letter was received, or not. It is not in dispute, however, that the said letter was sent to the previous address of the third named defendant's solicitors. Indeed, in para. 22, the plaintiff acknowledges as much when he avers as follows: *"I say that it is clear – as would be expected – that any correspondence sent to their previous address was being collected on a regular basis."* Nowhere, however, in the plaintiff's 9th November, 2020 affidavit does he explain why the letter was sent to the previous address of the third named defendant's solicitors. More significantly in my view, nowhere does the plaintiff explain why no request for voluntary discovery was made immediately after the third named defendant delivered its defence on 10th November, 2014. Nor does the plaintiff make any specific averments in relation to why a period of just over four years elapsed between the delivery by the third named defendant of its defence on 10th November, 2014 and the sending of a voluntary discovery request dated 16th November, 2018.

Five categories of discovery sought in November 2018 - Four years after defence delivered

80. At this juncture, it is appropriate to point out that the 16th November, 2018 voluntary discovery request, a copy of which comprises exhibit "FD4" to the plaintiff's replying affidavits of 2nd December, 2019 is a letter in which five categories of documents are sought and the reasons given in support of the voluntary discovery request are all reasons which include references to specific paragraphs in the defence delivered by the third named defendant. That being so, there does not appear to be any reason why such a letter could not have been sent at any stage from November 2014 onwards.

No motion for discovery after November 2018 request

81. As well as making no averments in an attempt to explain why voluntary discovery was not sought until four years after the third named defendant delivered a defence, the plaintiff makes no averments as to why a motion to compel discovery was not issued in the absence of any response to the 16th November, 2018 letter. In this regard, it is appropriate to point out that the text of the 16th November, 2018 letter includes, *inter alia*, the following:-

"AND TAKE NOTICE that if you fail, refuse or neglect to agree to make voluntary discovery within 21 days from the date of his (sic) letter, an application will be made to the High Court without further notice to you for an order requiring you to make discovery. Please note that this letter will be relied upon to fix you and with the costs of such motion."

As of 9th November, 2020, when the plaintiff swore his supplemental affidavit, almost two years had elapsed since the date of the voluntary discovery request, *without* any follow-up correspondence on the topic of discovery having been sent on behalf of the plaintiff to the third named defendant and *without* any motion for discovery having been issued, but the plaintiff's affidavit makes no averments in relation to these issues. The plaintiff avers, *inter alia*, that previous correspondence was sent to "12 South Mall, Cork" in 2014 and in 2016. The plaintiff does not, however, explain in his supplemental affidavit why it was the case that his solicitors wrote, on 12th September, 2018, to the *current* address of the third named defendant's solicitors enclosing a notice of intention to proceed, yet, less than a month *later*, the plaintiff's solicitors wrote to the *previous* address of the third named defendant's solicitors in respect of the voluntary discovery request.

82. The foregoing is not to make any finding that the voluntary discovery request was or was not received. It highlights, however, that no motion for discovery was served (on either the former or current address of the third named defendant's solicitors) despite the reference to same in the 16th November, 2018 voluntary discovery request which – for whatever reason – was never replied to. Given the conflicting averments concerning the receipt by the third named defendant's solicitors, I simply cannot hold that it was received by them and that the ball was exclusively in "their court" thereafter. On the contrary, the plaintiff made very clear what *he* would do, if there was no response to the discovery request within 21 days, but simply did not do that.

83. In paras. 23 and 24, the plaintiff refers to the assertion by Mr. Porter to the effect that the third named defendant is incorrectly named in the proceedings and the plaintiff avers that this is disputed and that it is a matter for trial, asserting also that the third named defendant is properly sued.

84. In paras. 25-30, the plaintiff makes averments under the heading of "*The alleged unavailability of witnesses*". The plaintiff avers, *inter alia*, that Mr. O'Sullivan was also a director of the third named defendant and that Mr. Stephen Walsh, along with Mr. Porter, is a current director of the third named defendant and the plaintiff avers that it is unclear to him whether there is any connection between Mr.

Stephen Walsh and Mr. Pat Walsh. In para. 28, the plaintiff avers that references to Mr. Walsh, Mr. Ferry and Mr. O'Sullivan no longer being employed by and, in the cases of Mr. Walsh and Mr. Ferry, Mr. Porter having had no contact with these individuals since 2008 and 2012, respectively, is not the same as those parties being unavailable to give evidence. In para. 29, the plaintiff avers that such parties could be subpoenaed and that, in the case of Mr. O'Sullivan, he could make the necessary arrangements to attend trial, even if based in Portugal. In para. 30, the plaintiff avers that no issue of delay and no issue as regards Mr. Walsh or Mr. Ferry, was raised in the third named defendant's defence of 10th November, 2014 and the plaintiff asserts that a significant inference can be drawn from what he describes as this "omission".

Efforts to contact witnesses

85. As regards the foregoing, to say one has had *no contact* with named individuals does not necessarily mean that those individuals are *uncontactable*. Nor does it mean that they will necessarily be *unavailable* as witnesses. It is also fair to say that the third named defendant has not made averments in relation to what *efforts* were made to contact any of the foregoing three individuals prior to affidavits being sworn. I will return to this issue later in this judgment. Before leaving the topic, however, it seems to me appropriate to say that even if the Court were to assume that all three (and any other relevant witnesses) would be available for a future trial, the distance between the events giving rise to the plaintiff's claim and a future trial, coupled with the need for a trial judge to rely to a material extent on witness memories to make findings of fact concerning disputed matters (including what was or was not said and understood in 2006, 2007 and 2008), does not seem to me to be "cured" by the availability of witnesses. A material degrading of witness memories would seem to me to be inevitable even if all relevant witnesses are available.

86. In paras. 30 and 32, averments are made under the heading "*Expert Evidence*" to the effect that a significant majority of the claim will be assessed by documentary evidence and/or expert evidence and the plaintiff refers to seven reports, including the report by Watts dated February - August 2009, going on to aver that the plaintiff is unclear as to what expert evidence the third named defendant would intend to call. As regards the foregoing, there are cases where the outcome will be determined by, for example, the interpretation of the wording used in a formal contract or the views of experts. This is not such a case. The pleadings disclose numerous disputes of fact including what was or was not said, represented, advised and understood by various parties, at various and numerous points in 2006, 2007 and 2008. This is not a case which can be decided exclusively with reference to either expert evidence or the interpretation of documents.

Averments regarding separate proceedings (Record No. 2011/5235P)

87. Paras. 33-43, inclusive, comprise averments made under the heading "*The Proceedings entitled Dooley v. Clancy Project Management Ltd & anor, High Court: Record No. 2011/5235P*". In these paragraphs, the plaintiff makes certain averments in relation to an entirely separate case, under Record No. 2011/5235P, in which the third named defendant in the present proceedings is the second named defendant in the proceedings under Record No. 2011/5235P. Among other things, the plaintiff refers to correspondence sent on 15th May, 2020 by Messrs. DWF Solicitors who represent Mulcahy McDonagh & Partners Ltd. in those other proceedings, which correspondence seeks further particulars from the plaintiff in those proceedings under Record No. 2011/5235P. The plaintiff exhibits that correspondence and he also exhibits his replies to particulars dated 10th June, 2020 as well as a response sent by DWF Solicitors

to the effect that the replies to particulars were being reviewed and that they would be sending a request for voluntary discovery in the coming days. The plaintiff also refers to a voluntary discovery request received by him on 21st July, 2020 and, as well as exhibiting this, he refers to and exhibits an exchange of correspondence of September 2020 with regard to modified categories of discovery proposed by the plaintiff's solicitors. The plaintiff also exhibits further correspondence regarding discovery in those other proceedings, which correspondence dates from October and November 2020.

88. In para. 41 of his 9th November, 2020 affidavit, the plaintiff avers that, whilst the third named defendant in the present proceedings asserts that there are going to be serious difficulties in witnesses giving evidence and also in having documentation available, he asserts that *"by contrast in the proceedings Record No. 2011/5235P they have, in fact, sought categories of voluntary discovery"*. In para. 42, the plaintiff asserts that no issue of witness unavailability has been raised in proceedings under Record No. 2011/5235P and, in para. 43, he makes the following averment:-

"In fact, I say and believe that, in both proceedings, the third named defendant is merely seeking not to deal with the claim: in this case, by seeking to have the claim dismissed for want of prosecution, rather than by dealing with the outstanding voluntary request; and in Proceedings Record No. 2011/5235P by raising particulars and then a belated discovery request, when this Deponent was looking to have the matter determined."

Damage to pub premises

89. It is a matter of fact that the proceedings under Record No. 2011/5235P are proceedings in which a different firm of solicitors acts for Mulcahy McDonagh & Partners Ltd. The plaintiff has not exhibited a copy of the pleadings in respect of those proceedings. As to their nature, the plaintiff merely avers, in para. 33 of his 9th November, 2020 affidavit that this other set of proceedings *"relate to damage caused to the pub premises located on the development site and owned by this deponent herein"*. Having regard to the foregoing averment, it is uncontroversial to say that those other proceedings involve different issues. It is clear, however, from a reading of the 21st July, 2020 letter sent by DWF Solicitors to the plaintiff's solicitors (which letter comprises exhibit "FD9" to Mr. Dooley's supplemental affidavit) that, in those other proceedings which relate to alleged damage to a pub premises, the question of the incorrect defendant having been named is a *"live"* issue. The following is a *verbatim* quote from the second page of the letter from DWF Solicitors dated 21st July, 2020 in which a reason is set out as a basis for a request for a particular category of documentation:-

"At paragraph 6 of its Defence delivered on the 24th day of April 2015, the second defendant denies the matters pleaded at paragraph 6 and 7 of the statement of claim. The second defendant denies that it provided project management and associated services and/or entered into an agreement with the plaintiff whether as alleged at paragraph 7 of the statement of claim or at all. It is also pleaded that the second defendant never had a contractual relationship with the plaintiff for project management services.

At paragraph 7 of the Defence the second defendant pleads that in or about May 2006, the plaintiff purporting to be Ocean Point Development Limited (with Phillip McDonald) requested MMP Project Management to provide a limited post tender project management service in relation to the development. The second defendant pleads that MMP Project Management Limited agreed to provide construction stage project services. The services to be provided by MMP Project Management Limited were limited to the construction stage of the development."

90. Nowhere in the plaintiff's 9th November, 2020 affidavit does he explain why the notice for particulars raised, and the discovery documents sought by Mulcahy McDonagh & Partners Ltd. in *separate* proceedings under Record No. 2011/5235P, concerning alleged damage to a pub, caused, contributed or is in any way relevant to the delay of just over four years on the part of the plaintiff with regard to writing a letter seeking voluntary discovery from the third named defendant in the *present* proceedings.

91. Nor does the plaintiff say how any steps taken by a different firm of solicitors in a different set of proceedings concerning different issues caused, or in any way contributed to, the delay on the part of the plaintiff in the present proceedings, with regard to issuing a motion to seek an order for voluntary discovery in the absence of the plaintiff receiving a response to the 16th November, 2018 voluntary discovery request.

92. Although making specific reference to separate proceedings under Record No. 2011/5235P, nowhere does the plaintiff aver that his involvement as a plaintiff in those proceedings caused, or contributed to, or explains any of the delay arising in respect of the prosecution by the plaintiff of the present proceedings. I am satisfied that it does not.

Proposed case-management of the Dooley and Ocean Point proceedings

93. In paras. 44-49, inclusive, averments are made by the plaintiff under the heading "*Proposed Case Management of (a) the Within Proceedings and (b) Proceedings entitled Ocean Point Development Company Limited (In Receivership) v. Patterson Bannon Architects Limited & Ors High Court: Record No. 2014/7827P*". In para. 44, the plaintiff avers that, on 16th July, 2020, particulars were sought by the plaintiff in respect of the defence delivered by the fifth named defendant and, in para. 45, it is averred that, on 30th July, 2020, the plaintiff's solicitors wrote to the fifth named defendant's solicitors seeking their consent to link the within proceedings and proceedings under Record No. 2014/7827P and seeking agreement as to expedited case management directions; and the plaintiff exhibits the relevant correspondence.

94. It is appropriate to point out that the aforesaid July 2020 notice for particulars, and request for the fifth named defendant's consent to the linking of proceedings and to case management, were made on behalf of the plaintiff almost a year *after* the third named defendant issued the present motion, on 6th August, 2019, seeking to dismiss the plaintiff's claim. The aforesaid 30th July, 2020 request, which was sent to McCann Fitzgerald Solicitors on 30th July, 2020, was declined by means of a 29th October, 2020 letter, sent by McCann Fitzgerald to the plaintiff's solicitors.

Separate and distinct causes of action

95. The plaintiff exhibits a copy of same and it is appropriate to quote the following from the 29th October, 2020 letter sent on behalf of the fifth named defendant:-

"Our client does not accept that any saving of court time or expense would be achieved if these two cases were heard together. The proceedings under High Court Record No. 2014/7827P consist of a breach of contract claim issued by Ocean Point Development Company Limited in relation to contracts entered into by it for the construction of a development at Courtown, Co. Wexford. The proceedings under High Court Record No. 2011/6564P relate to a claim in negligence by Mr. Francis Dooley related to obligations which Mr. Dooley alleges were owed to him by the parties involved in the construction of the development at Courtown, Co. Wexford. Save for the fact that the two cases relate to the same development, the causes of action arising in both cases are completely separate

and distinct. There is no overlap in the evidence between these two sets of proceedings and therefore no saving in court time or expense would accrue if these cases were heard together.

As you will be aware, our client successfully obtained an Order of the Court dated 29 May 2019 placing a stay on the proceedings issued by your client, Ocean Point Development Company Limited, under High Court Record No. 2014/7827P, against it, pending arbitration.

As you will also be aware, our client brought a motion seeking to strike the proceedings issued by your client, Francis Dooley, under High Court Record No. 2011/6564P. In her judgment delivered on 19 May 2015, Ms. Justice Costello dismissed the majority of the claim made by Francis Dooley as against our client save solely in respect of a claim in negligence with regard to duties owed by our client to Francis Dooley on the basis that the Court could not be satisfied that Mr. Dooley's claim against our client was bound to fail.

Therefore, our client has no involvement in the proceedings under High Court Record No. 2014/7827P and has a very limited involvement in relation to the proceedings under High Court Record No. 2011/6564P. In addition to the fact that there is no overlap in the evidence required to hear these two sets of proceedings, it would be unjust and unfair to expose our client to the inevitably increased cost and expense that would arise in the event that these cases we (sic) to be heard together..."

96. In para. 47, the plaintiff avers that the fifth named defendant has also failed to furnish replies to particulars and a response to his request for expedited directions to trial and he avers, in para. 48, that he has instructed his solicitors to issue a case management motion pursuant to O. 63C of the Rules of the Superior Courts in order to join the two sets of proceedings and in order to seek expedited directions to a full trial of these actions.

A clear path to a trial

97. In para. 49, it is averred that the foregoing is relevant to the third named defendant's application "as it sets out a clear path to a trial of the full action, which would, subject to This Honourable Court, include the third named defendant herein". As I noted earlier in this judgment, on 16th December, 2020, the plaintiff's solicitors issued a motion to join the present proceedings to those under Record No. 2014/7827P and to admit the matter to case management and, on 25th January, 2021, the said motion was adjourned to 24th March, 2021. Plainly, the said motion seeking to join the proceedings with those under Record No. 2014/7827P and seeking case management is a motion which was issued, a year and four months *after* the third named defendant issued the present motion, which seeks to have the plaintiff's claim dismissed. Given the fact that those other proceedings under Record No. 2014/7827P, in respect of which Ocean Point is the plaintiff, are proceedings which were issued on 5th September, 2014, it is appropriate to point out that, nowhere does the plaintiff explain why the motion to join both sets of proceedings and to seek directions was not brought until over six years and three months *after* the Ocean Point proceedings under Record No. 2014/7827P were issued.

98. In paras. 50-58, inclusive, the plaintiff makes a range of averments under the heading "*Watts UK Multi-Disciplinary Consultancy*". With regard to Mr. Porter's averment that MMP-PM files were "*thinned out and many files disposed of*" before the current proceedings were instituted in 2011, the plaintiff asserts that company books and records are required to be kept for a six-year period which, according to the plaintiff, has not occurred in this case and he avers that the third named defendant should have acted with an abundance of caution, where there were clearly issues relating to the development site, as he

puts it. With regard to Mr. Porter's averments regarding an interview with Watts, the plaintiff takes issue with Mr. Porter's assertion that MMP-PM were given a "*clear impression that there was no case to answer*". The plaintiff asserts that this could not be further from the truth and he goes on to quote from the Watts report dated 21st August, 2009, in particular, from paras. 2.8.11 and 2.8.12 of the Watts report. Having quoted from the Watts report, the plaintiff avers that "*Far from being 'satisfied' with the role of the third named defendant, the views of Watts were precisely the opposite*" and the plaintiff exhibits a full copy of the Watts report. Given its significance according to the plaintiff, it is appropriate to look in some detail at the Watts report.

The Watts report

99. It is clear from its contents that the Watts report was prepared, *not* for the plaintiff, but for the receiver appointed to Ocean Point and the title of the report is "*Project implementation plan for Ferris and Associates: relating to Ocean Point development, Ballintray, Courtown, Co. Wexford, Version: 1; report date: 21st August 2009*". Section 2.8 of the said report is stated to be "*Comment on Liability*". Plainly, that was a comment made by Watts, in 2009, in the context of what were recommendations to the receiver. Para. 2.8.1 of the Watts report states:-

"Within the report we have set down where we feel parties involved in the project may have some liability towards the cost of rectifying the various shortcomings that have arisen. In summary, findings are as follows ..."

Paras. 2.8.2 – 2.8.6 inclusive, concern Patterson Bannon and includes, at para. 2.8.6, the statement that:-

"Based on the above, we feel that the Receiver may, subject to further legal advice, contemplate taking action against Patterson Bannon for the recovery of damages associated with the cost of addressing matters of compliance. Their role in relation to the performance of the contractor on site should also be examined in detail."

The receiver did not, however, issue proceedings against Patterson Bannon arising out of these views expressed by Watts. Paras. 2.8.7 to 2.8.10 concern Clancy Construction and include, *inter alia*, the statement at para. 2.8.7 that: -

"Our investigations on site, and in particular the opening up work carried out throughout the development, has revealed serious shortcomings with the workmanship undertaken by Clancy Construction or by sub – contractors under their control."

At para. 2.8.8, the Watts Report states that: -

"Whilst Clancy's are not solely liable for these costs, they are in our view responsible for a portion and certainly a sum in the order of €760,000.00 for defective work/snags".

It is appropriate to set out verbatim the entire of paras. 2.8.11 and 2.8.12 which refer to the third named defendant: -

"MMP – Project managers

2.8.11: We met with MMP on one occasion at the onset of our review. It was clear from our meeting that MMP did not feel that they had any specific responsibilities throughout this project and it is unclear to us exactly what role MMP were performing during the construction phase. They did not provide Watts with details of their appointment document as requested. Members of the design team have all best reservations about the role of MMP and there is a doubt even amongst members of the design team as to the role they were playing. From the serious shortcoming in planning and

fire compliance alone, we feel that MMP have questions to answer regarding the management of this particular project and their role as Project Managers in the context of these shortcomings.

2.8.12: We have not had sight of any formal appointment documents and this may in fact exclude MMP from certain obligations. However, we are of the view that there was an implied obligation on MMP to at least ensure that the development was constructed in a manner to enable the development to be sold. This has not been achieved”.

It is not for this Court to make any determination in relation to issues which are in dispute in the underlying proceedings. It is uncontroversial to say, however, that the receiver, for whatever reason, chose not to institute any legal proceedings against the third named defendant arising out of the views expressed in 2009 by Watts. It is also fair to say that, whereas Watts note that no appointment document was provided, the plaintiff in the present proceedings has not exhibited any appointment document which is said to comprise any contract between the plaintiff and the defendant. It is also fair to say that nowhere does the Watts report engage with any possible distinction between the third named defendant in the present proceedings (company no. 44451) and the legal entity named “M.M.P. Project Management Ltd” (company no. 305367), in respect of which Mr. Porter exhibited an annual return made up to 4th September, 2019. What is entirely clear however is that any future trial would require a significant amount of oral evidence from a range of witnesses in order that the issues in dispute could be fairly determined; and this is borne out by the contents of the Watts report, the summary of which, at s. 4.11 states as follows: -

“4.11 Summary

4.11.1: In summary, the view of Watts has not changed since our first visit to the site in January 2009. We never disputed the main thrust of the allegations made by OPDL (Ocean Point), however we have always rejected the severity of the claims made in relation to structural defects and the remedies put forward by OPDL. It remains our view, and this is now supported by the investigations carried out, that all of the issues raised by OPDL team of consultants can be addressed by undertaking a programme of repairs to the development.

4.11.2: It is our opinion that liability for the cost of the repairs will attach to the party responsible and in the majority of cases this is the main contractor. In the case of poor workmanship issues or a failure to follow design information, these costs should certainly attach to the Main Contractor. In cases where the design was flawed or the wrong product was specified, these costs should attach to the design team member with responsibility for that element. We have endeavoured to allocate responsibility within this report and details are included in the relevant report sections.

4.11.3: In putting forward the proposition that the development was structurally unsound, the developer and his advisors failed to acknowledge the critical and fundamental issue that the completed development has not been constructed in accordance with the planning permissions in place and was therefore an unauthorised development. They also ignored the fact that the development is not constructed in accordance with the fire certificate and a potentially dangerous structure from the point of view of fire safety. Whether the developer’s position was formed by the understanding that OPDL were in some way complicit in design decisions, which subsequently resulted in non – compliance remains to be seen. However, it would appear from our review that the decision to proceed with certain elements of work, which are not compliant, were made at the request of OPDL. These include:

- *Proceeding with works that were the subject of the appeal to the 2007 planning grant.*
- *Constructing unauthorised structures in Retail Unit 6 and the Eurospar Unit.*
- *Constructing a rooftop structure to the Rotunda in excess of agreed heights.*
- *Erecting a staircase to a flat roof in contemplation of future development.*
- *Failing to build out the site of the Public House*

4.11.4: *A review will be required to understand if the role of the developer's project managers extended to advising the employer on the impact of these decisions and on the appointment of design team members to perform certain roles to ensure that everything was compliant, but this is a separate exercise that falls outside of the scope of this report.*

4.11.5: *All of the major claims in respect of the overall structural integrity of the development made by OPDL and their appointed advisors have, on the whole, proved to be unfounded and the scheme is certainly not a development that is structurally unsafe as was suggested. It is however a development that is unsafe to any occupier due to the fire safety issues. Also, all of the defects have a solution and it remains our opinion that these issues should have been addressed in the usual manner, through existing appointments and the building contract that was in place.*

4.11.6 *We go on to discuss the recommended works that we feel are required to address the shortcomings to the development in section 7.0 Recommended Works."*

54. While emphasising, once more, that this Court is not purporting to make any determination of any issue in dispute in the main proceedings, it is uncontroversial to say that the foregoing views were expressed by Watts in a report issued, not to the plaintiff, but to the receiver of Ocean Point and included, *inter alia*, views regarding Ocean Point's role in decisions taken; as well as the view that all major claims in respect of the overall structural integrity of the Development made by Ocean Point have on the whole proved to be unfounded; as well as the view that all defects had a solution. It is equally uncontroversial to say that the Watts report does not constitute a definitive view as to the liability of any party, be that the architect, the contractor, the third named defendant, or, for that matter, Ocean Point itself. The report's contents underscore, however, the need for oral evidence to be given in respect of matters going back, at this stage, between thirteen and fifteen years, in order for the issues which arise in the present proceedings to be determined.

The balance of justice

55. Returning to the plaintiff's supplemental affidavit of 9th November, 2020, paras. 59 to 61, inclusive, are said to relate to "*The Balance of Justice*". In para. 59, the plaintiff disputes that there has been any delay on his part and he goes on to aver that, if delay is established, it is neither inordinate nor inexcusable; and in para. 60 the plaintiff categorically disputes that the third named defendant is unable to defend the claim. In para. 60, the plaintiff avers that the third named defendant has not averred that the balance of justice favours the dismissal of the plaintiff's claim and the plaintiff asserts that the opposite is true. The affidavit concludes with para. 62, in which the plaintiff seeks that the third named defendant's relief be refused.

Replying affidavit of Lisa Mansfield, sworn 15th December, 2020

56. It is fair to say that this relatively short affidavit, comprising ten paragraphs, is primarily concerned with the issue of whether the letter dated 16th November, 2018 seeking voluntary discovery was received. In short, Ms. Mansfield, solicitor for the third named defendant disputes that the letter was ever received. She refers to the mail forwarding system which has been in place ever since her firm vacated its former

offices at 12 South Mall, Cork, to ensure that mail posted to that address is redirected to the “current” premises in Citygate Park, Mahon Point, Cork. Among other averments, Ms. Mansfield points out that, on 14th September, 2018, the plaintiff wrote to her firm’s *current address* enclosing a notice of intention to proceed whereas, a month later, the plaintiff’s solicitors wrote to their *old address* at 12 South Mall. Once again, I want to emphasise that I am not determining the issue in relation to whether the 16th November, 2018 letter was ever received, or not. It is not in dispute, however, that it was not followed up by any other correspondence, nor was the motion, which is threatened in the letter, issued until long after the third named defendant brought the present motion to strike out the plaintiff’s claim. At para. 7, Ms. Mansfield confirms that Mr. Pat Walsh and Mr. Stephen Walsh are not related. In para. 8, Ms. Mansfield avers that a defence is not an appropriate place to deal with issues of delay and unavailability of witnesses, and in para. 9, Ms. Mansfield avers *inter alia*, regarding the Watts report, that:-

“I say that the third defendant’s understanding, following its meeting with Watts UK multi – disciplinary consultancy in March 2009, was that there no (sic) case to answer and as there was no follow up from either Watts or the receiver with the third defendant following that meeting, that impression was reinforced”.

Affidavit of John P. O’Donohoe, sworn 4th February, 2021

57. Mr. O’Donohoe is the plaintiff’s solicitor and, in his affidavit sworn 4th February, 2021, he refers to and exhibits two motions which were issued on behalf of the plaintiff on 16th December, 2020, the first of which seeks to join the present proceedings with those under Record No. 2014/7828 P and to admit both matters to case management, the second motion being one which seeks an order compelling the third named defendant to make discovery. Elsewhere in this judgment I have referred to those motions. It is fair to say that they were issued long *after* the third named defendant issued its application to have the plaintiff’s claim against it dismissed by reason of delay.

The plaintiff’s discovery motion which issued on 16th December, 2020

58. Insofar as the plaintiff’s discovery motion is concerned, the sole correspondence relied upon is the 16th November, 2018 letter, the receipt of which is disputed by the third named defendant’s solicitors. It is appropriate to say, however, that nowhere does Mr. O’Donohoe aver that it was not possible for the plaintiff to write to the defendant sooner than 16th November, 2018 seeking discovery. Nor does Mr. O’Donohoe proffer any explanation for the fact that the 16th November, 2018 letter came just over four years *after* the third named defendant delivered a defence, dated 10th November, 2014. Furthermore, Mr. O’Donohoe offered no explanation in relation to the delay with regard to the issuing of the motion, namely, the delay between the 16th November, 2018 letter seeking voluntary discovery and the motion which did not issue until 16th December, 2020, over two years later.

59. The foregoing comprises an analysis of the entirety of the affidavits before the court in the Dooley proceedings.

Chronology of relevant dates in the Dooley proceedings

60. Having looked in some detail at the pleadings, the averments made in various affidavits and the exhibits thereto, a timeline emerges and it is helpful to set this out. The following chronology comprises certain dates which are particularly relevant to the Dooley proceedings (Record no. 2011/6564 P). The items highlighted in bold relate to the plaintiff’s pleaded claim against the third named defendant, whereas the items which are not highlighted concern the plaintiff’s claim against other defendants.

| Date | Event |
|--|--|
| 30th September, 2006 | Cleary Doyle quit the site after the plaintiff has paid them €285,000 and has incurred a further €200,000 in costs and professional fees (para. 20 of the statement of claim) |
| 6th October, 2008 | The fifth named defendant suspends the works and two days later abandons the site (para. 47 of the statement of claim) |
| 19th July, 2011 | Plenary summons issued |
| 26 th July, 2011 | Appearance by fifth named defendant |
| 28 th July, 2011 | Appearance by first named defendant |
| 29 th July, 2011 | Appearance by second named defendant |
| 11th August, 2011 | Appearance by third named defendant |
| 21 st November, 2012 | Notice of change of solicitor by fifth defendant |
| 3 rd April, 2013 | Notice for particulars by first defendant |
| 23rd May, 2013 | Notice of intention to proceed served by plaintiff |
| 4 th June, 2013 | Plaintiff replies to particulars raised by first defendant |
| 8 th August, 2013 | Defence of second defendant |
| 19 th September, 2013 | Further notice for particulars by first defendant |
| 26 th September, 2013 | Notice for particulars by plaintiff in relation to defence of second defendant |
| 5th November, 2013 | Statement of claim delivered to third defendant |
| | |
| 2 nd January, 2014 | Replies to particulars by second defendant |
| 3rd January, 2014 | Third defendant's notice for particulars |
| 31 st January, 2014 | Notice of change of solicitors for fifth defendant |
| 16th April, 2014 | Plaintiff's replies to third defendant's notice for particulars |
| 9 th May, 2014 | Notice for particulars by fifth defendant |

| | |
|--|---|
| 8 th September, 2014 | Title of proceedings amended by plaintiff |
| 16th September, 2014 | Plaintiff's notice of change of solicitor |
| 23 rd September, 2014 | Liquidator appointed to first defendant |
| 3 rd October, 2014 | Replies by plaintiff to fifth defendant's particulars |
| 9th October, 2014 | Plaintiff writes to third defendant seeking a defence |
| 10th November, 2014 | Defence of third defendant |
| 25 th December, 2014 | Second defendant is dissolved |
| 28 th September, 2015 | Amended statement of claim |
| 7 th December, 2015 | Orders (Haughton J.) amending plenary summons and entering judgment against first defendant |
| 16th December, 2015 | Letter to third defendant enclosing amended statement of claim (which amendments do not relate to the claim against the third defendant) |
| 12th May, 2016 | Plaintiff's letter to third defendant proposing consolidation of six sets of proceedings |
| 16th June, 2016 | Third defendant rejects consolidation proposal |
| 12th September, 2018 | Plaintiff's notice of intention to proceed |
| 16th November, 2018 | Plaintiff's letter seeking voluntary discovery (the receipt of which is disputed by third defendant) |
| 6th August, 2019 | Third defendant's motion to dismiss for want of prosecution |
| 8 th October, 2019 | Defence of fifth named defendant |
| 16th December, 2020 | Plaintiff issues motion to join these proceedings with proceedings brought by Ocean Point Development Co. Ltd. (in receivership) v. Patterson Bannon Architects Ltd. (in liquidation) & Ors Record No. 2014/7827 P and seeking case management |

| | |
|---------------------------------------|---|
| 16th December, 2020 | Plaintiff issues motion seeking order for discovery against third defendant (based on 16th November, 2018 letter) |
|---------------------------------------|---|

Having identified, above, the facts which emerge from an analysis of the evidence before this Court in the context of the application to dismiss the Dooley proceedings, I now propose to do likewise in respect of the Ocean Point proceedings.

The Ocean Point proceedings (Record No. 2014/7827 P)

61. In the Ocean Point proceedings, the same defendants were named in the plenary summons (which issued on 5th September, 2014 under Record No. 2014/7827 P) as had been named in the plenary summons in the Dooley proceedings (which issued on 19th July, 2011 under Record No. 2011/6564P). It is appropriate to examine the chronology of relevant events in the Ocean Point proceedings and I do so, as follows.

2014

62. The general indorsement of claim to the plenary summons provides that:-

"The plaintiff's claim is for: 1. Damages for negligence; 2. Damages for breach of duty; 3. Damages for breach of contract; 4. Damages for consequential loss and damage sustained by the plaintiff as a result of the negligence, breach of duty and breach of contract of the defendants, their servants or agents; 5. If necessary, an inquiry as to damages; 6. Further or other relief; 7. Interest pursuant to statute; 8. Costs."

Other than the foregoing, there is no specific detail given in relation to what is alleged to constitute the legal wrongs on the part of the defendants or how they are said to have occurred.

2015

63. A notice of change of solicitors was served on 31st August, 2015. An appearance was filed, on 15th September, 2015, on behalf of the third named defendant by Messrs. DWF Solicitors.

2016

64. Over two years *after* the issuing of the plenary summons, a statement of claim, dated 21st December, 2016, was delivered in the Ocean Point proceedings. It is necessary to look at the case made by Ocean Point, in some detail.

The Ocean Point statement of claim dated 21st December, 2016

65. In para. 7 of the Ocean Point statement of claim, it is pleaded that:-

"The plaintiff was the development company incorporated by its director and 100% shareholder Mr. Francis Dooley on 16th August 2006 to engage and complete in the development on lands in his ownership. The lands were known as the Courtown Entertainment Complex, in Courtown Co. Wexford. Mr. Dooley is the owner of both the lands and the adjoining licenced premises".

66. In para. 8 of the statement of claim, it is pleaded that redevelopment proposals for the said lands were commenced in mid-2004, with a planning application lodged in October 2004 and in para. 9 it is pleaded that *"Further to this Mr. Dooley engaged with a number of contractors/developers to complete the 'Development' on a turnkey basis"*. From para. 10, onwards, the pleas contained in the Ocean Point statement of claim mirror those which are found in the statement of claim in the Dooley proceedings (under Record No. 2011/6564 P).

Similarities

67. It is fair to say that the vast majority of the contents of the Ocean Point statement of claim reflect, *verbatim*, the contents of the statement of claim in the Dooley proceedings, save for what might be called "housekeeping" amendments (such as "Mr. Dooley" appearing in the Ocean Point statement of claim, instead of the word "Plaintiff"). In other words, the narrative as to relevant events; the dates of those events; the nature of the claims; and the particulars of alleged negligence, breach of contract and breach of duty in the statement of claim all reflect the pleas made in the Dooley proceedings.

Verbatim repetition

68. By way of example, if one looks at "*Particulars of negligence, negligence misstatement, breach of contract, and breach of duty, including statutory duty of the third named defendants*", one sees the following pleaded at para. 64 of the Ocean Point statement of claim: -

"64. *The third named defendant has caused the plaintiff loss and damage through their negligence, negligent misstatement, breach of contract, and breach of statutory duty in that they, inter alia;*

(s) Misrepresented to the plaintiff the importance and significance or (sic) proceeding with a development which was not in compliance with planning.

(t) Negligently failed to inform the plaintiff of the risks which he ran as a consequence of same.

(u) Failed to ensure that Cleary Doyle did not enter into possession of the site without there being an effective dispute resolution clause (and/or agreement as to price/scope of works) in place.

(v) Failed to properly supervise the works, or at all.

(w) Failed to ensure that the overhead line traversing the site was not a source of delay before the commencement of the works.

(x) Failed to ensure that the works proceeded in a workmanlike fashion.

(y) Failed to properly oversee the quality of the Fifth Named Defendant's works."

69. The above wording in para. 64 (s) – (y) in the Ocean Point statement of claim, dated 21st December, 2016, is *precisely* the same (including the typographical error "or" in the first sub-paragraph) as the wording found in para. 61 (a) – (g) of the statement of claim, dated 5th November, 2013, delivered in the Dooley proceedings (under Record No. 2011/6564 P); and is also *identical* to the wording in para. 61 (a) – (g) in the amended statement of claim dated 28th September, 2015 in the Dooley proceedings.

23rd May, 2006; 30th September, 2006

70. Earlier in this judgment, I examined at some length the contents of the statement of claim in the Dooley proceedings (Record No. 2011/6564 P). Given the similarities between both statements of claim it is unnecessary to repeat that analysis with respect to the Ocean Point statement of claim. It is appropriate, however, to observe that precisely the same pleas are made with regard to the relevant dates. For example, in para. 16, it is pleaded that Mr. Dooley approached the third named defendant on or about 23rd May, 2006 and met with Mr. Pat Walsh of the third named defendant "*to discuss his requirement*". Later, it is pleaded that Mr. Dooley, based on advice of the first and third named defendants, negotiated a commercial settlement with Cleary Doyle in respect of the works carried out. In para. 21 it is pleaded that, following a payment made to Cleary Doyle of €285,000:-

"*Cleary Doyle quit site by agreement in or around 30th of September 2006 leaving Mr. Dooley where he had begun, but delayed by a number of months and out of pocket in the amount of €285,000 paid to Cleary Doyle together with approx. €200,000 in associated costs, including professional fees. Moreover, Mr. Dooley was now back to square one as far as the development was concerned*".

2nd April, 2007; 31st March, 2008; 6th October, 2008

71. The statement of claim goes on to plead that the fifth named defendant, Clancy Construction, entered into a contract with Ocean Point on or about 2nd April, 2007, providing for a completion date for the works of 31st March, 2008 (para. 35 of the statement of claim). It is also pleaded that, in or around one week after the fifth named defendant began work on site, all work stopped because of the presence of a high voltage cable traversing the site (para. 39). The statement of claim goes on to make the same pleas in relation to alleged defects, alleged meetings and alleged discussions in respect of same, alleged insufficient supervision, revised completion dates and also repeats the pleas in respect of Certificates 15 and 16, issued by the first named defendant in favour of the fifth named defendant. In para. 51, the plea is made that “. . . the Fifth Named Defendant purported to suspend the works under clause 34 of the contract, on 6 October 2008 and 2 days later, in breach of contract, the Fifth Named Defendant abandoned the site.”

Loss pleaded by Ocean Point

72. The particulars of the plaintiff's loss, as pleaded by Ocean Point, include the loss of €3,257,000, which is pleaded in para. 69 and which mirrors the same figure pleaded in para. 67 of Mr. Dooley's 5th November, 2013 statement of claim, as well as in para. 68 of Mr. Dooley's 28th September, 2015 amended statement of claim.

73. Ocean Point also pleads loss of €20,000 in para. 70 of the statement of claim, reflecting the same sum pleaded at para. 68 of Mr. Dooley's 5th November, 2013 statement of claim and in para. 69 of Mr. Dooley's 28th September, 2015 amended statement of claim.

74. The sums of €285,000 and €200,000 are *not* sought by Ocean Point, in circumstances where it is pleaded that Mr. Dooley paid same.

75. The plaintiff's claim, as pleaded by Ocean Point at paras. 73 – 79, inclusive, mirrors the claim made by Mr. Dooley, save for the additional plea in the Ocean Point proceedings, at para. 74, wherein Ocean Point claims “*Damages and losses from appointment of receiver/manager*”.

Ocean Point's claim – relevant time period – 23rd May, 2006 to 8th October, 2008

76. It is clear from an analysis of the Ocean Point statement of claim that all the allegations made against the third named defendant relate to events which either pre-date the commencement of works in respect of the relevant development or which relate to the works carried out by the fifth named defendant, which the third named defendant is said to have failed to supervise properly. Just as is the case in respect of the claim brought by Mr. Dooley in his personal capacity, the relevant period, insofar as the allegations are concerned, is that commencing on 23rd May, 2006 (the day Mr. Dooley pleads that he met Mr. Pat Walsh of the third named defendant to discuss his requirement, *per* para. 16 of the Ocean Point statement of claim) and 8th October, 2008 (the day the fifth named defendant abandoned the site, having suspended works on 6th October, 2008). There are no allegations which relate to the period of time after the works ceased.

The statute of limitations

77. The relevant six-year period in the statute of limitations is well known and was referred to during the hearing, in submissions by counsel representing the applicant and respondent, respectively. Without making any findings, it is merely a statement of the obvious to note that six years *prior* to 5th September, 2014 (the date when the Ocean Point plenary summons was issued) is 5th September, 2008.

78. Many of the events in dispute, including alleged discussions, meetings and advices, as pleaded in the Ocean Point statement of claim, are said to have taken place over six years *prior* to the plenary summons being issued. An obvious statute of limitations issue would appear to arise in the claim instituted by Ocean Point, in September 2014, in respect of events dating back to 2006 and 2007. It is appropriate to look at certain pleas made by Ocean Point.

2006

79. If one looks at para. 64 (s) of the Ocean Point statement of claim, the plea that the third named defendant "*misrepresented to the plaintiff the importance and significance or (sic) proceeding with a development which was not in compliance with planning*" is a plea which relates to events of 2006 (as pleaded in para. 23).

September 2006

80. The plea at para. 64 (t) that the third named defendant "*negligently failed to inform the plaintiff of the risks which he ran as a consequence of same*" again relates to events of September 2006 (*per* para. 23 of the statement of claim).

June / August 2006

81. The plea in para. 64 (u) to the effect that the third named defendant "*Failed to ensure that Cleary Doyle did not enter into possession of the site without there being an effective dispute resolution clause (and/or agreement as to price/scope of works) in place*" also relates to events of 2006, in particular, a 22nd June, 2006 letter of intent (which, according to para. 17 of the Ocean Point statement of claim, Mr. Dooley issued to Cleary Doyle on foot of advices from the first and third named defendant, following which Cleary Doyle commenced work on site on 20th August, 2006).

September 2006 / October 2008

82. The plea at para. 64 (v) that the third named defendant "*failed to properly supervise the works, or at all*" can only relate to works which ceased as of 6th October, 2008 at the latest. To the extent that the plea relates to works by Cleary Doyle, as opposed to the fifth named defendant, it is pleaded at para. 21 that Cleary Doyle quit the site by agreement in or around 30th September, 2006.

2007

83. The plea at para. 64 (w) that the third named defendant "*failed to ensure that the overhead line traversing the site was not a source of delay before the commencement of the works*" relates to works carried out in 2007 (i.e. after a contract was entered into between Ocean Point and the fifth named defendant on 2nd April, 2007, *per* para. 35 of the statement of claim).

October 2008

84. The plea at para. 64 (x) that the third named defendant "*failed to ensure that the works proceeded in a workman like fashion*" can only relate to events prior to 8th October, 2008 (when the fifth named defendant is said by Ocean Point to have abandoned the site, having suspended works on 6th October, 2008, *per* para. 53 of the statement of claim). The plea at para. 64 (y) that the third named defendant "*failed to properly oversee quality of the fifth named defendant's works*" is, once again, a plea which can only relate to events *prior* to 8th October, 2008.

One month – 5th September to 6th October, 2008

85. Given that 5th September, 2008 is six years prior to the date the plenary summons was issued by Ocean Point, and given the plea that the fifth named defendant ceased works on 6th October, 2008, abandoning the site two days later, it seems to be the case that it is only the period of one-month (i.e.

between 5th September, 2008 and 6th October, 2008), in respect of which very obvious statute of limitations difficulties do not arise.

86. To make the foregoing observations is not to make any determination in respect of the underlying claim or the role played by the statute of limitations in respect of the various pleas. It is, however, appropriate to observe that such issues would appear to arise, given the timeline as pleaded by the plaintiff. It is also true to say that a defendant must plead the statute of limitations to rely on it. However, it is plain from the submissions made by the applicant in the present proceedings that they are very much "alive" to the issue of the statute of limitations and in the manner I will presently explain, no defence has yet been delivered.

87. For the sake of clarity, to point out that there is only a one-month period in respect of which obvious statute of limitations issues do not arise, is not say that this one-month period is insulated from any statute of limitations issues. Suffice to say that the Ocean Point claim involves what, on any analysis, was a very "late start", so late that statute of limitations issues would appear to arise in respect of much of the claim pleaded by Ocean Point.

88. Having looked at the Ocean Point statement of claim, dated 21st December, 2016, I now return to examining the progress of the Ocean Point proceedings in chronological order, turning next to the year 2017.

2017

89. On 24th February, 2017, the plaintiff's solicitors wrote to the solicitors for the third named defendant requesting a defence. Less than a week later, on 2nd March, 2017, the then solicitors for the third named defendant wrote to the plaintiff's solicitors stating: "*We refer to the above matter and to your letter dated 24 February last. We expect to be in receipt of instructions in the short term and we would appreciate it if you could hold off motioning at this time. Yours faithfully*". Approximately three weeks later, a notice of change of solicitors was served on behalf of the third named defendant, giving notice that RDJ Solicitors had come on record for the third named defendant, replacing Messrs. DWF. On 29th June, 2017, the plaintiff delivered a notice of intention to proceed. On 4th August, 2017 a notice for particulars was raised by the third named defendant. On 7th November, 2017, the plaintiff furnished replies to the third named defendant's notice for particulars. Thereafter the plaintiff, Ocean Point, took no step whatsoever in respect of progressing its claim against the third named defendant.

2018

90. Ocean Point took no step to progress the claim against the third defendant in 2018.

2019

91. On 6th August, 2019, the third named defendant issued a motion seeking to dismiss the proceedings against it by Ocean Point. The said application is grounded on an affidavit sworn by Ms. Lisa Mansfield on 2nd August, 2019 and I now turn to an examination of its contents.

Affidavit of Lisa Mansfield sworn 2nd August, 2019 in the Ocean Point proceedings

92. After making uncontroversial averments, Ms. Mansfield refers, in paras. 3 and 4, to the Courtown Development, for which planning permission was submitted in 2004, she avers that Ocean Point's claim relates to alleged professional negligence on the part of the defendants. At para. 5, Ms. Mansfield avers to the progress of Ocean Point's claim against the third named defendant. In paras. 6 and 7 it is averred that the last proceeding furnished on behalf of the plaintiff comprised the 7th November, 2017 replies to particulars. In para. 8, it is averred that, by virtue of the plaintiff's delay, the third named defendant is

unduly prejudiced. It is averred that the availability of witnesses will have diminished together with the availability of parties to defend the proceedings. It is averred that the first named defendant, Patterson Bannon Architects Ltd., is now in liquidation. It was also averred that the second named defendant, PH McCarthy Consulting Engineering Ltd., was dissolved in 2014, following the appointment of a liquidator in 2012. It is also averred that a receiver was appointed to the plaintiff, on 5th March, 2009. Relevant printouts from the Companies Registration Office were exhibited by Ms. Mansfield with regard to the foregoing pleas.

Liquidation / Dissolution / Receivership

93. The said Companies Registration Office printouts comprise exhibit "LM1". Having regard to their contents, it cannot be disputed that the first named defendant went into liquidation as of 23rd September, 2014, Mr. Eddie Kelly liquidator having been appointed on 27th August, 2014. Nor is it in dispute that the second named defendant was dissolved with effect from 25th December, 2014. It is not in dispute that a receiver was appointed to the plaintiff. Indeed, this is reflected in the title to the proceedings.

Witness memories

94. In para. 9, Ms. Mansfield avers that the plaintiff's failure to prosecute the proceedings in a timely manner has prejudiced the third named defendant's right to a fair trial in circumstances where the issues in dispute occurred approximately thirteen years prior to the date of the swearing of her affidavit. It is averred that, given the passage of such a period of time the memories of the relevant parties and/or witnesses to the issues will be compromised by what Ms. Mansfield describes as inordinate and in excusable delay. In para. 10, it is averred that the delay violates the third named defendant's right to a fair trial having regard to Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

Professional reputation

95. In para. 11, it is averred that the plaintiff's delay with regard to the outstanding claim has interfered with the third named defendant's professional reputation and has an ongoing effect on its professional indemnity insurance. In paras. 12 and 13, it is averred that the plaintiff's delay is inordinate and inexcusable and has caused prejudice to the third named defendant and the plaintiff's claim should be dismissed as a consequence.

Replying affidavit of Francis Dooley in the Ocean Point proceedings

96. Mr. Dooley swore a replying affidavit, on 2nd December, 2019, in the Ocean Point proceedings (Record No. 2014/7827P). Earlier in this judgment, I looked closely at Mr. Dooley's affidavit, also sworn on 2nd December, 2019, in his own proceedings (Record No. 2011/6564P). There are many similarities between the two affidavits and I will refer to those in due course.

97. In para. 3, reference is made to the nature of Ocean Point's claim for damages and, in para. 4, Mr. Dooley avers that he is a director and shareholder in Ocean Point which was incorporated on 16th August, 2006 and went into receivership on 5th March, 2009. It is also averred that Mr. Dooley is challenging the receivership in separate proceedings but has been authorised to bring the Ocean Point claim by the receiver, Mr. Ferris. In paras. 5-11, averments are made to the effect that the third named defendant's application is opposed. Reference is made to the Courtown, Co. Wexford development and to the Dooley proceedings, under Record No. 2011/6564P, Ocean Point being described as a special purpose vehicle set up by Mr. Dooley on or about 16th August, 2006 to execute the project's development.

98. It is averred that, prior to the incorporation of the plaintiff, the third named defendant had been appointed personally by Mr. Dooley as project manager in or around 23rd May, 2006. It is averred that, subsequent to the incorporation of Ocean Point, the third named defendant continued to act for Mr. Dooley, in his capacity as landowner of the development site and for Ocean Point, as the developer, and it is further averred that ultimately the Development was a failure, with averments made by Mr. Dooley to the effect that Ocean Point's claim against the third named defendant relates primarily to the latter's failure to properly supervise the works of the fifth named defendant and to ensure the Development was built in compliance with planning regulations. Para. 11 refers, *inter alia*, to damages sought in the sum of €20,000,000. At para. 11, a timeline is set out.

Denial that Ocean Point has failed to progress proceedings since November 2017

99. There is no para. 12 but, at para. 13, it is *denied* that Ocean Point has failed, refused and/or neglected to progress the proceedings since the delivery of replies to particulars raised by the third named defendant (something which occurred on 7th November, 2017). At this juncture, it is appropriate to point out that it is a matter of fact that no step whatsoever was taken by Ocean Point to progress its claim against the third named defendant from the point at which replies to particulars were delivered on 7th November, 2017 (the next step with regard to the claim against the third named defendant being the issuing by the third named defendant, on 6th August, 2019, of the motion which is now before this Court).

Reference to the fifth defendant's March 2018 arbitration motion

100. At para. 14, it is averred that, between March 2018 and May 2019, Ocean Point "*has been defending an arbitration motion (stay application) brought by the fifth named defendant herein, which judgment was only given in relation to same on 10th May 2019 by Mr. Justice Barniville*" and, at para. 15, it is averred that one of the principal reasons why the said application was opposed "*was to endeavour to retain all five (original) Defendants in these proceedings, in order that the issue of liability (if any) could be determined between them*".

101. With regard to the foregoing averment, Mr. Dooley does not, however, aver that Ocean Point ever wrote to the third named defendant or contacted the third named defendant at any stage to explain, if it be the case, that Ocean Point's attention was taken up (to any material extent and/or entirely) with the fifth named defendant's motion and that this would prevent, if it be so, Ocean Point from progressing its claim against the third named defendant. Nor did Ocean Point seek any consent from the third named defendant to a "pause" in Ocean Point's claim against the third named defendant for so long as Ocean Point was engaged in dealing with the fifth named defendant's arbitration motion. Furthermore, there is no evidence put before this Court which demonstrates that any engagement between Ocean Point and the fifth named defendant, with regard to the aforesaid arbitration motion, meant that it was impossible (or even difficult) for Ocean Point to simultaneously progress its claim against the third named defendant. There is no evidence that Ocean Point was hampered (due to unavailable time or unavailable resources or otherwise) from progressing its claim against the third named defendant at any stage, had it chosen to progress it.

Denial of delay by Ocean Point

102. At para. 16, Ocean Point's replies to particulars dated 7th November, 2017 are exhibited and, at para. 17, it is disputed "*that the plaintiff has delayed, or materially delayed, in the prosecution of the within proceedings, such that any such delay is inordinate and inexcusable*". Paras. 18-22, inclusive, deal with "*the motion for a 'Stay' Order brought by the fifth named defendant in the within proceedings*" and

reference is made to the fifth named defendant's motion, which was issued on 27th March, 2018 and heard on 2nd and 3rd April, 2019, with judgment delivered by Barniville J. on 10th May, 2019, granting an order placing a stay on the proceedings as against the fifth named defendant, with a copy of the said judgment exhibited. It is clear that the order sought by the fifth named defendant under Article 8(1) of the Model Law, referring Ocean Point and the fifth named defendant to arbitration, was granted.

Opposition to the fifth defendant's motion in the third defendant's "interests"

103. In para. 21, it is asserted that the third named defendant:-

"cannot raise any issue with the Plaintiff's opposition to said motion, which – if it had been successful – would have clearly been in the interests of the third named defendant, in requiring the fifth named defendant herein to defend the claim at the plenary trial of the action (as opposed to at an arbitration solely vis a vis the Plaintiff)".

At para. 22, it is averred that *"the aforesaid matters clearly demonstrate that the Plaintiff has not delayed in the prosecution of the said proceedings"*. With regard to the foregoing, it is appropriate to point out again that no averment is made that the third named defendant was contacted, at any point, in relation to the fifth named defendant's motion. Nor is it averred that the third named defendant ever indicated that it regarded opposition by Ocean Point to the fifth named defendant's motion as being in the third named defendant's *"interests"*. Viewed objectively, I cannot see how Ocean Point's objection to the fifth named defendant's reliance upon the terms of an arbitration clause, found at clause 38 of a contract dated 2nd March, 2007, to which both the plaintiff and the fifth named defendant were parties, can reasonably be said to be either an act which constitutes the progression of Ocean Point's claim against the third named defendant, or which constitutes something done in the *"interests"* of the third named defendant.

104. There is simply no evidence before this Court that Ocean Point's objection to going to arbitration with the fifth named defendant was other than a decision taken by Ocean Point, unilaterally, consistent with its own interests and without any reference to the third named defendant or the latter's interests whatsoever.

The third defendant's "conduct"

105. Paras. 23-29, inclusive, appear under the heading *"The Conduct of the Third Named Defendant in the Within Proceedings"*. Here, Ocean Point asserts that it is, in fact, the third named defendant who has delayed the proceedings. A complaint is made in para. 24 that, rather than deliver a defence, the plaintiff has brought the present motion.

106. At para. 25, reference is made to a letter which was sent on 24th February, 2017 to the former solicitors on record for the third named defendant requesting a defence be delivered within 21 days, in default of which a motion for final judgment would be issued. As regards the foregoing, it is a matter of fact that the former solicitors for the third named defendant replied, on 2nd March, 2017, to state that they expected to be in receipt of instructions in the short term and would appreciate it if the plaintiff's solicitors could hold off issuing a motion *"at this time"*. It is also a matter of fact that, shortly thereafter, a notice of change of solicitor was filed on behalf of the third named defendant, dated 24th March, 2017, pursuant to which the third named defendant's current solicitors, Messrs. RDJ, came on record. It was the third named defendant's current solicitors who delivered, on 4th August, 2017, a detailed notice for particulars, to which the plaintiff responded on 7th November, 2017.

The plaintiff's reliance on a 2nd March, 2017 letter from the third defendant's solicitors

107. At para. 29, it is averred, *inter alia*, that:-

"it is clear that the plaintiff herein did not take any steps in these proceedings as against the third named defendant specifically, to issue a motion against the third named defendants compelling them to file their defence, between the period from 2nd March 2017 until the 6th August 2019 at the request of the third named defendants themselves".

A number of comments can fairly be made in relation to the foregoing averments. If one looks at the 2nd March, 2017 letter from the third named defendant's former solicitors, it makes clear that Messrs. DWF "expect to be in **receipt of instructions in the short term** and we would appreciate it if you could **hold off motioning at this time**" (emphasis added). The evidence demonstrates that Messrs. DWF did receive instructions in the short term, in that, later in March 2017, a notice of change of solicitor was served and RDJ Solicitors came on record. Thereafter, RDJ Solicitors raised a detailed notice for particulars, dated 4th August, 2017, which was replied to some three months later by the plaintiff.

108. The 2nd March, 2017 letter most certainly did not ask that no motion be issued at any stage during the following two and a half years. Rather, the request made on 2nd March, 2017 was that the plaintiff's solicitors consider holding off motioning "at this time". They did so, and that was entirely reasonable in the circumstances. That does not, however, give licence to the plaintiff to take no further step in the proceedings for years thereafter and to assert that such inaction on the plaintiff's part, for years, reflected the third named defendant's request. No such request was made by the third named defendant.

109. The 2nd March, 2017 letter was a request, made at a particular time, in a particular context, by the former solicitors for the third named defendant, and in very specific terms, to which I have referred. Before that month was over, the third named defendant had a new firm of solicitors who, thereafter, raised a detailed notice for particulars, to which the plaintiff responded.

110. It is also a matter of fact that, following receipt by the third named defendant's current solicitors, of Ocean Point's 7th November, 2017 replies to particulars, no request was made by RDJ that the plaintiff hold off issuing any motion. Nor could the receipt of replies to particulars dated 7th November, 2017 be interpreted as confirmation given by the plaintiff that no motion would ever be issued seeking a defence to the plaintiff's claim. In other words, the position which pertained as of 2nd March, 2017, when DWF wrote its letter, had utterly changed over the course of the succeeding months. The proposition that Ocean Point did not issue a motion between 2nd March, 2017 and 6th August, 2019 "at the request of the third named defendants themselves" is wholly undermined by the evidence and I am bound to reject it.

Availability of witnesses and parties

111. Paras. 30-37, inclusive, which appear under the heading "*The Availability of Witnesses and Parties*", essentially repeat similar averments which were made by Mr. Dooley in the context of opposing the motion in his own proceedings. In short, it is denied that any witnesses will be unavailable; it is denied that the third named defendant's defence of the proceedings will be compromised; issue is taken with the proposition that the liquidator is unlikely to participate in the defence of the proceedings; and the thrust of the averments is that, insofar as witnesses are concerned, there is no prejudice to the third named defendant in respect of a trial of the proceedings. The comments I made earlier in this judgment concerning the difference between the *availability* of witnesses and the *reliability* of their evidence (including as to what was, or was not, said, done, agreed or understood between thirteen and fifteen years earlier) apply equally here.

Reputation

112. From paras. 38-43, inclusive, averments are made under the heading "*Professional Reputation*". Again, these reflect similar averments made by Mr. Dooley in opposition to the motion in his own proceedings. It is averred that no prejudice has been suffered by the third named defendant or, alternatively, to the extent that there is any prejudice suffered, which is denied, the balance of justice is said to favour the dismissal of the third named defendant's application.

The plaintiff has not delayed

113. A positive averment is repeated, at para. 42 of Mr. Dooley's 2nd December affidavit, to the effect that "*the plaintiff has not delayed*" in prosecuting the proceedings, with an alternative averment also being made to the effect that "*any such delays (if found) are not inordinate and/or inexcusable*" and, at para. 44, Ocean Point seek that the relief sought by the third named defendant be refused.

Replying affidavit of Kevin Porter

114. On 9th June, 2020, Mr. Porter, a director of the third named defendant, swore an affidavit in response. After uncontroversial averments in paras. 1-3, Mr. Porter avers, at para. 4, that no step has been taken in the proceedings since the delivery of the plaintiff's replies to particulars, on 7th November, 2017. At this juncture, let me say that the evidence undoubtedly demonstrates that this is so.

115. Mr. Porter also points out that the third named defendant was not a party to the fifth named defendant's motion and that this step taken by the fifth named defendant does not explain the plaintiff's failure to prosecute its claim against the third named defendant. Having regard to the evidence, I am satisfied that this is also correct.

116. At para. 5, it is averred that, since RDJ came on record in March 2017, the plaintiff has never requested delivery of a defence from the third named defendant. This, too, is undoubtedly a fact. At no stage, since the 24th March, 2017 delivery of a notice of change of solicitors, which confirmed that RDJ had come on record for the third named defendant, has the plaintiff ever written to call for a defence or threatened any motion if a defence was not furnished, nor has the plaintiff brought any motion.

117. In truth, the plaintiff has taken no step whatsoever with regard to seeking a defence, since March 2017 and the plaintiff has taken no step whatsoever to progress its claim against the third named defendant, since delivering replies to particulars at the start of November 2017.

118. At para. 6, Mr. Porter points out that, in 2014, the third named defendant delivered a defence in the proceedings brought by Mr. Dooley under Record No. 2011/6564P which, *inter alia*, plead that the third named defendant is not the correct defendant, whereas a separate limited entity, MMP-PM, was appointed as project manager of the Ocean Point development and he exhibits that defence. At para. 7, he avers that the third named defendant was incorporated in 2007, re-registered as a limited company in 2008, and changed its name to "Mulcahy McDonagh & Partners Ltd" in March 2009 and he avers that this company had no involvement whatsoever in the management of the site in question. At this juncture, it is appropriate to recall that, in para. 16 of the Ocean Point statement of claim (reflecting, exactly the pleas made in the statement of claim in the Dooley proceedings), the following is pleaded:-

"16. Mr. Dooley approached Mulcahy McDonagh & Partners Ltd ("*the third named defendant*") to this end and, on or about 23rd May 2006, he met Mr. Pat Walsh of the third named defendant to discuss his requirement. As a result of that meeting, the third named defendant was appointed as project managers to the project. At all stages, the third named defendant were to act as project managers for the entire development and to monitor progress and costs and effectively manage

the various parties carrying out the design and construction of the development on behalf of the plaintiff."

119. The plaintiff referred to in that plea is, of course, Ocean Point. It is plain from the foregoing plea that Ocean Point asserts that the third named defendant was appointed shortly after 23rd May, 2006. It is significant to note, however, that Mr. Porter's averment that the third named defendant was incorporated in 2007 is an averment in respect of which the plaintiff has exhibited no evidence to undermine, nor has the plaintiff contested it. In other words, it is certainly asserted that the relevant was entered into in May 2006 with the third named defendant and with no other party but the state of the evidence before this Court is that the third named defendant is a company which did not come into being until the following year *after* it is pleaded that they were retained.

120. To say the foregoing is not to determine any issue in respect of the underlying proceedings. It is simply to point out what would appear to be significant issues in the underlying claim. It will also be recalled that, in para. 8 of Mr. Dooley's replying affidavit sworn on 2nd December, 2019 in the Ocean Point proceedings, he avers, *inter alia*, that Ocean Point was set up as a special purpose vehicle "*in or around 16th August 2006 to execute the development of the project*". That, too, post-dates the 23rd May, 2006 meeting which allegedly took place between Mr. Dooley and the third named defendant's Mr. Pat Walsh. On behalf of Ocean Point, Mr. Dooley explains this by averring, at paras. 8 and 9 of his 2nd December, 2019 affidavit, that, prior to Ocean Point's incorporation, the third named defendant was appointed personally by him in or around 23rd May, 2006 and that, subsequent to Ocean Point's incorporation, the third named defendant continued to act for him in his capacity, as landowner, and also acted for Ocean Point, as the developer.

121. Without, as I stress again, purporting to decide any issue which arises in the underlying claim, it seems uncontroversial to observe that, regardless of whom the third named defendant is said to have acted for, as and from the pleaded appointment of the third named defendant in or around 23rd May, 2006, an obvious issue arises by virtue of Mr. Porter's uncontested averment that the third named defendant "*was incorporated in 2007*" and it is an issue which arises in proceedings which relate to events of 2006, 2007 and 2008 which Ocean Point chose not to institute until 2014. On any analysis this means the Ocean Point proceedings had the latest of starts and this is of some relevance when looking at how quickly (or not) Ocean Point progressed its claim after it eventually commenced proceedings.

Common parent

122. At para. 8, Mr. Porter avers that, for the purposes of complete transparency, both MMP-PM and the third named defendant are owned by the same "parent" company and these averments reflect, precisely, the contents of para. 10 of Mr. Porter's affidavit which was sworn in the Dooley proceedings and which I examined earlier in this judgment.

Witnesses and documents

123. Similarly, paras. 9-14, inclusive, in Mr. Porter's affidavit in support of the application to dismiss the Ocean Point claim reflect, precisely, the contents of paras. 11-16, inclusive, of Mr. Porter's affidavit sworn in the application to dismiss the Dooley proceedings. Those paragraphs deal with the absence of contact, for several years, with various named individuals and why they are said to be highly relevant as witnesses and it is averred, *inter alia*, that "*due to the passage of time, there are going to be serious difficulties in witnesses giving evidence and also in having the necessary documentation available*" (para. 14).

The stay obtained by the fifth defendant and prejudice to the third defendant

124. At para. 15, it is averred that the fact the fifth named defendant has successfully applied for a stay and will no longer participate in the proceedings is very prejudicial to the third named defendant in circumstances where the fifth named defendant, as the main contractor on site, was central to all events and their witnesses are required to support the defence of the third named defendant.

Devastating impact of the passage of time

125. Mr. Porter’s affidavit concludes with an averment that he says and believes that *“the passage of time has had a devastating impact on the ability of the Third Defendant to defend these proceedings”* and he describes the plaintiff’s delay as both inordinate and inexcusable and the relief is prayed for.

Affidavit of John P. O’Donohoe sworn 4th February, 2021

126. On 4th February, 2021, the plaintiff’s solicitor swore a short affidavit in which he referred to, and exhibited, a motion which issued on 16th December, 2020 seeking to join the Ocean Point proceedings (no. 2014/7827P) with the Dooley proceedings (no. 2011/6564P) and to admit both matters to case management. That was a motion which was issued in the present proceedings over a year and four months *after* the third named defendant issued its motion, on 6th August, 2019 to dismiss the Ocean Point proceedings.

Timeline in relation to Ocean Point proceedings

127. Having examined the pleadings and all affidavits and exhibits, the following emerges as a chronology of relevance to the Ocean Point proceedings. Where the particular item relates specifically to the claim by Ocean Point against the third named defendant, as opposed to other defendants, it appears in bold:-

| Date | Event |
|---------------------------------------|--|
| 23rd May, 2006 | Third named defendant is allegedly appointed as project manager |
| 22 nd June, 2006 | Letter of intent issued by Mr. Dooley to Clearly Doyle allegedly on foot of advice from first and third named defendants |
| August, 2006 | Clearly Doyle commence work on site and problems arise |
| 16th August, 2006 | Ocean Point is incorporated |
| 29 th September, 2006 | Planning application is refused but Mr. Dooley is allegedly advised to proceed, the third named defendant allegedly being involved in these discussions |
| 2 nd April, 2007 | Contract between Ocean Point and fifth named defendant is entered, providing for completion date for works of 31 st March, 2008 – the third named defendant allegedly having indicated that the fifth named defendant was a very competent contractor |
| 9th August, 2007 | Third named defendant is incorporated |
| 6th October, 2008 | Fifth named defendant suspends work on site and abandons site two days later |
| 5 th March, 2009 | Receiver appointed to Ocean Point |
| 5th September, 2014 | Plenary summons is issued by Ocean Point |
| 31 st August, 2015 | Notice of change of solicitors |
| 31 st August, 2015 | Appearance by fifth named defendant |

| | |
|--|--|
| 15th September, 2015 | Appearance by third named defendant (then represented by DWF Solicitors) |
| 15 th September, 2015 | Appearance by fourth named defendant |
| 21st December, 2016 | Statement of Claim served on third defendant |
| 24th February, 2017 | Letter from plaintiff requesting defence from third named defendant |
| 2nd March, 2017 | Letter from third named defendant (DWF Solicitors) saying instructions expected in the short time and asking "if you could hold off motioning at this time" |
| 24th March, 2017 | Notice of change of solicitors for third named defendant (RDJ Solicitors come on record) |
| 29th June, 2017 | Plaintiff's notice of intention to proceed |
| 4th August, 2017 | Notice for particulars raised by third named defendant |
| 11 th September, 2017 | Notice for particulars raised by fourth named defendant |
| 7th November, 2017 | Replies by plaintiff to notice for particulars raised by third named defendant |
| 22 nd November, 2017 | Replies by plaintiff to notice for particulars raised by fourth named defendant |
| 24 th January, 2018 | Letter from plaintiff to fifth named defendant re defence |
| 26 th January, 2018 | Letter from fifth named defendant re clause 38 (arbitration) of the RIAI contract dated 2 nd March, 2007 |
| 27 th March, 2018 | Fifth named defendant issues motion re arbitration |
| 27 th June, 2018 | Replying affidavit by Mr. Dooley re fifth defendant's arbitration motion |
| 2 nd August, 2018 | Affidavit of John O'Shaughnessy re fifth defendant's motion |
| 23 rd August, 2018 | Affidavit of Mr. Dooley re fifth defendant's motion |
| 2 nd /3 rd April, 2019 | Hearing of arbitration motion before Barniville J. |
| 10 th May, 2019 | Judgment of Barniville J. |
| 6th August, 2019 | Third named defendant issues motion to dismiss plaintiff's claim |

Pre-commencement delay by Ocean Point

128. The evidence before the Court in respect of the Ocean Point proceedings demonstrates, *inter alia*, both pre-commencement and post-commencement delay, as follows. In circumstances where works on site were suspended as of 6th October, 2008, a period of five years and eleven months expired between the cessation of works and the issuing, by Ocean Point, of the plenary summons on 5th September, 2014.

129. Earlier in this judgment, I examined the pleas made in Ocean Point's statement of claim and the relief sought by Ocean Point against the third named defendant and it is uncontroversial to say that the relief sought at para. 64(s), (t) and (u) all concerns events going back to 2006, namely, eight years prior to the plenary summons being issued; whereas the relief sought at para. 64(w) relates to events of April 2007, over seven years prior to the plenary summons being issued. The relief sought at para. 64(v), (x) and (y) all relate to an alleged failure to supervise or properly oversee or ensure that they proceeded in a workmanlike fashion, works which ceased as of 6th October, 2006.

130. Without determining any issue in the main proceedings, and fully conscious that no defence has been filed, it is clear from the submissions made on behalf of the third named defendant in the context of this application, that the third named defendant is very much "alive" to the statute of limitations issue. That being so, it is uncontroversial to observe that 5th September, 2014, when the plenary summons was issued, is six years after 5th September, 2008, being just one month before work on site ceased.

Post-commencement delay by Ocean Point

131. As to the important issue of post-commencement delay, a period of over two years and three months elapsed between 5th September, 2014 (when the plenary summons was issued), and 21st December, 2016 (when a statement of claim was delivered). Thereafter, there was some activity in the months of February, March, June, August and November 2017 but, from 7th November, 2017 onwards, Ocean Point took no step whatsoever to progress its proceedings against the third named defendant.

132. In other words, after a very late start and after a very substantial period of delay which followed the issuing of the plenary summons by Ocean Point, there was further and substantial post-commencement delay which was "brought to a head" only by the issuing of the present motion to dismiss.

Silence

133. There is no evidence whatsoever that the period of delay commencing on 7th November, 2017 was a period of delay which the plaintiff had any intention of terminating. In other words, it was not as if, prior to the third named defendant's motion issuing on 6th August, 2019, the plaintiff had written even a single letter to the third named defendant indicating any intention to take any step. Nor did Ocean Point even cause a notice of intention to proceed to be served. Ocean Point did not ask for a defence, threaten a motion or suggest, by any means, that it had any intention of proceeding with the claim at any stage from November 2017 onwards. There was simply "silence" which was broken by the third named defendant's motion which was issued on 6th August, 2019.

Fifth defendant's motion

134. It is also appropriate to observe that, in opposing the motion to dismiss the Ocean Point proceedings, very significant emphasis is laid by the plaintiff on the fact that the fifth named defendant sought a stay in respect of Ocean Point's proceedings and relied upon an arbitration clause in the contract, *inter se*. The reality, however, is that the fifth named defendant's motion did not issue until 27th March, 2018. That was over four and a half months *after* Ocean Point delivered replies to particulars, yet during that four and half month period, Ocean Point took no step whatsoever, not even requesting a defence to be delivered.

135. Furthermore, even though the fifth named defendant's motion issued on 27th March, 2018, Mr. Dooley's first affidavit was delivered in opposition to that motion three months later, with a second affidavit delivered a further two months later. The second of Mr. Dooley's two affidavits in response to the fifth named defendant's motion was delivered on 23rd August, 2018 and the relevant hearing did not

take place until over seven months later, on the 2nd and 3rd April, 2019, yet the evidence is that Ocean Point took no step whatsoever during those intervening seven months and more to progress its claim against the third named defendant.

136. In addition, it is incontrovertible that Barniville J.'s judgment was delivered on 10th May, 2019 yet, even knowing the *outcome* of the fifth named defendant's motion, Ocean Point did nothing to progress its claim against the third named defendant, be that in the latter half of May 2019 or in June 2019 or July 2019 and, as I say, there is no evidence whatsoever of any intention on the part of Ocean Point to progress the claim in August 2019.

Two affidavits in five months

137. Any suggestion that the delivering of two affidavits in opposition to the fifth defendant's motion, during the course of a *five-month* period (i.e. from late March 2018 to late August 2018), rendered it impossible for Ocean Point to progress its claim against the third named defendant during a period of *21 months* i.e. from 22nd November, 2017 (when Ocean Point delivered Replies to particulars) to 6th August, 2019 (when the third named defendant issued the present motion) is unsupported by evidence and, in my view, wholly unsupportable.

Legal principles

138. Of particular relevance to the applications before this Court are the principles set out in the well-known decision in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459. The facts in the *Primor* case were as follows. The defendant was the plaintiff's auditor in respect of the financial year ending 31st December, 1978. In December 1984, the plaintiff issued legal proceedings claiming, *inter alia*, that the defendant failed to carry out its obligations in a careful and prudent manner. Proceedings were served in 1985 and a statement of claim was delivered in January 1986. A defence was delivered in January 1991, shortly after which cross – orders for discovery were made on consent. In February 1994, the High Court refused the defendant's application to dismiss the claim for want of prosecution. The High Court found that, although the plaintiff had been guilty of inordinate and inexcusable delay, the fact that the defendant had sought a cross – order for discovery in January 1991, coupled with the fact that the plaintiff had incurred considerable expense in complying with same, estopped the defendant from obtaining a dismissal of the proceedings. The defendant appealed the matter to the Supreme Court, as did another firm of accountants named in a second set of proceedings which were also brought by the plaintiff and, in which proceedings, similar allegations were made in respect of the financial year ending 31st December, 1979. In allowing the appeals and dismissing the proceedings for want of prosecution, Hamilton C. J. identified the following legal principles of relevance to an application to strike out proceedings for want of prosecution: -

"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows: –

(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a 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.”

139. It is the foregoing principles which have guided this Court in the decisions explained in this judgment. As can be seen from the above, *Primor* lays down a three – limb test, in that the court is required to ask (a) is the delay *inordinate*? (b) is the delay *inexcusable*? and (c) if the delay is both inordinate and inexcusable, is the *balance of justice* in favour of, or against the case being allowed to proceed?

The Dooley proceedings in light of the *Primor* principles

140. The plenary summons issued on 19th July, 2011 and an appearance was filed, promptly, on behalf of the third named defendant, on 11th August, 2011. A period in excess of two years and three months elapsed between 19th July, 2011 (when the plenary summons issued) and 5th November, 2013 (when the plaintiff served a statement of claim on the third named defendant). That was not the only period of post-commencement delay.

141. The third named defendant delivered a defence on 10th November, 2014 and a period of one year and one month elapsed, thereafter, during which the plaintiff took no step to progress the claim against the third named defendant, until 16th December, 2015 (when the third named defendant was furnished with a copy of an amended statement of claim).

142. Earlier in this judgment I looked closely at the amended statement of claim and it is clear that there were no amendments made in respect of the plaintiff's claim against the third named defendant. Thereafter, with the exception of sending a single letter (on 12th May, 2016) the plaintiff did nothing to progress its claim against the third named defendant from 16th December, 2015 (when an amended

statement of claim was furnished) to 12th September, 2018 (when the plaintiff served a notice of intention to proceed).

143. From 16th December, 2015 to 12th September, 2018 represents a period of some two years and nine months. It will be recalled that the 12th May, 2016 letter was one by which the plaintiff sought consent to a proposed consolidation of six different sets of legal proceedings. The 12th May, 2016 letter from the plaintiff was responded to relatively promptly by means of a letter dated 14th June, 2016. That letter confirmed that the third named defendant would *not* be consenting to an application to consolidate six different sets of proceedings.

144. In submissions, counsel for the plaintiff laid particular emphasis on the first four words in the following sentence which appears in the said 14th June, 2016 reply which was sent by RDJ Solicitors for the third named defendant: "***Having considered the matter***, it is not clear to us that these matters are appropriate for consolidation and our client will not be consenting to any such application." (emphasis added). With reliance on those first four words, it was submitted on behalf of the plaintiff that the third named defendant considered all relevant matters including delay and it was submitted that, by not referring to delay in the 14th June, 2016 letter, the third named defendant was acquiescing in respect of any delay. I cannot accept that submission. The first four words in the 14th June, 2016 letter cannot be taken out of context and it is beyond doubt that "*the matter*" considered was the matter raised by the plaintiff's solicitors in their 12th May, 2016 letter, namely, the request to consolidate six sets of legal proceedings. No other matter was at issue and it would be to deny both logic and fairness for this Court to interpret the 14th June, 2016 letter in the manner contended for on behalf of the plaintiff.

145. It is entirely fair to say, however, that despite the fact that the plaintiff's 12th May, 2016 letter referred to a motion to seek an order linking the six sets of proceedings, the plaintiff did *not* issue any such motion in response to the 14th June, 2016 letter declining consent to the consolidation. In other words, having received the third named defendant's 14th June, 2016 letter refusing consent to the proposed consolidation, the plaintiff did nothing for a period of some two years and three months, until 12th September, 2018, when a notice of intention to proceed was served. That was not, however, the last of the post-commencement delay as regards the plaintiff's claim against the third named defendant in the Dooley proceedings.

146. In the manner examined earlier in this decision, the plaintiff's 12th September, 2018 notice of intention to proceed was served on the *current* address of the third named defendant's solicitors, whereas, on 16th November, 2018, a letter seeking voluntary discovery was written to the *previous* address of the third named defendant's solicitors. There is a dispute as to whether this letter was ever served. What is not in dispute, however, is that the 16th November, 2018 letter was explicit as to the fact that, if the third named defendant failed, refused or neglected ". . . to agree to make voluntary discovery within 21 days from the date of his (sic) letter, an application will be made to the High Court without further notice to you for an order requiring you to make discovery". No response was furnished within 21 days, yet the plaintiff issued no such motion and the plaintiff took no further step whatsoever in the proceedings against the third named defendant, until the latter issued the motion to dismiss for want of prosecution on 6th August, 2019, i.e. eleven months after the plaintiff's notice of intention to proceed, and nine months after the disputed request for voluntary discovery of 16th November, 2018.

147. The fact that there was no bar to the plaintiff issuing a motion to compel the third named defendant to make discovery in the terms sought in the 16th November, 2018 letter is put entirely beyond doubt by

the fact that, on 16th December, 2020, i.e. two years and one month *after* the 16th November, 2018 voluntary discovery request (the receipt of which is denied by the third named defendant) the plaintiff issued a motion for discovery. It is clear from the affidavit grounding the motion that the *only* correspondence relied upon by the plaintiff is a copy of the 16th November, 2018 letter. The reasons proffered by the plaintiff as basis for the discovery sought relate to the 10th November, 2014 defence delivered by the third named defendant. Thus, it is not in doubt that the plaintiff's discovery motion (issued on 16th December, 2020) post-dated (by six years and one month) the delivery by the third named defendant of its defence (dated 10th November, 2014).

148. There was no acquiescence by the third named defendant. There was, however, a manifest failure to progress the claim on the part of the plaintiff.

The assertion that the proceedings did not involve a 'late start'

149. Among the submissions made with skill by Mr. Donelon BL on behalf of the plaintiff was to suggest that the claim in the Dooley proceedings "*relates to 2008/2009*" and to submit that the Dooley proceedings "*did not involve a 'late start'*". Earlier in this decision, I looked closely at the relief claimed by the plaintiff in the Dooley proceedings and it is beyond doubt that the pleas at para. 61 (a), (b) and (c) all relate to events of 2006. Similar comments apply in relation to the plaintiff's pleaded loss of €285,000 paid to Cleary Doyle Construction Ltd. (para. 66) and the loss of €200,000 expended by the plaintiff on professional fees in respect of what is described as an abortive design build contract (para. 67). Despite the foregoing, it was over five years later that the plenary summons was issued.

The assertion that the primary cause of action relates to late 2008/09

150. In submissions on behalf of the plaintiff, it is argued that the "primary" cause of action relates to late 2008 and concerns allegedly defective work which works the plaintiff claims were not adequately supervised by the third named defendant. Two comments appear to be fair to make. Firstly, for the purposes of the application before this Court, I do not see that I can ignore what are plainly very material elements of the plaintiff's pleaded claim which undoubtedly relate to events of 2006 and which represent a claim approaching €500,000. Indeed, the contents of para. 12 of Mr. Dooley's 2nd December, 2019 affidavit, in which he describes "*the gravamen*" of his claim against the third named defendant makes it clear that he regards alleged wrongs on the part of the third named defendant, which go back to events of 2006, as of fundamental importance to his claim. He has sworn that they comprise part of what he calls "*the gravamen*" of his claim.

151. It is also a matter of fact that work ceased on the Development as of 6th October, 2008 and there can be no question of supervision of works which had ceased. Thus, even if one were to ignore the claim which relates to the events of 2006, it is beyond doubt that some two years and nine months elapsed between works ceasing on site and the plaintiff issuing the plenary summons. It is uncontroversial to say that the plenary summons did not set out in detail the nature of the plaintiff's claim. To see that, one needs to look at the statement of claim in the Dooley proceedings. A period of over five years elapsed between works ceasing on site (as of 6th October, 2008) and service of a statement of claim on the third named defendant (on 5th November, 2013). For the foregoing reasons, I am satisfied that the Dooley proceedings involved a "late start" in the sense that term has been referred to in the authorities.

152. It has long been recognised that where there has been pre-commencement delay and a "late start" to proceedings, there is a need for greater speed on the part of the plaintiff. As Lord Diplock observed in *Birkett v. James* [1977] 2 All ER 801:-

"To justify dismissal of an action for want of prosecution the delay relied on must relate to time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

To issue legal proceedings in July 2011 relating to events going back between three and five years earlier is to make a late start. I cannot accept the submission made on behalf of the plaintiff to the effect that, because the phrase "late start" was not used in the third named defendant's affidavits, and because the claim that there was a late start to the Dooley proceedings was only made in written legal submissions exchanged shortly before the hearing commenced in February 2021, this Court should not deal with the issue and cannot hold that there was a late start to the Dooley proceedings.

153. The phrase "late start" appears in relevant legal authorities and refers to a situation where, as in this case, there has been a significant delay between the accrual of a cause of action and the institution of proceedings. I have no hesitation in holding that, on the facts of the present case, there was a late start.

Inordinate delay

154. With regard to the meaning of the term "*inordinate*", Cooke J. observed in *Framus Ltd. v. CRH plc* [2012] IEHC 316 (at para. 23) that: "*In its ordinary meaning delay is 'inordinate' when it is irregular, outside normal limits, immoderate or excessive*". Having regard to the various periods of delay on the part of a plaintiff with regard to progressing the claim against a third named defendant, from 19th July, 2011 onwards (when the plenary summons issued), the plaintiff's post-commencement delay is undoubtedly inordinate. The plaintiff's delay is on any fair analysis, irregular, outside normal limits, immoderate, and excessive. The foregoing is objectively true, even if there had been no pre-commencement delay (which there certainly was) and even if the plaintiff had not made a late start (which he certainly did).

155. It is also appropriate to note what Irvine J. (as she then was) stated in *Millerick v. Minister for Finance* [2016] IECA 206 (at para. 21) in a passage which echoes both the warning sounded by Lord Diplock four decades earlier, as well as the jurisprudence in this jurisdiction: -

"In assessing whether the High Court judge correctly classified the delay in the present case as inordinate it is relevant to note that the proceedings were issued very close to the expiry of the limitation period prescribed for claims of this nature. In such circumstances there is a special obligation of expedition on a plaintiff to move matters forward once proceedings are commenced. This proposition has been consistently endorsed in recent judgments of the superior courts. (see: Cahalane and Another v. Revenue Commissioners and Others [2010] IEHC 95 and Quinn v. Faulkner t/a Faulkner's Garage and Another [2011] IEHC 103)".

156. I am satisfied that the plaintiff's case can fairly be regarded as one involving a late start and, that being so, the plaintiff was under a special obligation to progress his case expeditiously and the evidence demonstrates that the plaintiff failed to do so. For the reasons detailed in this judgment, I also find the plaintiff's post-commencement delay to be inordinate.

No Superior Court Rule imposes a deadline for the completion of litigation

157. In submissions on behalf of the plaintiff, counsel argued that there is a difference between "delay" and "inordinate delay", submitting that no rule exists which requires a case to be brought to a conclusion

within any particular period, be that "5, 10, 15, 20 or 25 years". Counsel submitted that each case is fact-specific and will depend on the particular circumstances. It is of course true that each case is fact-specific and must be looked at as such, but I am satisfied that, in light of the facts before this Court, the plaintiff's delay is nonetheless and undoubtedly inordinate. Furthermore, the fact that no specific rule requires legal proceedings to be concluded within a particular time-frame does not entitle this Court to ignore very lengthy periods of complete inaction on the part of the plaintiff in the present case. Nor does it give a "blank cheque" to a plaintiff to proceed without reasonable expedition, which is what the plaintiff in this case has done after a very late start to his claim.

158. The proposition that, because no specific rule identifies a "back-stop" date by which litigation must be completed, somehow means that extraordinary delay cannot count against a plaintiff ignores, at the very least, (a) the particular interest of a given defendant in having litigation against them brought to trial with reasonable speed, as well as (b) the wider public interest in litigation being disposed of efficiently in a court system which, (c) not having limitless resources, can only function for the public good, if cases are progressed with due expedition.

No concession

159. It will also be recalled that in affidavits sworn by Mr. Dooley, he made no concession whatsoever that there had been *any* delay on the plaintiff's part. On the contrary, he positively disputed that the plaintiff had delayed, going on to aver that any such delay was not material and was neither inordinate nor inexcusable. The facts paint an entirely different picture. Fairly considered, the various periods of post-commencement delay which I have identified in this judgment can each be considered to be inordinate and, even if I am wrong in that view, I am entirely satisfied that, cumulatively, those periods of post-commencement delay certainly constitute inordinate delay.

There may have been some delays here and there

160. Counsel for the plaintiff submitted that, "*there may have been some delays here and there*", making it clear, however, that the plaintiff does not accept that there were "*massive delays*" and does not accept that any delay was inordinate. A careful examination of the evidence entirely undermines this submission and I have no hesitation in holding that there was in fact inordinate delay on the part of the plaintiff.

Lismore Builders Ltd (In Receivership) v. B.o.I. Finance Ltd & Ors [2013] IESC 6

161. Counsel for the plaintiff placed significant reliance on an authority which was furnished to his opposite number on the morning of the resumed hearing (i.e. 17th November, 2021, being day three of the hearing), namely, the Supreme Court's decision in *Lismore Builders Limited (In Receivership) v. Bank of Ireland Finance Limited & Ors* [2013] IESC 6. Counsel for the plaintiff laid particular emphasis on paras. 5 – 7 inclusive of that judgment where MacMenamin J. addressed the "*onus of proof*" and emphasised – as is not disputed in the present case – that "*the onus of proof in applications to dismiss for inordinate an inexcusable delay lies upon the moving party...to demonstrate that the delay was inordinate and inexcusable; not the converse.*" For the reasons given in this judgment, I am entirely satisfied that the foregoing is an onus which the third named defendant has discharged. The facts in *Lismore* are also starkly different to those in the present case.

162. Counsel for the plaintiff submitted that *Lismore* is authority for the proposition that delay of sixteen years may not be held to be inordinate. Reliance on *Lismore* cannot assist the plaintiff in my view. On the particular facts in *Lismore*, the court came to the view that time began to run from February 2002 and that, even from this point, the issue of an appeal against a High Court order compelling the plaintiffs to

reply to particulars was only decided in January 2004, with the motion to dismiss issued in February 2005, little more than one year later. The facts in the present case and the plaintiff's delay are of a totally different order. It is also fair to say that much of the delay in *Lismore* arose as a result of court delay insofar as dealing with a range of appeals etc. On the particular facts of that case, the court felt that striking out the case was too draconian a remedy. I fully agree with the submission by counsel for the plaintiff to the effect that *Lismore* emphasises the appropriateness of a fact-specific approach to be taken in each case and it is the facts in the present case which have given rise to this Court's decision. No principle derived from *Lismore*, a case decided on its very particular facts, alters the fact of the plaintiff's inordinate delay in the present case.

Inexcusable delay

163. In para. 16 of the plaintiff's 2nd December, 2019 affidavit in the Dooley proceedings, he disputed that the plaintiff had delayed, or materially delayed, and he submitted that any such delay was neither inordinate or inexcusable. He then went on to make a number of "*points*". Insofar as these are proffered as reasons to explain delay, it is appropriate to refer to the earlier passages in this judgment where I looked closely at paras. 16 to 29, inclusive, of Mr. Dooley's 2nd December, 2019 affidavit.

164. The first "*reason*" or "*point*" put forward by the plaintiff relates to the fifth named defendant, which delivered a defence on 8th October, 2019. The plaintiff speculates as to the reason why the fifth named defendant did not deliver a defence before that point, suggesting that this may be due to the fact that the fifth named defendant issued a motion, in separate proceedings (i.e. the Ocean Point proceedings under Record No. 2014/7827 P) seeking to stay those proceedings pursuant to an arbitration clause in a contract between Ocean Point and the fifth named defendant, which motion was heard in April 2019, resulting in this Court (Barniville J.) placing a stay on the Ocean Point proceedings, as against the fifth named defendant, on 10th May, 2019.

The fifth defendant's defence

165. It is not necessary to repeat, here, the entire analysis contained earlier in this judgment. Suffice to say that what the fifth named defendant did, or did not do, including in separate proceedings, does not provide any excuse for the plaintiff's delay with regard to progressing the present proceedings against the third named defendant, in light of the facts which emerge from a careful analysis of the facts in this case.

166. The fact that the plaintiff only received a defence from the fifth named defendant in October 2019, over eight years after issuing these proceedings, can fairly be said to be a reflection of inaction on the part of the plaintiff with regard to prosecuting his claim. It is not any failure on the part of the third named defendant. Nor is it in dispute that an appearance was filed by the fifth named defendant in the present proceedings on 28th July, 2011. The plaintiff has made no reference to any motion which he ever issued against the fifth named defendant to compel the delivery of a defence and I am satisfied that the plaintiff never issued any such motion. No explanation has been given for why this is so.

167. It is also a matter of fact that the third named defendant had no role whatsoever in the exchange of pleadings as between the plaintiff and the fifth named defendant and I am entirely satisfied that neither any delay on the part of the fifth named defendant, nor the plaintiff's failure to prosecute its claim against the fifth named defendant, can be considered to be "*reasons*", much less valid excuses, to explain the plaintiff's failure to progress his claim against the third named defendant.

168. It is also a fact that the fifth named defendant's motion in the Ocean Point proceedings was heard in April 2018. Thus, it can provide no excuse of any sort for the plaintiff's delay from 19th July, 2011 onwards, in that well over seven years elapsed *prior* to the fifth named defendant issuing its motion in separate proceedings seeking a stay thereof.

Crystallisation of losses

169. A second point raised by the plaintiff, as is clear from para. 21 onwards of his 2nd December, 2019 affidavit, relates to the suggestion that the plaintiff's losses have "*failed to fully crystallise as of yet*". It is appropriate for this Court to ask whether this excuses the plaintiff's delay. The plaintiff refers to separate proceedings by ACC Bank seeking judgment against him in the sum of €19,993,793.50, as of 2nd November, 2011, plus continuing interest. It has to be said, however, that nowhere in the plenary summons or statement of claim is it pleaded that the plaintiff is unaware of his loss or of his alleged losses. On the contrary, very specific figures are pleaded under the heading of "*Particulars of the plaintiff's loss*", as can be seen from paras. 65 – 68, inclusive, of the plaintiff's statement of claim and at paras. 66 – 69, inclusive, of the amended statement of claim. I looked at these earlier and, in summary, the position is as follows.

Specific sums pleaded

170. Four very specific sums are pleaded in respect of the plaintiff's alleged loss, namely: €285,000 paid to Cleary Doyle; €200,000 expended on professional fees relating to the abortive design build contract; €3,257,000 incurred by the plaintiff on extended financing and €20,000,000 in respect of profits which the plaintiff pleads that he stood to make from the sale of the Development, were it not for the negligence, breach of contract and breach of duty on the part of the defendants. The plaintiff has never suggested that judgment in the ACC proceedings is required before the present proceedings could be heard.

Consolidation declined

171. It will also be recalled that, on 14th June, 2016, the third named defendant declined to consent to the consolidation of six sets of proceedings, as requested in a letter from the plaintiff's solicitors dated 12th May, 2016. One of those sets of proceedings comprised the claim by ACC. The 12th May, 2016 letter sent on behalf of the plaintiff referred to a motion to consolidate the various sets of proceedings. If the plaintiff truly regarded it as essential to consolidate the ACC proceedings and the present proceedings, an application to consolidate same could have been made by means of such a motion, but no such application was ever made. This entitles me to conclude that the plaintiff did not regard it as essential for the claim by ACC to be determined along with the present proceedings. Thus, it seems entirely reasonable to conclude that, from the plaintiff's perspective, whether or not the plaintiff's losses as a consequence of the determination of the ACC proceedings were or were not known by the time the Dooley proceedings were heard, was not material.

No consolidation application regarding the ACC claim

172. The fact that it is *not* necessary, in the plaintiff's view, for the ACC proceedings to be determined alongside the present claim is also clearly demonstrated by the fact that, when the plaintiff did eventually make an application to consolidate proceedings, being an application which was brought by way of a motion issued on 16th December, 2020, the relief sought was an order linking the present proceedings and those brought by Ocean Point under Record No. 2011/6564 P. There was *no* reference whatsoever to the ACC proceedings being of any relevance to a determination of the present proceedings. Moreover,

the only consolidation application which has ever been issued by the plaintiff, was issued one year and four months *after* the third named defendant issued the present motion to dismiss for want of prosecution. **173.** In light of the foregoing, I am satisfied that what the plaintiff says in relation to the crystallisation of his losses cannot explain or excuse his delay with regard to the prosecution of his claim against the third named defendant.

Reports

174. In submissions made on behalf of the plaintiff, counsel also referred to the plaintiff having obtained certain "reports" (none of which were exhibited). That may be so, but it does not obviate the necessity to progress a claim. A careful and fair consideration of the evidence does not establish that the obtaining of any reports caused, or excuses, inordinate delay with regard to the plaintiff's prosecution of his claim against the third named defendant.

Voluntary discovery letter

175. Another one of the "*points*" made by the plaintiff in an apparent attempt to explain or excuse his delay (repeatedly averring that no delay in fact occurred) is to assert that the third named defendant failed to respond to the letter seeking voluntary discovery, dated 16th November, 2018. I have already addressed this issue earlier in this judgment and at some length. In short, there is a dispute as to whether this letter seeking voluntary discovery was ever received and, although I cannot resolve that dispute, it is incontrovertible that the motion to compel discovery, which the plaintiff said he would bring within 21 days of 16th November, 2018, is a motion which the plaintiff did *not* cause to be issued until 16th December, 2020 i.e. two years and one month *after* the date of the 16th November, 2018 voluntary discovery request; and over six years *after* the third named defendant delivered a defence; as well as *after* the third named defendant brought the present motion to dismiss the plaintiff's claim.

176. Not having received any response to the 16th November, 2018 letter, it was incumbent on the plaintiff to take at least *some* step in my view, be that to send a reminder letter or to issue the motion which is referred to in the said letter, when the 21-day period referred to in that letter expired. The plaintiff took no such step, even if one assumes for present purposes that the letter *was* received by the addressee, at that time (i.e. on or about 17th November, 2018).

177. It is also fair to say that, had his solicitors made *any* contact with the third named defendant, the plaintiff would have learned that the third named defendant maintained that the 16th November, 2018 letter was never received. The plaintiff, via his solicitors, made no such contact

178. Insofar as reliance is placed on the sending of this request for discovery in an attempt to excuse delay, it must also be pointed out that nowhere has the plaintiff explained why such a discovery request was not sent earlier, i.e. during the more than four years which elapsed between the delivery of the third named defendant's defence (on 10th November, 2014) and the sending of the 16th November, 2018 letter, itself.

179. In my view, sending a single letter on 16th November, 2018 does not constitute any excuse, much less an adequate excuse for the plaintiff's delay *prior* to or *subsequent* to that point, particularly in circumstances where the plaintiff could have, but failed to, follow up on that request in any way and did not issue a motion for discovery, despite referring to such a motion in the 16th November, 2018 letter.

180. When a motion was eventually issued by the plaintiff, over two years later in December 2020, it relied exclusively on the fact and content of the 16th November, 2018 letter, the plaintiff not having written even a single letter since.

181. For the foregoing reasons, I am entirely satisfied that nothing in relation to the 16th November, 2018 letter constitutes an acceptable excuse for the plaintiff's inordinate delay.

Assertions based on delay by the third defendant

182. The plaintiff also suggests that the third named defendant delayed for a period of eleven months between service (on 11th February, 2013, according to the plaintiff) of the statement of claim and the service (on 3rd January, 2014) by the third named defendant, of an extensive notice for particulars. I have already looked at these averments which appear in para. 26 of the plaintiff's 2nd December, 2019 affidavit. There is no evidence whatsoever to support the plaintiff's claim that a statement of claim was served on 11th February, 2013 and I am entirely satisfied that, as a matter of fact, the plaintiff did *not* serve a statement of claim on the third named defendant until 5th November, 2013 (being the date which is hand-written on the statement of claim itself).

183. It will also be recalled that the month and year "July 2012" and the name and address of the plaintiff's *former* solicitors appears on the statement of claim in typed format, but these were "crossed out" and, in manuscript, the 5th November, 2013 and the name and address of the plaintiff's then solicitors were inserted, instead.

184. No explanation has been given in respect of the delay between July 2012, when, it appears, a draft statement of claim was drafted and available and ready to be served, and November 2013, when the statement of claim was in fact served on the third named defendant. In any event, the evidence demonstrates that it was not until November 2013 that a statement of claim was delivered and a detailed notice for particulars was delivered by the third named defendant relatively soon thereafter, on 3rd January, 2014.

185. In my view, the foregoing does not represent unreasonable delay on the part of the third named defendant, particularly given both (a) the contents of the notice for particulars which was a detailed document and (b) the fact that the Christmas and New Year holiday period intervened between receipt of the plaintiff's statement of claim (dated 5th November, 2013) and the raising of particulars by the third named defendant (dated 3rd January, 2014).

186. The plaintiff makes a complaint that replies to particulars were delivered on 16th April, 2014 and it was not until 10th November, 2014 that the third named defendant delivered a defence. I have taken full account of this period of almost six months, but such delay on the part of the third named defendant cannot fairly be said to explain, in any way, much less excuse, the undoubted delay on the part of the plaintiff *prior* to 16th April, 2014 (when the plaintiff delivered replies to particulars) and *subsequent* to 10th November, 2014 (when the third named defendant delivered a defence).

187. It is also fair to say that it was on 9th October, 2014 that the plaintiff sent a letter to the third named defendant seeking a defence, whereas just one month later, on 10th November, 2014, the third named defendant in fact delivered a defence.

In an ideal world

188. On behalf of the plaintiff a submission was also made to the effect that, "*in an ideal world, things might have progressed quicker*" and counsel went on to submit that this does not mean there has been inordinate delay or that it is inexcusable. For the reasons detailed in this judgment, I am satisfied that there has been, in fact, inordinate delay and, fairly considered, the prosecution by the plaintiff of his claim is not merely less than "*ideal*". There was a complete failure on the part of the plaintiff to progress his

claim with anything like reasonable expedition and there has been a complete failure to offer any credible excuse or explanation for this failure for what is, I am entirely satisfied, inexcusable delay.

Multi-million euro claim involving multiple defendants

189. In suggesting that there was *no* inexcusable delay and that any delay was excusable, counsel for the plaintiff also suggested that the Court should have regard to the number of defendants named in the proceedings and to the fact that it is a multi-million euro claim involving a number of parties. Counsel submits that the foregoing "*carries some weight*" although he acknowledges that this, of itself, "*may not be a sufficient excuse*". I am entirely satisfied that it is not an excuse, either of itself or taken in conjunction with anything else said by or on behalf of the plaintiff.

Extraneous activities

190. In seeking to excuse delay, counsel for the plaintiff relied, *inter alia*, on the following passage from the judgment of Geoghegan J. delivered on 12th November, 1999 in *Truck and Machinery Sales Ltd. v. General Accident Fire and Life Assurance Corporation plc.*:

"I have no doubt that the delay in this case was inordinate. As to whether it was inexcusable is more difficult. Mr. Mansfield, Director of the Plaintiff company, has explained in two separate affidavits that the company was involved in other forms of litigation which threatened the continuing viable existence of the company. He alleges that that took up all the time and energy of the company's management and that this is why full attention could not be given to this action. I am doubtful that those are the kind of excuses (however genuine) which the Supreme Court had in mind when using the expression 'inexcusable'. Strictly speaking it would seem to me that the excuses relied on should relate in some way to the actual proceedings in hand because an opposing party can hardly be expected to stand aside and wait while the other party resolves its problems which have nothing to do with the litigation. Nevertheless, I am satisfied that all the surrounding circumstances including so called excuses based on extraneous activities must to some extent be taken into account and weighed in the balance in finally considering whether justice requires that the action be struck out or allowed to proceed."

Involvement in other litigation

191. With regard to the foregoing, it must be said that nowhere does Mr. Dooley aver that his involvement in other litigation took up all his time and energy and prevented him from progressing this claim against the third named defendant in the present proceedings. Indeed, the decision in *Truck and Machinery Sales* would seem to be clear authority for the proposition that a plaintiff's involvement in other litigation, even if the facts established that it prevented the plaintiff's full attention being given to the claim which is the subject of the dismissal application (something certainly *not* established in the present application) does *not* excuse delay. I have, however, consistent with the guidance given in *Truck and Machinery Sales*, taken *all* the circumstances into account, including the plaintiff's involvement in other proceedings. For the reasons detailed in this judgment, the plaintiff's involvement in other litigation does not constitute an explanation of or excuse for his inordinate delay in progressing his claim against the third defendant in the Dooley proceedings.

192. In fairness to counsel for the plaintiff he does not assert that such involvement in other proceedings, alone, excuses delay, but he submits that this is to be "*taken into account*". I have taken it into account, insofar as there is evidence of same before this Court, in the context of this Court's decision, just as I have taken into account the existence of the Ocean Point proceedings. For the avoidance of doubt,

however, the existence of the Ocean Point proceedings and the plaintiff's involvement in those proceedings, *qua* director of Ocean Point does not explain or excuse delay on the part of the plaintiff with regard to progressing his claim against the third named defendant in the present case.

193. It also must also be pointed out that the Ocean Point plenary summons was not even issued until 5th September, 2014. By that point, the plaintiff in the Dooley proceedings had issued his plenary summons (on 19th July, 2011) following which he did *nothing* to progress his claim for the following two years and four months, until the service upon the third named defendant of a statement of claim in the Dooley proceedings (dated 5th November, 2013). The foregoing delay cannot under any circumstances have been caused by the plaintiff's involvement in the Ocean Point proceedings which were not issued until the following year. Thus, there is no question of such involvement excusing that delay which, of itself, was inordinate.

The third defendant's "awareness" that the Plaintiff was defending the fifth Defendant's motion

194. Counsel for the plaintiff lays particular emphasis on the motion which was brought by the fifth named defendant in Ocean Point and suggests that it is "*very significant*" in the context of explaining and excusing delay. Counsel suggests that this Court "*can infer*" that the third named defendant in the Dooley proceedings was fully aware of the fifth named defendant's motion in the Ocean Point proceedings. It further submitted that this "*awareness*" of the fifth named defendant's motion, on the part of the third named defendant, meant that the third named defendant "*knew of the plaintiff's intention to progress his claim*" in the present proceedings as against the third named defendant.

195. This is not a submission I accept, and I say this for the following reasons. It will be recalled that the fifth named defendant issued its motion in the Ocean Point proceedings (i.e. entirely *separate* proceedings) on 27th March, 2018. Thus, it cannot conceivably explain or excuse the plaintiff's delay in the present proceedings *prior* to that point. Furthermore, there is no evidence before this Court that the plaintiff ever wrote to the third named defendant to explain the fact of, or the plaintiff's attitude to, the motion brought by the fifth named defendant in the *Ocean Point* proceedings or to explain that this would cause a delay with regard to the prosecution of the plaintiff's claim in the present action. The plaintiff neither asked the third named defendant in the present proceedings for any indulgence, nor was there any concession made by the third named defendant to the effect that they acknowledged that the plaintiff's involvement in a separate motion in separate proceedings had any effect on the present claim, much less prevented the plaintiff from progressing the present claim. It is also a matter of fact that the motion in Ocean Point was heard in April 2019 and Mr. Justice Barniville delivered his decision on 10th May, 2019, staying the Ocean Point proceedings as against the fifth named defendant.

196. What, it can fairly be asked, did the plaintiff in the present case do to progress his claim, as of 11th May, 2019, knowing the outcome of the fifth named defendant's motion in the Ocean Point proceedings? The answer is, *nothing*. Any knowledge on the part of the third named defendant in respect of the fifth named defendant's motion in the Ocean Point proceedings cannot, in my view, constitute knowledge on the part of the third named defendant that Mr. Dooley intended to progress his claim against them in the present proceedings. Furthermore, even after the outcome of the Ocean Point motion was known, Mr. Dooley, as a matter of fact, did nothing to progress his claim against the third named defendant in the present proceedings; and that remained the position for some four months *after* Barniville J. gave his decision in respect of the Ocean Point motion. Against the background of the plaintiff having taken no

step whatsoever to progress the present claim, it was the third named defendant who issued the present motion to dismiss.

To be apprised of steps in other proceedings

197. For the reasons explained in this decision, I am satisfied that the fifth named defendant's motion in the Ocean Point proceedings neither explains nor excuses the plaintiff's inordinate delay in progressing his claim against the third named defendant in the present proceedings. At this juncture, it is appropriate to refer to a relatively recent judgment by this court in *Pugh v. PGM Financial Services Ltd & Ors* [2020] IEHC 49 wherein, from para. 45 onwards, Sanfey J. stated the following:-

"45. In all the circumstances, I do not accept that the delays of the plaintiffs as against the first and second named defendants are justified by events in the proceedings involving the other defendants. Responsibility for the delays between the delivery of the statement of claim (March 2016) and the delivery of its defence by the fourth named defendant (January 2019) cannot be attributed solely to the plaintiffs. Nonetheless, they were responsible for substantial delay during that period. While it may be argued by the plaintiffs that they were engaged in progressing the litigation against all defendants and that this necessarily involved a slower rate of progress than if there were proceedings against the first and second named defendants alone, it is asserted by the first and second named defendants – and not denied by the plaintiffs – that not until receipt of Mr. Carroll's affidavit in the present motion were they apprised of the matters involving prosecution of the claims against the various other defendants which the plaintiffs say contributed to the delay in progressing matters against the first and second named defendants."

198. Having regard to this Court's comments in *Pugh*, it is appropriate to emphasise again that nowhere does the plaintiff aver that his solicitors kept the third named defendant's solicitors apprised of such steps as the plaintiff claims to have taken with regard to prosecuting his claim against the other defendants (in these in other proceedings); nor does the plaintiff assert that steps taken by him to progress his claim against other defendants (in these or in other proceedings) caused the delay in respect of the plaintiff's prosecution of his claim against the third named defendant in the present proceedings. On the contrary, the plaintiff asserts, *inter alia*, that there was no delay on his part with regard to prosecuting his claim against the third named defendant in the present case.

To apprise a defendant of difficulties involving other defendants

199. Mr. Justice Sanfey, in *Pugh*, went on to state the following:-

"46. It seems to me that, in circumstances where plaintiffs are under an onus due to a 'late start' to prosecute proceedings promptly and without further delay, there is a concomitant onus on the plaintiffs to apprise the defendants of any difficulties which are causing further delay, so that the defendants are assured of the plaintiffs' intention to proceed with their claims, and are not left in the dark as to whether or not the plaintiffs will press on with the matter. A plaintiff who has fully apprised a defendant of delays involving other defendants is, apart from anything else, in a much better position to argue that the defendant who has been informed of the reasons for the delay and does not object to or complain about such delays, has effectively acquiesced in the delay and cannot subsequently complain about it. On the other hand, where there is unexplained delay on the part of a plaintiff whose proceedings have already commenced with a 'late start' a defendant may be able to argue with some force that it was entitled to assume that the plaintiff had thought better of going ahead, and that it is prejudiced in the preparation of its defence by the unexplained delay."

200. The foregoing observations seem to me to be highly relevant to the facts in the present case. The plaintiff's claim is one which undoubtedly had a "*late start*", in circumstances where certain causes of action go back to 2006 and the works on site entirely ceased as of 6th October, 2008, whereas the plenary summons was not issued until July 2011. With regard to the plaintiff's obligation to prosecute his claim promptly and without further delay, it cannot be disputed that almost two years and four months elapsed between the plenary summons being issued and a statement of claim being served on the third party. No excuse, much less a credible excuse or explanation, has been furnished in respect of that delay. Nor is there any evidence that the plaintiff apprised the third named defendant of *any* difficulties which were said to be causing further delay. That being so, there is simply no question of the third named defendant having been assured of the plaintiff's intention to proceed with his claim.

In the dark

201. In reality, the third named defendant was left entirely "in the dark" as to whether or not the plaintiff intended to press on with his claim or not and, in light of the evidence, it was not unreasonable for the third named defendant to take the view that the plaintiff had decided *against* progressing with his claim. In the present case, there was not merely a very tardy approach taken by the plaintiff to the progress of his claim. There was also what can fairly be regarded as a half-hearted approach. Two examples of this can be given.

Half-hearted approach

202. Firstly, it will be recalled that the third named defendant delivered a defence on 10th November, 2014. Other than sending the third named defendant, on 16th December, 2015, a copy of an amended statement of claim (which does not amend any pleas against the third named defendant) the plaintiff took no step whatsoever between 10th November, 2014 and 12th May, 2016. At that juncture, the plaintiff wrote a single letter seeking the third named defendant's consent to a proposed consolidation of six separate sets of legal proceedings and that letter referred to a motion and affidavit being prepared in respect of an application to court for an order consolidating the actions. The third named defendant made its position clear in a reply of 16th June, 2016, rejecting the consolidation proposal. Despite the foregoing, the plaintiff *never* issued any motion to consolidate these six sets of proceedings. Thus, not only was there very significant delay, there was also a half-heartedness in the plaintiff's approach. Either consolidation was essential, or it was not. Either it was important enough to issue a motion, or it was not. In the present case the plaintiff referred to a motion which it simply did not issue and no explanation or excuse has ever been given in relation to why. Thus, it is entirely fair to infer that the reality is that the plaintiff simply did not give the progression of his proceedings anything like the commitment and attention reasonably expected of someone who had chosen to commence legal proceedings.

203. A second stark example of half-heartedness in the plaintiff's approach and lack of attention to the progression of his claim arises from the 16th November, 2018 letter seeking voluntary discovery. Once again, it came after an extended period of utter inaction on the part of the plaintiff (which commenced with the 16th June, 2016 letter from the third named defendant's solicitors rejecting the proposal to consolidate the six sets of proceedings, which delay only terminated with a 12th September, 2018 notice of intention to proceed, served on behalf of the plaintiff). Thus, after a period of well over two years of complete inaction, the plaintiff wrote a letter seeking voluntary discovery and stated very clearly that a motion to compel the third named defendant to make discovery would be made if consent was not forthcoming within 21 days. No consent was forthcoming (in circumstances where the third named

defendant disputes that this letter which was, in fact, addressed to its *previous* office, was ever received) but the point is that the plaintiff singularly failed to follow-through on the threatened motion. No such motion to compel discovery was issued by the plaintiff until a further two years and one month had elapsed. There was what can again be called a half-heartedness in the plaintiff's approach and the 16th November, 2018 letter from the plaintiff's solicitors neither explains nor excuses the undoubted delay on the part of the plaintiff both up to and following the date of that letter, even if one were to assume that the letter had been received at the time - a matter wholly disputed.

204. On the evidence before this Court, it was not at all unreasonable for the third named defendant, who never acquiesced in any delay, and who was never apprised of problems said to have caused delay, to consider that the plaintiff may well have decided against proceeding, given the approach the plaintiff had taken over the years, which the foregoing examples illustrate.

205. In saying the foregoing, I want to emphasise that I have taken full account of the third named defendant's conduct in the present proceedings, including when assessing where the balance of justice lies, very conscious that litigation is a two - party operation. The evidence, however, demonstrates that the delay on the part of the plaintiff far exceeds any delay on the third named defendant's part. The evidence also demonstrates that nothing the third named defendant did, or failed to do, excuses the plaintiff's delay.

Culpable delay

206. By pointing, in para. 26 of the plaintiff's 2nd December, 2019 affidavit, to a six-month period which expired between the delivery by the plaintiff of replies to particulars and the delivery by the third named defendant of their defence, the plaintiff is clearly suggesting that a period of six months' delay on the part of the third named defendant should be regarded as "culpable" delay or of such significance that it excuses any delay on the part of the plaintiff. Such a suggestion is impossible to reconcile with the plaintiff's assertion that there has been no delay on his part, even though the evidence demonstrates that the plaintiff has delayed, on several occasions, for periods far in excess of six months. Furthermore, having taken, *inter alia*, full account of such delay as the third defendant is responsible for, I am entirely satisfied that the plaintiff's delay is inexcusable as well as inordinate.

207. Counsel for the plaintiff also argued that, by raising a notice for particulars dated 3rd January, 2014, the third named defendant acquiesced in respect of any and all delay on the part of the plaintiff. I am bound to reject that submission. On 5th November, 2013, after a delay of almost two years and four months, the plaintiff delivered a statement of claim. The third named defendant's response was to serve, relatively promptly, a notice for particulars dated 3rd January, 2014. Doing so does not alter the fact that these were "late start" proceedings. Nor does it alter the fact of the delay of two years and four months *prior* to the delivery of the 5th November, 2013 statement of claim. It might be said that, had the plaintiff progressed his claim, thereafter, expeditiously and consistently so and with engagement by the third named defendant, the latter might have had a difficulty, in such a scenario, were it to move an application of the present type, some years later, in the absence of any further delay on the part of the plaintiff and against the backdrop of co-operation by it in preparing the case for trial. That, of course, is certainly not the factual position which is presented to this Court. The reality is that there was very significant delay on the part of the plaintiff both *prior* to, and *subsequent* to the notice for particulars raised by the third named defendant and responded to by the plaintiff.

Robbing this Court of jurisdiction

208. I am entirely satisfied, in light of the evidence before this Court, that I am entitled to have regard to these very substantial periods of delay both prior to and subsequent to the raising of and responding to particulars in 2014. Indeed, for this Court to take a different view would seem to me to rob the Court of its jurisdiction to deal appropriately with cases involving delay, in the context of a proper application of the *Primor* principles. Similarly, if I were to accept the submission made by counsel for the plaintiff that this application should be dismissed because there was no plea of delay in the third named defendant's 2014 defence and no reference to delay in the notice for particulars which preceded it, this would also be to rob the Court of the jurisdiction it undoubtedly enjoys as per the *Primor* principles.

Issuing the present motion

209. It is also argued on behalf of the plaintiff that the third named defendant is guilty of acquiescence because, subsequent to delivering its defence, "*it did nothing other than to issue the present motion*" to dismiss the plaintiff's claim. This does not constitute acquiescence. To my mind, it is the *opposite* of acquiescence. The foregoing submission utterly ignores the plaintiff's obligation to prosecute his claim. The facts demonstrate that it was the third named defendant who took the initiative and issued the present motion against a backdrop of inaction on the part of the plaintiff.

The rejection in June 2016 of the request to consolidate six sets of proceedings

210. It was also suggested that the letter of 16th June, 2016, in which the third named defendant's solicitors rejected the consolidation proposal, amounted to acquiescence on the part of the third named defendant. I cannot agree with that submission, particularly in circumstances where, despite referring in the plaintiff's 12th May, 2016 letter to a motion in respect of consolidating the six sets of proceedings, the plaintiff failed to issue any such motion in the months and years which elapsed thereafter.

211. By sending, on 16th June, 2016, a relatively prompt response to the plaintiff's 12th May, 2016 request (i.e. rejecting the suggestion that six sets of proceedings be consolidated) the third named defendant made its position clearly known, but what did the plaintiff do? The answer is, *nothing* for the remainder of 2016; and *nothing* at all throughout the entire of 2017; and *nothing* whatsoever in 2018, other than to issue a notice of intention to proceed on 12th September, 2018 and to send a 16th November, 2018 voluntary discovery request to the old address of the third named defendant's solicitors (the receipt of which is disputed). Even then, the plaintiff did *nothing* by way of following-through on the plaintiff's stated intention to issue a motion within 21 days of 16th November, 2018, in the event consent to the making of voluntary discovery was not forthcoming. It was not forthcoming (in circumstances where there is a dispute as to whether the voluntary discovery request was ever received) but it cannot be disputed that, as the party seeking discovery, it was entirely within the power of the plaintiff to issue the motion which he said he would issue. He did not do so and that is not acquiescence on the part of the third named defendant. It is a complete failure on the part of the plaintiff to prosecute his claim with anything like reasonable diligence or expedition.

The plaintiff's reliance on the Comcast decision

212. Given the emphasis placed by counsel for the plaintiff on the judgment by McKechnie J. in *Comcast International Holdings Ltd. v. Minister for Public Enterprise* [2012] IESC 50, it is appropriate to quote from same as follows:-

"33. ...*may I immediately disown any interpretation which suggests that the old days of "endless indulgence" have returned. I hold no such views. It is not what I convey or intend to convey. My point is utterly simple. In the situation under discussion justice is best achieved by letting it react*

to given facts. The same period of delay, in different cases, may demand different treatment. Justice is not always referenced to the highest bar. If that were the case the wealthy, powerful, and the influential would set it. That should not be allowed. Justice sets its own bar. A failure of the average man and his average lawyer to match the gold standard of their opposite in society and in practice must not be necessarily condemned.

34. In the same general context there is another matter which I would like to touch on. It relates to the 'inactivity' on the part of a defendant, in circumstances in which he subsequently complains of inordinate and inexcusable delay on the part of the plaintiff. In a number of cases, a distinction has been made between what has been described variously as 'active delay' or 'culpable delay' as distinct from 'inactive delay' or 'mere delay'. The former in general refers to an undischarged obligation on the defendant's part whereas the latter is intended to reflect the passage of time simpliciter or the 'do nothing' approach. Again, I remain unconvinced that such a formal departmentalising of the defendant's conduct is justified. In *Dowd v. Kerry County Council* [1970] I.R. 27 O'Dálaigh C.J., with whom Walsh and Budd JJ. agreed, said the following by way of a general observation:

'First, in weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution. There is the provision of Order 27, r. 1, and the provision of Order 108, r. 11, where there has been no proceeding for two years. The adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances it is acted upon by a defendant in the hope that he will "get by" without having to face the peril of being decreed. Litigation is a two-party operation, and the conduct of both parties should be looked at' [emphasis added].

35. The passage from the judgment of Finlay P. in *Rainsford*, where he said that '[d]elay on the part of a defendant seeking a dismissal of the action, and to some extent a failure on his part to exercise his right to apply at any given time for the dismissal of an action for want of prosecution, may be an ingredient in the exercise by the court of its discretion' [emphasis added], is, on occasion, relied upon as justifying the distinction above referred to, with the consequence that depending on how this activity can be categorised, different weight considerations apply. It is not at all clear to me that the learned President, as he then was, intended such a distinction. Certainly I do not believe that *Primor* supports such a view, but I readily accept that to varying degrees other judges have.

36. Whilst there can be no doubt but that the moving party has the greater obligation of expedition overall, nonetheless the defendant's interaction or lack of it, as the case may be, with the delay of which he later complains, whether active or purely inactive, to use such phrase, may rightfully attract condemnation by virtue of many other circumstances such as: the identity and character of the particular defendant; the position which he holds; whether that be public or private; the standing and accountability of that position, whether it be representative of the public, of an institution which it serves or otherwise; and the nature of the issues which he is called upon to answer. Given the gravity of the charges levelled against the State defendants in this case, I am astonished that they have not sought, with all due alacrity, an immediate opportunity to answer such charges and to vindicate their repeated assertion as to the integrity of such a hugely significant

public process. Whilst I readily accept that what in truth is the plaintiffs' delay should not rest on the defendant's table, nonetheless it must be remembered that the constitutional guarantee of fair procedures and the right to a fair trial – both of which are invariably relied upon in motions to dismiss for either want of prosecution or in the interests of justice – are at the disposal of a defendant in a host of varying circumstances, and relatively speaking from a very early stage of the proceedings. See O 27 R 1, dealing with a failure to deliver a Statement of Claim, O 36 R 12, regarding the absence of a Notice of Trial, and O 122 R 11, permitting a dismiss application for want of prosecution, of the Rules. Those rules, coupled with many statutory provisions, as well as judicial precedent, are all designed to further, in an administrative, practical and operational sense, the defendant's rights, every bit as much as the plaintiff's rights. Murphy J. declares so in *Hogan and Others v. Jones and Others* [1994] 1 I.L.R.M. 512 ('Hogan'), where at page 520 the learned judge states:

'insofar as the defendants assert a constitutional right to have the litigation conducted in accordance with fair procedures, it seems to me that they and all litigants must view the Rules of the Superior Courts and the relevant legislation (including in particular the statute of limitations) as part of the structure designed to give effect to the constitutional right. The constitutional right to fair procedures is protected not only by the power of the court to dismiss a case for want of prosecution but also by the other interlocutory steps or procedures which protect either party from undue delay by the other'.

I respectfully agree with what the learned trial judge has stated.

37. Hogan is also of interest by reason of the manner in which the judge dealt with the delay alleged against the particular defendant, which had two aspects to it. The first was its failure to deliver a defence, which is not of interest, but the second, which was its failure to move against the plaintiff, which itself was in serious default, is. In that context reference was made to *Calvert v. Stollznaw* [1980] 2 N.S.W.L.R. 749, where the issue as to how far a defendant should go to compel a plaintiff 'to progress the outstanding litigation' is discussed. Cross J., in his unreported judgment but which was affirmed on appeal as stated, disagrees with the suggestion found in some English cases, that a defendant is entitled to 'let sleeping dogs lie' in the hope that the action will expire. If he chooses this route and if his tactical gamble, for that is precisely what it is, should not come to pass, then surely he should not be allowed to subsequently rely on that delay to advantage himself? To so permit seems unattractive and unfair. This description is mine but the views of Cross J. are to the same effect. In any event, whilst describing the relevant passage as 'apposite', Murphy J. did not find it necessary to further comment on this apparent difference, stating that 'the topic is amply covered in this country by a series of decisions of the Supreme Court reaching from *Dowd v. Kerry County Council* [1970] IR 27 to ... *Celtic Ceramics Ltd v. IDA* affirming the decision of *O'Hanlon J* reported in [1993] ILRM 248'. I cannot see any formal system of classification or rating of the defendants' conduct in such cases.

38. Consequently, I remain of the view that differentiation at a formal level of the defendant's activity, with the consequences that have been suggested, is one which I doubt is either desirable or necessary.

39. However, if some form of recalibration is generally favoured then I have no doubt but that mutuality of adjustment must apply and that a greater sense of awareness must also attach to the

defendant's position, in whatever way that may have come about. Otherwise to say that justice is a two-way process is entirely hollow."

213. Insofar as the plaintiff seeks to rely on the foregoing, I want to emphasise again that I have very carefully considered, *inter alia*, the conduct of the defendant. Having done so, I am entirely satisfied that it could not fairly be said that the third named defendant acquiesced in respect of the plaintiff's delay. Regardless of how much counsel for the plaintiff emphasises what the learned judge stated in para. 39 of *Comcast*, with regard to a greater sense of awareness attaching to the defendant's position, and leaving aside entirely the very different factual context in which *Comcast* was decided, two key points deserve emphasis: (1) On the facts of this case, the third named defendant did not acquiesce in the plaintiff's delay; and (2) It is the plaintiff who bears primary responsibility for prosecuting the claim he chose to initiate. As McKechnie J. observed in *Comcast* (at para. 34): - "...there can be no doubt but that the moving party has the greater obligation of expedition overall...". Viewed fairly, any delay on the part of the third named defendant is not such as would attract condemnation, given the evidence before this Court.

214. In my view, the fact of the plaintiff's "late start"; the tardy approach to progressing the present proceedings once they were issued; the plaintiff's involvement in a range of other proceedings; the nature of the pleaded claim and the nature of the defence filed, including an explicit plea that the plaintiff had named the wrong defendant; meant that the third named defendant could not fairly be criticised for taking the approach it took. Although there was some delay on the defendant's part (albeit dwarfed by the plaintiff's delay) the evidence most certainly does not demonstrate *acquiescence* by the third named defendant insofar as the plaintiff's delay was concerned.

"Silence, inactivity and acquiescence"

215. In submissions, counsel for the plaintiff argues that there was "*silence, inactivity and acquiescence*" on the part of the third named defendant. Having carefully reviewed the evidence, I am entirely satisfied that this is not a fair characterisation. There was no acquiescence on the part of the third named defendant. It is not necessary for the purposes of the present application to "classify" the defendant's conduct or to make a formal determination as to whether the term "culpable" delay, as opposed to delay, is or is not appropriate in respect of any conduct on the part of the third named defendant or any portion of the delay which could be attributed to the third defendant. Suffice to say, however, that I have considered very carefully and have taken into account for the purposes of this Court's decision, the conduct on the part of the third named defendant, as well as the conduct of the plaintiff, consistent with the principles in *Primor*, including the guidance given at para. (d) (iii), (iv) and (v) on pages 475 & 476 of the Supreme Court's judgment in that case.

A summary of the plaintiff's post-commencement delay: six years

216. While the plaintiff asserts, and his counsel submits, that delay of six months on the part of the third named defendant entitles this Court to refuse the relief sought, the evidence demonstrates that, in cumulative terms, the plaintiff's post-commencement delay exceeds six years. I say this in light of the following: -

- **Two years and four months** elapsed between 19th July, 2011 (plenary summons issued) and 5th November, 2013 (statement of claim delivered);
- **One year and one month** elapsed between 10th November, 2014 (third named defendant's defence delivered) and 16th December, 2015 (letter sent by plaintiff to third named defendant

enclosing amended statement of claim, which did not, in fact, amend the claim against the third defendant);

- **Five months** elapsed between 16th December, 2015 (plaintiff's letter enclosing amended statement of claim which did not amend the plaintiff's claim against the third named defendant) and 12th May, 2016 (plaintiff's letter to third defendant proposing consolidation of six sets of proceedings);
- **Two years and three months** elapsed between 16th June, 2016 (third defendant's letter rejecting proposal to consolidate proceedings) and 12th September, 2018 (plaintiff's notice of intention to proceed);
- **Nine months** elapsed between 16th November, 2018 (plaintiff's letter seeking voluntary discovery, the receipt of which is disputed by the third named defendant) and 6th August, 2019 (third defendant's motion to dismiss for want of prosecution).

217. Leaving aside entirely the issue of the plaintiff's undoubted "late start" in relation to commencing the proceedings, it cannot be disputed that, by the time the third named defendant issued the present motion (on 6th August, 2019), over eight years had elapsed since the plaintiff issued his plenary summons (on 19th July, 2011). I have carefully considered all averments made by, and all submissions made on behalf of, the plaintiff in an effort to explain and excuse what was undoubtedly inordinate delay on the plaintiff's part.

218. The principal issues canvassed in an attempt to expect explain and excuse the delay included: (a) the number of defendants in the Dooley proceedings; (b) the nature of those proceedings; (c) the plaintiff's involvement in other proceedings; (d) the arbitration motion which was issued in the Ocean Point proceedings; (e) the plaintiff's "reliance" on the 16th November, 2018 letter seeking voluntary discovery (the receipt of which is disputed by the third named defendant). None of the foregoing, individually or collectively, excuse the inordinate delay on the plaintiff's part. Nothing said by or on behalf of the plaintiff excuses the plaintiff's post-commencement delay.

But for the plaintiff's delay

219. Over eight years elapsed between these proceedings being issued by the plaintiff and the present motion being issued by the defendant. A careful analysis of the evidence reveals that, of that eight-year period, in excess of six years constitutes delay on the part of the plaintiff which, I am entirely satisfied, can fairly be described as both inordinate and inexcusable delay. This Court is entitled to take the view that, but for the plaintiff's inordinate and inexcusable delay, at least six years of that eight-year period could have been avoided or "saved". In other words, had plaintiff progressed his case with reasonable expedition, from July 2011 onwards, there is no reason to believe that it would have taken more than two years for the proceedings to reach the stage they were at when the present motion was issued (which is still a relatively early stage given that discovery has not yet been dealt with).

All factors cumulatively

220. Counsel for the plaintiff also submits that, if the Court takes "*all factors cumulatively*", it excuses any inordinate delay *if* the Court were to find that there was delay and that it was inordinate. I have taken all factors into account which counsel for the plaintiff directed that Court's attention to and, to the extent that they are to be given due weight in the context of a proper analysis of the *Primor* principles, they have formed part of the Court's consideration. Nevertheless, the facts which emerge from an analysis of the evidence demonstrate beyond doubt that the plaintiff has been guilty of inordinate and

inexcusable delay. Satisfied, for the foregoing reasons, that the plaintiff's delay is both inordinate and inexcusable, I now turn to the balance of justice.

The balance of justice

221. In *Desmond v. MGN Ltd.* [2009] 1 IR 737, the Supreme Court made it clear that, in assessing where the balance of justice lies, a court is entitled in appropriate cases to have regard to the "scope and ambit" of a party's defence. At para. 71, Macken J. stated the following: -

"[71] *In assessing where the balance of justice lies as between the parties, I consider also that **the scope and ambit of the defence** as filed by the appellant is a factor which, in an appropriate case, may be taken into account. The defence includes, according to the appellant itself, a plea of justification . . . A plea of justification it is particularly important, having regard to the nature of the obligations imposed in that regard, for the law makes it very clear, as Kelly, J. stated in *Cooper Flynn v Radio Telefís Eireann* citing Lord Denning M.R. in *Assoc. Leisure v Assoc. Newspapers* [1970] Q.B. 450 at 456: -*

'Like a charge of fraud, (counsel) must not put a plea of justification on the record unless he has clear and sufficient evidence to support it'.

[72] *I am satisfied that counsel would not put a plea of justification other than in accordance with their obligations in that regard, since the case law also makes it clear that a plea of justification, simpliciter, is a mere repetition of a libel, and ordinarily, material facts supporting a plea of justification should be included in the defence as delivered (McDonagh v Sunday Newspapers Ltd [2005] IEHC 183 [2005] 4 IR 528)"* (emphasis added).

The scope and ambit of the defence

222. In the present application I am satisfied that it is appropriate to have some regard to the defence as filed by the defendant, in the context of looking at where the balance of justice lies as between the parties. At para. 4 of the defence, the third named defendant denies that it was appointed as project manager in respect of the relevant development. This is not merely a "bald" denial. Rather, the defendant makes the express plea that it was an entirely *different* legal entity, namely "MMP Project Management Ltd." (referred to in this judgment as 'MMP-PM') that was appointed as project manager. Furthermore, in an affidavit sworn by Mr. Kevin Porter on 9th June, 2020, Mr. Porter avers, at para. 9, that the third defendant has been incorrectly joined in the proceedings and that the correct defendant is MMP - PM. In para. 9 of Mr. Porter's 9th June, 2020 affidavit, he also avers that the third named defendant "was incorporated in 2007 as *Mulcahy McDonagh Consultancy Services*, was re - registered as a limited company in 2008 and changed its name to *Mulcahy McDonagh & Partners Ltd.* on 4 March 2009". No issue was taken with the fact that the third named defendant was incorporated in 2007 and the date of incorporation is not disputed by the plaintiff.

223. Despite the foregoing, it is pleaded from para. 15 of the statement of claim that the plaintiff approached the third named defendant in or about 23rd May, 2006 to act as project manager and it is pleaded, *inter alia*, that a letter of intent sent on 22nd June, 2006 was negligently drafted by the third named defendant. Moreover, the cause of action in respect of the €285,000 which the plaintiff pleads that he paid to Cleary Doyle Construction Ltd. and the €200,000 which the plaintiff claims to have expended on professional fees in relation to the abortive design build contract, concern matters which arose on or before September 2006.

224. It is not for this Court to make any determination in respect of matters which arise in the underlying proceedings, but it is fair to say that the third named defendant's incorporation, *after* the plaintiff pleads to have entered into a contract with the third named defendant, creates an obvious issue. Nowhere in the plaintiff's affidavits sworn in opposition to the present motion does he engage directly with the averment that the third named defendant was incorporated in 2007, yet the plaintiff has pleaded, *inter alia*, that he received advices *from* the third named defendant in 2006.

225. In submissions on behalf of the plaintiff, counsel pointed out that it is not explicitly pleaded in the defence that the third named defendant was incorporated in 2007, the thrust of his submission being that the Court should have no regard to Mr. Porter's averments in that regard. It seems to me that the manner in which the defence has been pleaded does not deprive the third named defendant of the entitlement to aver, in the context of the present application, that the third named defendant was, in fact, incorporated in 2007. Nor, it must be said, does it prevent the plaintiff from exhibiting evidence to undermine Mr. Porter's averment as to when the third named defendant was incorporated (something the plaintiff has not done).

226. With regard to the assertion that the third named defendant is the incorrect defendant, what Mr. Dooley avers (at para. 24 of his 9th November, 2020 affidavit) is that ". . . *this is disputed and, in any event, is a matter for trial. For the avoidance of doubt, I reiterate that the third named defendant is properly sued herein*". It is, of course, a matter for a trial judge to determine issues which are in dispute in a pleaded case but, given that for the purposes of the present motion it is not disputed that the third named defendant was incorporated in 2007, I take the view that the foregoing aspect of the third named defendant's defence to the claim is something which can form part of the Court's consideration of where the balance of justice lies and, in my view, it weighs in favour of a dismissal of the claim against the third named defendant. That is not for a moment to suggest that it is a very weighty or a determinative factor. It is merely to say that it is one of a wide range of factors which call for consideration and which require to be given appropriate weight in the context of applying the third limb of the *Primor* test.

Where inordinate and inexcusable delay is established

227. In circumstances where this Court is now focussing on the third limb of the *Primor* test, it is appropriate to recall the guidance given by Irvine J. (as she then was) in *Cassidy v. The Provinciate* [2015] IECA 74. A line of jurisprudence, stretching back to the Supreme Court's decision in *O'Domhnaill v. Merrick* [1984] IR 151, focuses on the court's inherent jurisdiction to dismiss legal proceedings in the interest of justice. In *Cassidy*, the court looked at the difference between the *Primor* and *O'Domhnaill* lines of authority, stating, *inter alia*, the following, from para. 35 onwards: -

"35. *I am satisfied that the third leg of the Primor test, which obliges the defendant to prove that the balance of justice favours the dismissal of the claim, does not carry the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the O'Domhnaill test*".

Moderate prejudice

228. The following year, in *McNamee v. Boyce* [2016] IECA 19, at para. 35, Irvine J. gave the following guidance in the Court of Appeal's decision: -

"Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the

plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the Primor test”.

Four / five years delay – reduction in the potential of witnesses to give meaningful assistance

229. In *Rogers v. Michelin Tyre plc.* [2005] IEHC 294, Clarke J. (as he then was) made it clear that the court may have regard to general prejudice which could reasonably be expected to arise. In *Rogers*, the court referred to comments by Finlay Geoghegan J. in *Manning v. Benson & Hedges Ltd.* [2005] 1 ILRM 190 to the effect that: -

“Delays of four to five years as a matter of probability will reduce the potential of such persons to give meaningful assistance or act as a witness”.

The nature of the evidence and other relevant circumstances

230. Clarke J. (as he then was) went on to observe in *Rogers* that: -

“Obviously the extent to which a comment such as the above may be true will depend on the nature of the evidence which is likely to be given and other relevant circumstances”.

Prejudice which could reasonably be expected to occur /general prejudice

231. The court in *Rogers* went on to refer to “*general prejudice*”, which was explained by the court in the following terms: -

“The defendant is entitled to rely on what might reasonably be called general prejudice, that is to say the prejudice which could reasonably be expected to occur in any case of the type concerned and having regard to the delay involved. A defendant will also be entitled, if it wishes, to put before the court any special or additional prejudice. If it does so, it will necessarily have to draw the court's attention by means of evidence to a specific or additional prejudice which has occurred by reason of the absence of a witness, the difficulty of a witness in being able to give full evidence, the absence of documents or any other material fact. Clearly if a defendant does bring to the court's attention any such special prejudice the court must take that fact into account. However, it would also be naïve to ignore the fact that by so doing the defendant will draw the plaintiff's attention to the difficulty which the defendant would incur in properly defending the proceedings in the event that their application for a dismissal is unsuccessful. In those circumstances it seems to me that it is perfectly appropriate for a defendant (if it wishes) to rely simply on general prejudice”.

Likely prejudice is a matter of significant weight

232. On the question of prejudice, Baker J. made it clear, in *Boliden Tara Mines Ltd. v. Irish Pensions Trust Ltd.* [2014] IEHC 488, at para. 36: -

*“It is settled law that likely or actual prejudice to another party is a matter of significant weight in the discretion of the court in hearing an application to dismiss proceedings or extend time for the service of pleadings. The law does not go so far to say that there must be actual prejudice and it is sufficient that prejudice be likely or probable. Prejudice may be either specific or general and again this is clear from the case law. In *Rogers v. Michelin Tyre Plc & Anor.* [2005] IEHC 294, Clarke J. made it clear that the court would look at both general prejudice that would be expected to occur in any case in particular or specific prejudice, the actual prejudice which is found or argued to be found in an individual case. The prejudice, having regard to the characterisation of the jurisdiction of the court, is not merely specific to an individual case but also one which the court must exercise in the context of evolving jurisprudence and the desire to prevent a culture of delay in litigation*

and accordingly, both forms of prejudice are relevant to me, and actual prejudice does not have to be shown”.

233. Applying the foregoing principles to the facts which emerge from analysis of the evidence before this Court, I am entirely satisfied that *at least* general prejudice to the third named defendant has been established of the type referred to in *Rogers v. Michelin Tyre plc*.

Disputed matters for which oral evidence is likely to be necessary

234. In the manner examined earlier in this decision, it is clear from the pleaded case that oral evidence would be required at any future trial, including evidence as to *discussions, advices* and *understandings*, arising out of what is alleged to have taken place in 2006, 2007 and 2008 involving a range of parties. This is very clear having regard to the pleas made in the statement of claim and the full defence delivered. At this juncture, it is appropriate to refer to certain of these pleas which illustrate both the need for oral evidence at a future trial and the many issues which oral evidence would be required to play a material role in a trial judge determining:

- the alleged *discussion* of the plaintiff’s requirements on or about 23rd May, 2006 (statement of claim, para. 15);
- *advices* allegedly received, on foot of which the plaintiff issued a letter of intent on 22nd June, 2006 (statement of claim, para. 16);
- the plaintiff’s understanding based on the *advices* of his advisors as to what occurred at site meetings in August 2006 (statement of claim, para. 17);
- what the plaintiff says was the *impression* given to him by the first and third defendants (statement of claim, para. 17);
- what the plaintiff says he *understood* had already been agreed, based on *advices* from the first and third named defendant (statement of claim, para. 17);
- the alleged *understanding* of the plaintiff which formed the basis of his borrowings from the Bank (statement of claim, para. 17);
- what the plaintiff was *informed* of by the third named defendant (statement of claim, para. 18);
- the *advices* allegedly provided by the first and third named defendants on foot of which the plaintiff negotiated a commercial settlement with Cleary Doyle (statement of claim, para. 19);
- that the plaintiff was effectively being held to ransom by Cleary Doyle in 2006 and was left with no choice but to buy them out (statement of claim, para. 19);
- the alleged involvement of the third named defendant in *discussions* after the refusal on 29th September, 2006 of a planning application for alterations (statement of claim, para. 21);
- the *comfort* which the plaintiff allegedly took based on what the defendants *were saying* and the plaintiffs pleaded reliance on their *advices* (statement of claim, para. 21);
- the ongoing *discussions* between the plaintiff and ACC Bank beginning in early 2006 (statement of claim, para. 22);
- the alleged *awareness* on the part of the first and third named defendants of the *motives* behind the plaintiff’s decision to incorporate Ocean Point in or around 16th August, 2006 (statement of claim para. 22);
- the pleaded *involvement* of the first, second and third named defendants on behalf of the plaintiff personally (statement of claim, para. 22);

- the alleged *awareness* of the defendants that the incorporation of Ocean Point as a means for the plaintiff to personally manage the tax implications of the development (statement of claim, para. 22);
- that, prior to the incorporation of Ocean Point, the first and third named defendants acted for the plaintiffs in his personal capacity and that once Ocean Point was appointed the first and third defendants continued to owe the plaintiff a duty of care (statement of claim, para. 24);
- that, based on the *advice* of the first and third defendants, the plaintiff decided to re-tender the works in 2006 (statement of claim, para. 25);
- that the plaintiff's *strategy* was approved of by the first and third defendants (statement of claim, para. 25);
- that all of the defendants took their *instructions* from the plaintiff as regards matters relating to the construction project (statement of claim, para. 27);
- that during the course of the tender the third defendant *advised* the plaintiff of a company called Clancy Construction (statement of claim, para. 28);
- that the third defendant *indicated* that the fifth defendant was a very competent contractor (statement of claim, para. 29);
- that, on the basis of the *advices* of the third defendant, the fifth defendant was given an opportunity to tender (statement of claim, para. 29);
- that the fifth defendant was awarded the contract based in particular on the *advices* of the fourth and third defendant (statement of claim, para. 31);
- that the plaintiff had a *legitimate expectation* on foot of inter alia his pre-existing contractual relationship with the first and third defendant that they would take all reasonable steps to protect his position (statement of claim, para. 33);
- that without the plaintiff's *knowledge* the first, third and fourth defendants failed to ensure that an insurance policy was put in place (statement of claim, para. 34(b));
- the alleged failure on the part of the third named defendant to take any or adequate steps to address a work stoppage in April 2007 which eventually required a personal intervention by the plaintiff to advance matters (statement of claim, para. 35);
- that the plaintiff *highlighted* defects in the works to the defendants at *every site meeting* but his *concerns* were brushed aside (statement of claim, para. 39);
- that the plaintiff raised a *concern* regarding progress of the works at *site meetings*, particularly with the first and third defendants and was repeatedly *assured* that progress would improve (statement of claim, para. 40);
- that the first, second and third and fourth defendants were incapable of compelling the fifth named defendant to accelerate progress or properly supervising the standard of work (statement of claim, para. 42);
- that the plaintiff raised a number of specific items of concern in a meeting on 31st January, 2008 having already notified the third named defendant (statement of claim, para. 42);
- that it was *agreed* that no further monies would be paid to the fifth defendant until specified defects had been rectified (statement of claim, para. 46);
- that contrary to this agreement Certificate no. 16 was issued in favour of the fifth defendant (statement of claim, para. 47).

235. During the course of submissions on behalf of the plaintiff, his counsel acknowledged, very appropriately, that “*oral evidence will come into play and be needed*” at any future trial. That is undoubtedly so, and the significance of the need for oral testimony at any further trial, in order for a trial judge to make findings of fact, in respect of a range of dispute issues is illustrated by the foregoing pleas.

236. Given the contents of the third named defendant’s defence which puts all the foregoing in issue, in order to resolve the issues in dispute, a trial judge would be asked to rely to a material extent on disputed oral evidence, given at a future trial (which is unlikely to take place before late 2022), including in respect of what was or was not *said, discussed, advised or understood*, between May 2006 and October 2008.

237. Bearing in mind what Finlay Geoghegan J. stated in *Manning v. Benson & Hedges Ltd.* (and cited by Clarke J. as he then was in *Rogers v. Michelin Tyre plc*) with regard to delays of four to five years as a matter of probability reducing the potential of individuals to give meaningful assistance or to act as witnesses, the same issue arises in the present case, where the evidence establishes that the cumulative delay on the part of the plaintiff, with regard to progressing his claim against the third named defendant exceeds a period of six years and there is no question of a trial taking place until fifteen years after the first of the disputed events.

238. Given the requirement for oral evidence at a future trial, I am satisfied that the delay on the part of the plaintiff has, as a matter of probability, reduced the potential of relevant witnesses to give meaningful assistance to a trial judge. To my mind, such prejudice is likely or probable and amounts, at the very *least*, to the general prejudice contemplated by the authorities to which I have referred.

239. I want to make clear that I take this view even if all relevant witnesses turn out to be available and even if there are documents available from the time. That availability does not seem to me to be the core issue, nor would it “cure” the prejudice because this is not a “documents case”. Rather, all parties agree that oral evidence will be necessary, irrespective of what documents may or may not be available and the pleas in the statement of claim clearly illustrate why this is so. Thus, in light of the particular circumstances in the present case and having regard to the issues in dispute, at least general prejudice has been established arising from the likely degrading of witness memories and the consequent diminution in their ability to assist the Court at a trial where the trial judge would need to rely, to a material extent, on witness memories of disputed events (including what was or was not said) to make findings of fact.

240. It will be recalled that in *McNamee*, the current High Court President made it clear that, where culpable delay has been proved, a defendant need only prove moderate prejudice arising from same in order to succeed under the *Primor* test. The evidence which I have examined in the present case demonstrates that at least moderate prejudice has been proved in circumstances where the plaintiff’s delay is both inordinate and inexcusable.

241. As Fennelly J. made clear in the Supreme Court’s decision in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 IR 510 (at 520): “*Furthermore, it has long been recognised that general prejudice arises from the natural remove of the time of trial from the contested events*”. In the present case, the contested events go back to 2006. Indeed, the relevant events, insofar as the plaintiff’s pleaded case is concerned, are “bookended” by, firstly, the 23rd May, 2006 (when the plaintiff pleads that he met with a Mr. Pat Walsh of the third named defendant to discuss the plaintiff’s requirement) and the 6th October, 2008 (when the plaintiff pleads that the contractor ceased work on site), being works which the plaintiff claims were not adequately supervised by the third named defendant. When the third named defendant issued the present motion in August 2019, it was already at the remove of over thirteen years since the

first of, and over eleven years since the last of, the contested events. In my view, this underlines the fact of, at the very least, moderate prejudice having arisen, namely the probable impairment of the memories of witnesses and the impairment of their ability to assist the court in terms of an accurate recollection of events which, at this juncture, go back to between thirteen and fifteen years ago.

Documents cases

242. In *Rodenhuis & Verloop B.V. v. HDS Energy Ltd.* [2011] 1 IR 611, Clarke J. (as he then was) stated inter alia (at paras. 19 and 20): -

“ . . . There are cases which turn on the interpretation of documents themselves. There are also cases where parties will never have any recollection of the events other than by reference to contemporaneous records. However, there are cases, such as this, where the parties may be assisted in their recollection by documentation, but whether issues which will need to be determined by the court may depend on precisely what was said. In such cases, while documents will make the task of the parties and court easier, it will not necessarily be the case that the documents will be decisive.

20. Furthermore, in addition to the general prejudice which any party might be likely to suffer by significant delay, it seems to me that there is specific prejudice on the part of HDS established in this case. So far as the workmanship issue is concerned, there is likely to be some prejudice in attempting to establish matters that happened between ten and thirteen year ago”.

243. In the present case, the issues in dispute are not confined to an interpretation of documents. Thus, the likely impairment of witness memories is both a very real issue and one which cannot be adequately compensated for by reference to documents. Carefully considering all the averments made, I am satisfied that there is no evidence that any particular witness is certain to be *unavailable* to the defendant. Thus, for the purposes of a consideration of the balance of justice, I am assuming that all relevant witnesses *will* be available. That does not, however, address the prejudice which, as I say, is at least of a moderate type, arising from the degrading of witness memories. A fair determination of the matters in issue, having regard to the pleaded case, would require an examination and cross – examination of a number of witnesses, as to their recollection of events, including conversations, advices, discussions, complaints and understandings, going back, at this stage, between thirteen and fifteen years ago. Regardless of what documents may or may not be available at a future trial, the foregoing will still be so. Again, that fortifies me in the view that, at the very least, general prejudice to the third named defendant’s ability to defend the present proceedings arisen or can be assumed.

The suggestion that there is no issue as to memories fading

244. Among the submissions made on behalf of the plaintiff was to suggest that the contents of the defence delivered by the third named defendant on 10th November, 2014 demonstrated that “*there is no issue as to memories fading*”. In making this submission, counsel for the plaintiff suggested that this was “*not simply a two-page defence*”, going on to submit that, because it is a comprehensive defence containing numerous denials, “*it is clear that the third named defendant knows its position*”, the thrust of the submission being that the contents of the defence constitutes evidence that there has been no degrading of witness memories. I regard myself as obliged to reject that submission. It simply does not follow that, because a formal defence, delivered on 10th November, 2014, is detailed, containing a range of denials (as was hardly unlikely, given what was a very comprehensive and detailed statement of claim) it evidences that there has been no adverse effect on the reliability of witness memories, be that *up to*

that point, or in the years that have elapsed *afterwards* (the plaintiff having been responsible for delay prior and subsequent to that defence).

245. Among the plaintiff's submissions was to say that any "*thinning out*" of files by the defendant or any availability of their documents "*cannot be laid at the door of the plaintiff*". Even if I were to accept that entirely (and the averment on behalf of the third named defendant is that such thinning out of files occurred *before* the present proceedings were brought) it is not a submission which avails the plaintiff or which "cures" the prejudice established. It is not a consideration which weighs in the plaintiff's favour in an assessment of where the balance of justice lies.

246. Counsel for the plaintiff relied, *inter alia*, on passages from the Court of Appeal's decision in *Colm Granahan T/A CG Roofing and General Builders v. Mercury Engineering* [2015] IECA 58, where Irvine J. (as she then was) stated (at para. 39) that, while at face value averments made on behalf of the defendant respondent: "*contend for significant prejudice, and clearly the trial judge was impressed that this was so, I am inclined to agree with counsel for the plaintiff that the prejudice alleged is much more likely to be illusory than real.*" Counsel for the plaintiff submits that the foregoing is also the position in the present case. In *Granahan*, the court commented, *inter alia*, on the importance of the defendant obtaining contact details for any relevant witness who may, for whatever reason, leave its employment and noted that the defendant appellant had not indicated what steps, if any, had been taken to ensure that relevant witnesses would remain available to give evidence at the trial when they left, or what efforts had been made to trace the whereabouts of witnesses. For the reasons explained, the Court of Appeal in *Granahan* placed "*little weight upon the fact that a number of the defendant's potential witnesses are no longer in its employment*" (see para. 40).

No weight placed on unavailability of witnesses

247. I want to make clear that I have placed no weight whatsoever on the assertion that none of the witnesses identified by the third named defendant continue to be employed by the third named defendant. Given the absence of averments as to what steps, if any, were taken by the third named defendant to contact those and any other witnesses deemed essential, I have assumed that all witnesses would be available for the purposes of giving evidence at a future trial. Despite this *availability* of witnesses, the passage of time since the events at issue (many of which are said to relate discussions, understandings, advices etc.) of which at least six years can fairly be said to relate to the plaintiff's delay as regards the prosecution of his claim against the third named defendant, this Court can safely assume that it is likely there has been an adverse effect on the *ability* of such witnesses to assist the Court. This is particularly in circumstances where relevant events go back to between May 2006 and October 2008, yet no trial could be expected to take place before the end of 2022 at the earliest. In other words, even assuming as I do, for present purposes, that all witnesses identified in the third named defendant's affidavits would be available at a future trial, general prejudice (insofar as the likely impairment of witness memories) has been established and this is not "cured" by witness availability or, for that matter, documents being available. General prejudice is *not*, however, the extent of the prejudice which has been established.

Specific prejudice

248. Quite apart from general prejudice or moderate prejudice which, I am entirely satisfied, has been proved in light of the evidence before this Court, the third named defendant has made a range of averments to the effect that the plaintiff's delay has caused actual or specific prejudice to them, including:-

- That the first named defendant went into liquidation in 2012 and that the second named defendant was dissolved in 2014 (para. 8 of Ms. Mansfield's 2nd August, 2019 affidavit);
- That the plaintiff's claim has interfered with the third named defendant's reputation and has an ongoing effect on its professional indemnity insurance (para. 11 of Ms. Mansfield's 2nd August, 2019 affidavit);
- That the MMP – PM files were "*thinned out and many files disposed of before the current proceedings were launched in 2011*" (para. 16 of Mr. Porter's 9th June, 2020 affidavit).

249. The foregoing, individually and/or collectively, seems to me to constitute actual or specific prejudice (i.e. in addition to the at least moderate prejudice to which I previously referred). Furthermore, even if this Court were to ignore the liquidation in 2012 of the first defendant; and were to ignore the fact that the second defendant was dissolved in 2014; and were also to ignore the averment that certain MMP-PM files were "*thinned out*" and "*many files disposed of*" before the present proceedings were instituted in 2011 (and there is no reason to ignore any of the foregoing) the effect on the third named defendant's reputation and professional indemnity insurance, alone, constitutes prejudice which has been established in this case (in addition, as I say, to general prejudice flowing from the likely degrading of the memories of witnesses).

250. In my view, the foregoing is sufficient, of itself, to constitute prejudice which has been demonstrated. In other words, if I am wrong that general prejudice has been established, the effect on the third named defendant's reputation and professional indemnity insurance is, apart from anything else, prejudice, and, in my view, is *at least* the type of "moderate prejudice" referred to *McNamee v. Boyce*.

Failure to plead delay and prejudice

251. During the course of submissions on behalf of the plaintiff, counsel stressed that if there was any substance in the proposition that there was any delay with regard to the progress of these proceedings, or any prejudice suffered by the third named defendant, these issues would and should have been canvassed in the third named defendant's notice for particulars or defence. In the context of the prejudice asserted by the third defendant, the plaintiff's counsel argued that the third named defendant did not make reference to delay or prejudice when it delivered a notice for particulars (on 3rd January, 2014) and when it delivered a defence (on 10th November, 2014). These were submissions made in the context of the balance of justice assessment, the thrust of the plaintiff's submissions being that this Court could and should hold that no prejudice had been established in circumstances where, according to the plaintiff's counsel, the failure to plead delay and prejudice constituted acquiescence by the third named defendant, tipping the balance of justice against the case being dismissed.

Pleading delay and/or prejudice in a defence

252. I cannot agree with the foregoing submission. I am aware of no authorities which establish that a pre-requisite for moving a motion to strike out proceedings on delay grounds is that, years *earlier*, a defendant must have formally pleaded delay and/or prejudice in any defence delivered. In my view, the absence of a specific reference to delay in a formal defence cannot be taken to constitute acquiescence on the part of the defendant, in respect of delay by the plaintiff, be that *prior* to, or *subsequent* to, the delivery of the defence in question. I cannot agree that the absence of any particular plea in the third named defendant's defence leads to the conclusion that delay did not occur prior to the defence; or that delay has not occurred since the defence; or that such delay has not prejudiced the third named defendant. In short, the absence of any particular plea in the third named defendant's defence does not

constitute an acceptance by the third named defendant of what was, on the facts in this case, undoubtedly inordinate and inexcusable delay both prior to and subsequent to the delivery of the said defence. Nor does it constitute "proof" that no prejudice has arisen. Still less does it "remedy" prejudice which has resulted from the third named defendant's delay, including significant delay *after* the defence was delivered. In my view, this submission adds no weight in favour of the plaintiff's claim being permitted to proceed.

Pleading in a notice for particulars

253. As regards the third named defendant's notice for particulars, it is uncontroversial to say that the purpose of a notice for particulars is to seek details in relation to a pleading. In the present case, the 3rd January, 2014 notice for particulars sought further details in respect of the plaintiff's statement of claim dated 5th November, 2013. A notice for particulars is *not* the place to make *pleas*, be that in relation to delay or prejudice or otherwise. I am entirely satisfied that the absence from the third named defendant's notice for particulars of a reference to delay or to prejudice simply cannot be taken as acquiescence on the part of the third named defendant with regard to delay by the plaintiff. Nor does it "prove" that no prejudice has arisen. Neither does it "cure" the prejudice established. The absence of a "plea" of prejudice or delay from the notice for particulars is not at all surprising and, regardless of the ingenuity with which the plaintiff's counsel makes this submission, the foregoing adds no weight whatsoever in favour of the plaintiff's claim being proceeding.

Induced to incur further expense

254. Nor is there any question of the third named defendant having *induced* the plaintiff to incur further expense in pursuing the action, despite submissions to the contrary by the plaintiff's counsel. Although *Primor* makes it clear that such a consideration, although relevant, is not determinative of an application to dismiss proceedings on delay grounds, it is *not* the situation in the present case that the third named defendant, for example, put the plaintiff to the cost of making discovery and subsequently sought to strike out the proceedings. Indeed, with regard to the topic of discovery, an analysis of the evidence reveals the fact that, four years after the delivery of the third named defendant's defence, the plaintiff sent a single letter to the former office of the third named defendant's solicitors (the receipt of which is disputed) but took no further step, making no phone call, sending no follow-up letter and issuing no motion to seek an order for discovery until over two years had elapsed after the said letter had been sent.

255. It is also important to observe that it was the third named defendant who, in fact, took the initiative and issued the present motion. It did so against a background of utter inaction on the part of the plaintiff for a period of many months. In other words, the third named defendant's motion was not a *reaction* to, for example, the delivery by the plaintiff of a notice of intention to proceed in the weeks prior to the motion to dismiss being issued. The last act which the plaintiff claims to have taken was to deliver a 16th November, 2018 request seeking voluntary discovery (which the third named defendant claims never to have received). Leaving aside the fact that the third named defendant disputes the receipt of same, it is common case that the plaintiff did nothing whatsoever *after* 16th November, 2018 to follow-up on the voluntary discovery request and the plaintiff could have but plainly did not issue the motion to which it had referred in the 16th November, 2018 letter. Instead, there was, once again, a long period of total silence on the part of the plaintiff and it was the third named defendant who "brought matters to a head" by issuing the motion to dismiss on 6th August, 2019. In short, it was the third named defendant who was *pro-active*.

Knows and has always known the case against it

256. On behalf of the plaintiff, it is also submitted that the third named defendant “*knows and has always known the case against it*” and counsel for the plaintiff also submits that this is clear from the defence delivered. That is a submission was made in the context of urging the Court to hold that the balance of justice lay in favour of the plaintiff’s case being permitted to continue. It is not a submission which can avail the plaintiff, having regard to the facts in the present case. A number of comments appear to be appropriate in this regard. Firstly, it is a matter of fact that the plaintiff delivered no “letter before action”. In other words, the plaintiff issued the plenary summons on 19th July, 2011 without writing in advance to the third named defendant to outline the basis for the plaintiff’s claim; the legal duty or duties relied upon by the plaintiff; the alleged breach or breaches; and the alleged loss. Earlier in this judgment I looked closely at the contents of the plenary summons. It is fair to say that a wide range of “bare” pleas are made therein, but the specific nature of the claim and the factual basis upon which the claim is asserted is entirely unclear from the plenary summons, which refers to the plaintiff pursuing damages for loss, damage, inconvenience, distress, interest and costs associated with alleged breach of contract and/or negligence and/or breach of duty to include breach of statutory duty on the part of the defendants or each, either or all of them, their respective servants and agents.

257. In other words, as of July 2011, the third named defendant was aware of the *fact* but not the specific *nature* of the claim which the plaintiff had instituted. It would take a further two years and four months before a statement of claim was delivered in which the nature of the claim was detailed as against the third named defendant. By this point over seven years had elapsed since many of the events pleaded, and over five years had elapsed since the contractor had ceased work on site, being work which, according to the plaintiff, the third named defendant had failed to supervise properly. In other words, the proposition that the third named defendant has “*always known the case against it*” is undermined by the facts and it is a submission which cannot avail the plaintiff in the context of the present application. I am entirely satisfied that, in the context of a balance of justice exercise, it carries no weight in favour of where the plaintiff contends the balance of justice lies.

Gold standard

258. Mr. Justice McKechnie said the following in para. 33 of his decision in *Comcast*, upon which the plaintiff places significant reliance in submitting that the balance of justice favours the continuation of the plaintiff’s proceedings:-

*“ . . . may I immediately disown any interpretation which suggests that the old days of “endless indulgence” have returned. I hold no such views. It is not what I convey or intend to convey. My point is utterly simple. In the situation under discussion justice is best achieved by letting it react to given facts. The same period of delay, in different cases, may demand different treatment. Justice is not always referenced to the highest bar. If that were the case the wealthy, powerful, and the influential would set it. That should not be allowed. Justice sets its own bar. A failure of the average man and his average lawyer to match the **gold standard** of their opposite in society and in practice must not be necessarily condemned”* (emphasis added).

In submissions on behalf of the plaintiff, this Court was urged not to judge the plaintiff’s conduct against a “*gold standard*”. This Court has done no such thing. Viewed fairly and objectively, however, the plaintiff’s conduct, insofar as progressing his claim against the third named defendant, repeatedly failed to reach any acceptable standard, much less a gold standard. To allow a period of some two years and four months

to elapse between issuing a plenary summons and serving a statement of claim is not to fall short of a gold standard. It is to fail to meet a minimum standard expected of any plaintiff who has chosen to maintain proceedings against a defendant.

259. To write to a defendant with a proposal to consolidate a range of six sets of legal proceedings and to indicate that a motion would be issued if consent was not forthcoming and, after consent had been refused, to fail to issue any motion whatsoever is not to fall short of a gold standard. It is to fail to reach *any* standard. In other words, if consolidation was truly required, it is self – evident that a motion should have been issued by the plaintiff. If consolidation was not required, it is difficult to understand the purpose of a request for consolidation in the first place.

260. Similarly, to make a request for voluntary discovery and to indicate that a motion will issue unless consent to the making of voluntary discovery is received within 21 days, but to fail to issue such a motion for discovery for a period of two years and one month is not to fail to reach a gold standard. It is to fail to meet *any* standard reasonably expected of a plaintiff.

261. Nowhere does the plaintiff aver that he did not receive appropriate legal advice or assistance. Thus, no criticism is directed at the plaintiff's legal advisors, but it is entirely fair, on the evidence before this Court, to direct criticism at the plaintiff for a failure to progress a legal claim which the plaintiff decided to initiate but chose not to progress with anything approaching the minimum standard reasonably expected of a plaintiff desirous of maintaining proceedings (which are purely commercial in nature, and which relate to events between May 2006 and October 2008).

The significance of the fifth named defendant's defence

262. Counsel for the plaintiff also submitted that the fifth named defendant delivered a defence in October 2019 and has not, in that defence, raised the question of delay. On behalf of the plaintiff, it is submitted that this supports the plaintiff's position and renders the current motion "*entirely misconceived*", the thrust of the submission being that the balance of justice must favour the refusal of relief sought in an application which was entirely misconceived. For the reasons detailed in this decision, I cannot accept the foregoing submission. The attitude taken, or not, by a different defendant neither undermines the fact of the plaintiff's inordinate delay as regards the prosecution of his claim against the third named defendant, nor does it constitute any explanation, much less a satisfactory excuse, for the plaintiff's inordinate and inexcusable delay. Furthermore, the stance which a different defendant may or may not take does not, it seems to me, "cure" either the general or the specific prejudice which has been established.

The plaintiff's case-management motion dated 16th December, 2020

263. Counsel for the plaintiff also pointed out that a motion has been issued which seeks to amalgamate and to case-manage both the Dooley and the Ocean Point proceedings. This, it is submitted, can "excuse" any inordinate delay; and it was also submitted that the plaintiff's case-management motion should be taken into account in terms of the Court's balance of justice assessment. These are submissions I am bound to reject. The plaintiff chose to issue, on 16th December, 2020, a motion which seeks orders linking the Dooley proceedings and the Ocean Point proceedings, as well as case-management in respect of both cases. Plainly, this motion was issued a year and four months *after* the third named defendant's motion to dismiss the present proceedings for want of prosecution.

264. Given that the plaintiff's motion post-dates the motion which this Court has to decide, by well over a year, one may ask rhetorically: *how can it constitute any excuse, much less a valid excuse, for the*

plaintiff's undoubted delay up to 6th August, 2019 (the date the motion to dismiss was issued)? To my mind it cannot explain or excuse the plaintiff's inordinate delay. Nor does the plaintiff aver that he was on the point of issuing such a motion but was "pipped at the post" by the third named defendant's motion to dismiss. The facts paint an entirely different picture. It has never been explained why the plaintiff waited until the end of 2020 to issue such a motion, given that the Ocean Point proceedings were commenced by means of a plenary summons which was issued six years earlier, on 5th September, 2014. The plaintiff's case-management motion could fairly be considered to be a *reaction* to the third named defendant's application to strike out the proceedings (and a very delayed reaction at that). In my view, it is not a consideration to be taken into account when assessing where the balance of justice lies. Even if I am wrong in that view and even if I were to take it into account, the outcome of the balance of justice assessment is the same as such a consideration could little or no weight in favour of the plaintiff's case proceeding, having regard to an assessment of all facts and circumstances and all matters detailed under the third limb of the *Primor* test.

The conduct of the litigation by the plaintiff is the primary focus of attention

265. At this juncture, it is appropriate to refer to the further guidance given by the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206 wherein, at para. 36, Irvine J. (as she then was) stated:-

"36. It is clear from the authorities that the conduct of both parties to proceedings has to be examined in considering an application of this kind. Having said that, the judgment of Fennelly J. in Anglo Irish Beef Processors Limited makes clear that it is the conduct of the litigation by the plaintiff, that is the primary focus of attention. A defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant that constitutes acquiescence in the delay, his silence or inactivity is not material. It is obviously not a consideration on the first question as to whether the delay is inordinate and inexcusable. The only way it can arise therefore is in the balance of justice. The question at that point is whether the defendant caused or contributed to the plaintiff's delay or in some manner gave the plaintiff to understand or led him to believe that the defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the plaintiff. This understanding of the law is also consistent with the later authorities of the Supreme Court and the High Court."

266. It was the plaintiff who had the obligation to bring his claim to trial. The evidence demonstrates that he failed in that obligation and is responsible for some six years of delay by virtue of his inaction with regard to progressing his claim against the third named defendant. The evidence before this Court does not allow for a finding that the defendant caused or contributed to the plaintiff's delay or ever gave the plaintiff to understand that the third named defendant was acquiescing in the delay or induced the plaintiff to incur additional costs.

267. The following passages from para. 37 and 38 of the Court of Appeal's decision in *Millerick* also appears to me to be relevant to the case before this Court, having regard to the various submissions made on behalf of the plaintiff that the balance of justice lies in favour of the proceedings continuing:-

"[37] ...it is the plaintiff who commences legal proceedings and draws the defendant into the legal process. No defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise. In many cases the plaintiff has no valid claim and they may be no mark for any award of costs that a defendant may obtain following a

successful defence of the proceedings. Often times, a defendant's personal or professional reputation may be badly scarred regardless of having mounted a successful defence to a claim.

[38] 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?"

268. In my view, the foregoing comments apply to the respective positions of the plaintiff and the third named defendant in the present proceedings. Taking account, also, of the Supreme Court's views expressed in *Comcast*, I am thoroughly satisfied that there was no acquiescence on the part of the third named defendant in the present proceedings and, taking full account of the defendant's actions, in the context of a proper consideration of where the balance of justice lies, certainly does not "tip the balance" in favour of the proceedings being permitted to continue, in my view.

269. In *Anglo Irish Beef Processors Ltd & Anor v. Montgomery & Ors* [2002] 3 IR 510, Fennelly J. stated (at 518) that: -

"It is no exaggeration, in these circumstances to say that the respondents have not even made pretence of an attempt to explain, still less offered an excuse for their quite extraordinary delay in pursuing the claim. There may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of a claim. No comparable misfortune has been advanced in the present case. The claim is of a purely commercial character".

270. In my view, the foregoing observations by Fennelly J. apply equally in the present case. Nowhere has the plaintiff acknowledged that there has been *any* delay on his part with regard to progressing his claim against the third named defendant. On the contrary, in para. 28 of the plaintiff's 2nd December, 2019 affidavit, he positively avers, *inter alia*, as follows: "*I say and believe that your deponent has not delayed in the prosecution of the said proceedings...*". He repeats that averment at para. 42 of the same affidavit. In para. 59 of the plaintiff's 9th November, 2020, affidavit, he makes *inter alia* the following averment: "*I refer to paragraph 17 of the affidavit of Kevin Porter and dispute that there has been any delay on the part of this deponent...*".

271. Given the fact that the plaintiff does not accept there has been *any* delay on his part, it is perhaps unsurprising that he has not offered what he says constitute reasons to explain or excuse delay. Earlier in this decision I looked at what he describes as the "*points*" he wishes to make, but none of those points (being the role of the fifth named defendant; the crystallisation of the plaintiff's losses; and the alleged delay on the part of the third named defendant) either explain or excuse the very lengthy periods of delay on the part of the plaintiff. Nor is it the case that the plaintiff was unfortunate enough to suffer any of the hazards to which Fennelly J. referred. The plaintiff in the present proceedings relies on no alleged misfortune which is said to have impeded the progress of his claim against the third named defendant which is, as the pleadings made clear, a claim of a purely commercial character. Later in his decision,

Fennelly J. referred to the failure on the part of the plaintiff in *Anglo Irish Beef Processors Ltd.* to “proffer even the vestige of an explanation for the delay”, stating that this was “a circumstance which should not be overlooked” and observing that “the courts are entitled to expect something more from parties who crave its indulgence”. In my view, the foregoing comments can fairly be applied to the facts before the Court in the present application.

Countervailing circumstances / something weighty

272. It is also appropriate to refer to Fennelly J.’s comments from p. 519 of his judgment where he stated:-

“One of the authorities cited by Hamilton C.J. was O’Domhnaill v. Merrick [1984] I.R. 151, where Henchy J said:

*‘Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of case. However, where as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are **countervailing circumstances**, such as conduct akin to acquiescence on the part of the defendant, or the inability on the part of an infant plaintiff to control or terminate the delay of his or her agent.’*

That statement of the law indicates that the another of delay which is found to be both inordinate and inexcusable will not be absolved of fault unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess the third consideration in the cited passage from the judgment of Hamilton C.J. namely whether “on the facts the balance of justice is in favour of or against the proceeding of the case.” As I have already suggested, the respondents were unable to point to any disadvantage or disability affecting them. Nor was there any delay or acquiescence of the appellants, which might redress the balance of fault.

*In such circumstances, when the court comes to strike that “balance of justice” in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J., it will need to find **something weighty** to cancel out the effects of the respondents” behaviour. It will attach weight to the character of the claim and to the character of the respondents. When considering any allegation of delay or acquiescence by the appellants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the respondents” claim dismissed” (emphasis added).*

No countervailing circumstances in this case

273. Carefully considering all the evidence before the Court, I have not been able to identify any “countervailing circumstances” in the sense identified by Henchy J. in *O’Domhnaill*. Nor have I been able to identify any “something weighty” of the type identified by Fennelly J. in *Anglo Irish Beef Processors Ltd.* which would be sufficient to cancel out the effects of the plaintiff’s behaviour and which, in the context of a proper weighing up of all the considerations identified in para. (d) (i) to (vii) of *Primor*, would result in the balance of justice favouring the case being allowed to proceed.

274. I also want to make clear that, even if this Court (a) took no account whatsoever of the fact that these are “late start” proceedings; (b) gave no weight whatsoever to the nature of the defence (including the plea that the plaintiff has named the wrong defendant); (c) assumes that all witnesses will be available at a future trial; and (d) assumes that documents dating from 2006 – 2008 would be available at a future

trial, the proper exercise of this Court's discretion on the facts before it is to hold that the balance of justice is *against* the proceeding of the case, having regard to the plaintiff's inordinate and inexcusable delay and the prejudice to the third named defendant (which is of at least a general type, as regards the likely degrading of witness memories, but which is not limited to that on the evidence before this Court, also including prejudice regarding the reputation and professional indemnity insurance of the third named defendant, which, of itself, is also sufficient to tilt the balance decidedly in favour of a dismissal of these proceedings) in all the circumstances and in the absence of any countervailing circumstances and/or anything weighty which would contend for a different outcome.

Ensuring litigation is completed in a timely fashion

275. It is also appropriate to note that in *William Connolly & Sons Ltd. v. Torc Grain and Feed Ltd.* [2015] IECA 280, the Court of Appeal emphasised the obligation on the courts to ensure that litigation is conducted in a timely fashion, stating, *inter alia*, the following: -

"[25] *As was so aptly observed almost fifty years ago by Diplock L.J. in Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229 at page 255: —*

'The chances of the courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard'

[26] Accordingly, it is clear that entirely independent of the views of the parties to litigation, the court itself must, because of its constitutional mandate, by its own conduct ensure that litigation is completed in a timely fashion. Its obligation in this regard is inconsistent with affording any undue tolerance to unnecessary delay in the course of litigation. Further, as can be seen from many recent judgments, recognition of this obligation on the part of the courts has had a significant beneficial impact in bringing to an end the culture of delay that previously bedevilled litigation in this jurisdiction".

276. Similar comments were made by Hogan J. in *Quinn v. Faulkner* [2011] IEHC 103 (at para. 29) wherein the learned judge stated as follows: -

"While as Charleton J. pointed out in Kelly v. Doyle [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost 'endless indulgence' towards such delays led in turn to a situation where inordinate delay was all too common . . ."

277. In my view, were this Court to do other than grant the relief sought by the third named defendant, it would involve an impermissible sanctioning of inordinate and inexcusable delay which has prejudiced the third named defendant (at least in a general way, as regards the potential impairment of witness memories of events at such a distance; as well as in a specific manner, as regards its reputation and professional indemnity insurance) and it would be inconsistent with this Court's obligation to ensure that litigation is completed in a timely fashion.

Campbell-Sharp Associates Ltd. v. MVMANI JV Ltd. & Anor. [2013] IEHC 470

278. I am satisfied that the plaintiff's reliance on this Court's decision (Hanna J.) in *Campbell-Sharp Associates Ltd. v. MVMANI JV Ltd. & Anor.* [2013] IEHC 470 cannot avail him and most certainly does not tip the balance in favour of the case being permitted to proceed. Commenting on the specific case before him, the learned judge stated, *inter alia*, that: -

"The defendants in the present case seek to rely on specific prejudice in tracing the employees of the first defendant and of the railway procurement agency. The defendants have sought to rely specifically on prejudice arising from the difficulty in tracing employees of the first named defendant. The defendants contend that it would be next to impossible to say what happened on particular days because of the difficulty in locating particular witnesses, i.e. the employees of the first named defendant who were working on the ground. However, this company had gone into voluntary liquidation in early 2008 and so the difficulty in tracing employees was an issue that had clearly arisen at this point irrespective of any delay on the part of the plaintiffs. So any prejudice which may have arisen in the normal course of events as a result of the economic difficulties of that particular company could have been negated by the defendant. The plenary summons was served on the first named defendant in 2004 giving it more than sufficient notice to address problems in relation to tracing witnesses. In this regard I am satisfied that there is no prejudice to the defendants."

279. In the manner explained, I have assumed - for the purposes of the consideration of where the balance of justice lies - that all relevant witnesses will be available for the future trial. Nevertheless, prejudice in terms of the likely impairment of witness memories remains, as does prejudice to the third named defendant's professional reputation. It can also be pointed out that the facts in the present case are quite unlike those in *Campbell-Sharp*. In that case the plenary summons was served in 2004 and the relevant company went into liquidation four years *later*, in 2008. In the present case, it is averred that Mr. Ferry, the senior project manager on the project who carried out the week-to-week management, left MMP-PM, in 2008 (see para. 14 of Mr. Porter's 9th June, 2020 affidavit). This was three years *before* the plaintiff issued the plenary summons in this case on 19th July, 2011. Notwithstanding the foregoing, I have assumed all witnesses will be available.

When memories were very fresh

280. It is also appropriate to note that, in the *Campbell-Sharp* case, the court found, *inter alia*, that the relevant "... *claim came at a time when memories were very fresh, when the railway procurement agency would have all of its documentation intact and would have all of its witnesses still present.*" The position in the present case is utterly different, where the plaintiff made a decidedly "late start" to the proceedings and compounded his pre-commencement delay by delaying post-commencement. The first time the third named defendant understood the specific allegations made by the plaintiff was when a statement of claim was served, which is dated 5th November, 2013. This was already over seven years after the first of the disputed events (said to have occurred in mid-2006) and it was a full five years since the last of them (given that the contractor is said to have ceased working on site as of 6th October, 2008, walking off site two days later). By no means was this a claim which came when memories were "fresh". On the facts before the court in *Campbell-Sharp*, the learned judge came to the view that the defendant had failed to show "that the delay attributable to the plaintiff in prosecuting these proceedings has resulted in the likelihood that the defendants will not obtain a fair trial and therefore the balance of justice favours the refusal of the relief sought". By contrast, the facts in the present case reveals that inordinate and inexcusable delay for which the plaintiff is responsible has resulted in real prejudice, tipping the balance of justice decidedly in favour of granting the relief sought.

Causal connection / prejudice arising independent of a plaintiff's delay

281. Counsel for the plaintiff also drew this Court's attention to the Court of Appeal's decision in *William Connolly & Sons Ltd. trading as Connolly's Red Mills v. Torc Grain & Fee Ltd.* [2015] 11 JIC 3002; [2015] IECA 280. In that case, the court took the view that the defendant had not established "... any causal connection between the asserted prejudice and the delay in the proceedings", and held that any prejudice (which in that case was said to arise out of the loss of a sample from a consignment collected by the plaintiff's agent; and the fact that any testing carried out on the balance of the consignment could not be considered reliable) constituted "...prejudice that arises entirely independent of the delay on the part of the plaintiff in pursuing these proceedings." The foregoing is not the position here. There is most certainly a causal link between delay for which the plaintiff is responsible and, at least, general or presumed prejudice with regard to, the impairment of witness memories and specific prejudice regarding the third named defendant's reputation and professional indemnity insurance. Wholly unlike the situation in *William Connolly & Sons*, the prejudice which has arisen was not caused by some independent actor or action. There is a direct causal connection between the plaintiff's delay and the prejudice.

No prejudice suffered

282. The submission was made on behalf of the plaintiff that the third named defendant had suffered no prejudice whatsoever. For the reasons set out in this judgment, I must reject that submission as it is wholly undermined by the facts which emerge from an examination of the evidence before this Court. It was further submitted that, if the Court came to the view that the third named defendant *had* suffered prejudice, the prejudice to the plaintiff which would result from being "shut out" from prosecuting his multi-million euro claim "*is manifestly more*".

The chance of a major injustice to the plaintiff

283. Quoting from *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 (31st July, 1979), the plaintiff's counsel submitted that what Finlay P. (as he then was) stated in that case applied on the facts of the present case, namely:-

"...that the balance of justice is in favour of permitting this action to proceed and that the chance of a major injustice being done to the plaintiff were the action now to be dismissed is significantly greater than the chance that a major injustice would be done to the defendants by allowing it to proceed."

In making this submission, counsel for the plaintiff relied on the contents of the Watts report, going on to submit that the prejudice to the plaintiff tipped the balance of justice decidedly in favour of the continuation of the proceeding. The plaintiff's counsel also submitted that it would always be open to the third named defendant to issue a "*further motion*" seeking to dismiss the present proceedings where the plaintiff to delay in the *future*.

284. Earlier in this judgment I looked at the Watts report. It was commissioned by the liquidator in the context of whether to issue legal proceedings. The liquidator brought no proceedings against the third named defendant. It is fair to say that the conclusions reached in the said report are detailed and specific as regards the first named defendant (Architects) and in relation to the fifth named defendant (Contractor). That is not so as regards the entity identified in the Watts report as 'MMP', of which the report states, *inter alia*: "*We have not had sight of any formal appointment documents and this may in fact exclude MMP from certain obligations.*" It will be recalled that an element of the third named defendant's defence to the present claim is that the plaintiff did not enter a contract with it, and that the correct defendant who contracted with the plaintiff was MMP-PM. The Watts report makes no distinction

between these two entities, nor does it express any view as to which contracted with the plaintiff. In light of the foregoing, reliance on the Watts report cannot in my view bolster the plaintiff's submissions or add any weight in favour of a claim involving inordinate and inexcusable delay being permitted to continue. Nor do I accept the proposition that the entitlement on the part of the third named defendant, at a point in the *future*, to bring a *further* motion of this type is any answer to the inordinate and inexcusable delay on the plaintiff's part and the resulting prejudice.

The monetary value of the plaintiff's claim

285. Doubtless every plaintiff who opposes a motion to dismiss their claim on grounds of delay (and regardless of the monetary value of their claim) can say that they will suffer prejudice if their claim is not permitted to proceed. I have taken that into account in the present case. However, this type of prejudice to a plaintiff self-evidently cannot be *determinative* of an application of this type. If it were, there would be no requirement for any "balancing exercise", as the future prejudice flowing from a dismissal of a plaintiff's case would always "trump" the established prejudice to a defendant resulting from delay. Furthermore, the fact that a plaintiff's claim will come to an end is plainly not one of the "countervailing circumstances" or "weighty" considerations to which the authorities refer (regardless of the quantum sought in that claim).

286. The prejudice to a plaintiff resulting from the dismissal of a claim is not explicitly referred to in the *Primor* principles, quite possibly because it is something which will always arise for a plaintiff who objects to having their claim dismissed and, thus, is always something the court will weigh in the balance, as I have done. Where, as in this case, inordinate and inexcusable delay has been established, the plaintiff must proffer something more to "save" his claim and it must be something significant and material. This is because, by the time this Court came to look at the third aspect of the *Primor* test, the scales were no longer in equilibrium. On the contrary, due to the plaintiff's inordinate and inexcusable delay, the scales tipped against his action being permitted to continue. The plaintiff has not put forward anything significant or material which would even bring the scales back towards equilibrium, still less has he put forward anything weighty by way of countervailing circumstances to tip the scales in favour of his claim proceeding.

287. This Court is very mindful of the constitutional right of access to justice and very conscious that to dismiss a plaintiff's claim is to bring to an end the possibility of that plaintiff having their claim determined at a trial. Para. (4) (a) of *Primor* refers to "*the implied constitutional principles of basic fairness of procedures*" and that speaks to the same issue. However, giving all due weight to the consequences for the plaintiff of acceding to the application before this Court, I am nevertheless fully satisfied that, having applied the *Primor* principles, and considered all relevant matters in so doing, the outcome is very clearly that justice requires the dismissal of the plaintiff's claim.

Submissions made with reference to proceedings under Record No. 2011/5235P

288. During the course of submissions on the third (and final) day of the hearing, counsel for the plaintiff urged the Court to take "judicial notice" of the fact that, in separate proceedings brought by Mr. Dooley (entitled *Francis Dooley v. Clancy project Management Ltd trading as Clancy Construction and by order of the court Mulcahy McDonagh & Partners Ltd; Record No. 2011/5235P*) an affidavit had been sworn by Mr. Pat Walsh. It will be recalled that Mr. Walsh was one of the three witnesses (named at paras. 13 – 15 of Mr. Porter's 9th June, 2020 affidavit) who had permanently left the third named defendant's employment. Ms. O'Connell BL for the third named defendant objected to that submission.

289. By way of relevant background, the hearing of the present applications ran for two days in February 2021 and, not finishing within the original estimate, day three of the hearing was 17th November, 2021. It appears that a motion was brought in the aforesaid proceedings under Record No. 2011/5235P at a point after the first two days of the hearing in this case, which motion stood listed for a separate hearing due to commence on 18th November, 2021 (i.e. the day after the hearing of the present applications completed). Separate counsel were retained to appear in relation to the hearing of the motion in those proceedings and separate firms of solicitors were on record for the relevant defendant.

290. At the risk of stating the very obvious, no pleadings or affidavits in those separate proceedings (under Record No. 2011/5235P) were before this Court and none were considered.

291. No authority was opened to me by counsel for the plaintiff in support of the proposition that, in the context of a consideration of the balance of justice in respect of the motion before this Court in the Dooley proceedings, I was entitled to take judicial notice of the fact that an affidavit had been sworn in an application brought in entirely separate proceedings where, it also appears, different relief is being sought. Given the nature of it, the submission made by the plaintiff's counsel was, it is fair to say, not a submission grounded on any evidence which was before this Court in any affidavit. I want to make clear that I am not at all convinced that it is appropriate for this Court to do what Mr. Dooley's counsel suggests. The following comments are made in that context.

292. Even if it is entirely proper that I do what counsel for the plaintiff urges (and I accept for present purposes that Mr. Walsh recently swore an affidavit in separate proceedings brought by the same plaintiff) I am entirely satisfied that it does not "cure" the prejudice flowing from the degrading of witness memories caused by delay for which the plaintiff is responsible. The fact that a witness who ceased working for the third named defendant swore an affidavit in separate proceedings indicates the *availability* of the deponent in question. It does not, however, address fundamentally important matters which arise in the present case (and which are by no means limited to Mr. Walsh) as regards the *reliability* of disputed oral testimony concerning issues in dispute on the pleadings in this case, including as to what was or was not said, understood, advised or discussed by a range of different parties, not merely Mr. Walsh on diverse dates in 2006, 2000 and 2008. Nor does it address in any way, the prejudice to the third named defendant's reputation, flowing from the plaintiff's delay in this case, which has also been established. I repeat again that, for the purposes of a determination of where the balance of justice lies in the present case, I assumed, *inter alia*, that all witnesses would be available but for the reasons detailed in this judgment, that does not by any means "cure" the prejudice, general and/or specific which has arisen and most certainly does not tip the balance in favour of the plaintiff's case being permitted to proceed.

293. On day three of the hearing, counsel for the plaintiff also urged this Court to take "judicial notice" of the fact that, in those separate proceedings (i.e. under Record No. 2011/5235P), the second named defendant therein (which is the third named defendant in the present proceedings) "*has made discovery*". No discovery affidavit or documentation, as discovered in separate proceedings, was put before this Court in the present motion; nor was it considered by this Court in the context of its judgment. The Court does not know the extent of such discovery or its content. Having said the foregoing, and without being at all satisfied that I should do what the plaintiff's counsel urges, I make the following comments.

294. As I have said more than once, this is not a "documents case". It is a claim where, as all parties agree, oral evidence will be *necessary* for its determination. Its outcome cannot be determined merely by the interpretation of documents (such as the meaning of a clause or clauses in a formal written contract

executed by the relevant parties which all parties agree encapsulates all legal relations). The foregoing is simply not the position here. Rather, on crucial issues, the assessment of oral evidence in respect of a range of disputed matters, involving a range of parties, on a range of dates, over a three-year period (2006 – 2008), would be required to determine the facts (such as what was or was not agreed; what advices were or were not received; what understandings were or were not formed; what impressions were or were not given and what was or was not said and done etc). That is perfectly clear from the contents of the statement of claim in the Dooley proceedings which I have looked at in detail.

295. In light of the foregoing, even if it is entirely permissible (and I am not at all convinced that it is) for me to take judicial notice of the fact that, in the separate proceedings (i.e. under Record No. 2011/5235P), the second named defendant (being the third named defendant in the present proceedings) has made discovery, this does not “cure” the prejudice which has arisen, or can reasonably be presumed, as a result of the plaintiff’s delay, in particular, the degrading of witness memories. Not being purely a “documents case”, in order to reach findings of fact in respect of a wide range of disputed matters of fundamental importance to the present claim, a trial judge would have to rely on the memories of witnesses giving oral evidence, no earlier than 2022, as regards events, including conversations, between 2006 and 2008. I am entitled to take it that witness memories have degraded in a material respect during the relevant period as a result of the plaintiff’s delay. Furthermore, the availability, at a future trial, of documents could by no means “cure” the established prejudice to the third named defendant’s reputation.

296. It is also important to note that counsel for the third named defendant objected to the foregoing submissions (and it seems to me that her objections were valid), also pointing out that, in making them counsel for the plaintiff was tacitly acknowledging that such discovery as has been made in those separate proceedings, could be made available in *these* proceedings, and, that being so, such discovery could be relied on by the third named defendant in support of its contention as to where the balance of justice lay in the present case. In the manner explained in the comments which I made regarding the submissions which were objected to, the outcome in the present case is wholly unaffected by them.

297. In short, in circumstances where the plaintiff’s delay is both inordinate and inexcusable, having weighed up all relevant factors in the context of exercising this Court’s discretion on the facts of the case as to whether the balance of justice is in favour of or against the case proceeding (and assuming, as I have, that all relevant witness will be available, including those referred to by Mr. Porter) I am nonetheless satisfied that the balance of justice tilts decisively against the plaintiff’s claim being allowed to proceed, regardless, too, of what documents might be available to a trial court.

The O’Domhnaill principles

298. In circumstances where this Court, having balanced all relevant considerations, consistent with the principles identified in *Primor* as they emerge from the conduct of and interests of the plaintiff and third named defendant, having regard to the evidence before this Court) and having found that, under the *Primor* principles, the balance of justice strongly favours the dismissal of the plaintiff’s claim, it is not necessary to analyse the situation through the lens of the *O’Domhnaill* principles.

299. For the sake of completeness, however, it is fair to say that, whereas the *Primor* approach concentrates on the plaintiff’s conduct before moving to the defendant’s position, in the context of an analysis of where the balance of justice lies, the *O’Domhnaill* approach concentrates on the defendant’s position and whether they would suffer a patent injustice or unfair burden if required to meet the delayed claim.

300. Commenting on the court's inherent jurisdiction to dismiss proceedings in the interest of justice, Mr. Justice McKechnie put matters as follows at para. 40 of his judgment in the Supreme Court's decision in *Comcast*:

"That the courts have such an inherent jurisdiction cannot be doubted. It surfaced in O'Domhnaill, was further established in Toal (No. 1) and Toal (No. 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 for 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 such defendant to so defend?"

301. Earlier in this decision I looked closely at the plaintiff's pleaded claim. It will be recalled that the plaintiff has made a range of pleas against the third named defendant the determination of which is likely to require oral evidence and it is unnecessary to repeat them. Although I have decided this application in favour of the third named defendant based on a consideration of the *Primor* principles, and by way of comment only, the plaintiff himself avers, *inter alia*, that "...oral evidence will, of course be necessary for the trial of the action..." (para. 38 of the plaintiff's 2nd December, 2019 affidavit). As a matter of first principles, the longer the gap between (i) disputed conversations, advices, understandings and discussions, and (ii) a trial of the action, the less reliable witness memories are likely to be; and the less reliable the oral evidence of witnesses, the greater the risk of an unfair trial and an unjust result. To say the foregoing is not to decide this application on the basis of the *O'Domhnaill* principles. However, viewing the matter from the perspective of the *O'Domhnaill* principles fortifies me in the view that the balance of justice, in the context of an analysis of matters through the lens of the *Primor* principles, decidedly favours the granting of the relief sought in the third defendant's motion.

Decision in relation to the motion to dismiss the Ocean Point proceedings

302. Having explained the reasons for this Court's decision to dismiss the Dooley proceedings (Record No. 2011/6564P), I now turn to the decision in respect of the motion in the Ocean Point proceedings. It is not necessary to repeat the various extracts from relevant authorities which have been set out earlier in this judgment. Suffice to say that, for the purposes of considering the fifth named defendant's application, in respect of the proceedings brought by Ocean Point, I have taken full account of all of the relevant authorities previously referred to and I have applied the relevant principles, having approached the application *per* the guidance laid down in *Primor*.

Statute of limitations

303. As regards the additional obligation on a plaintiff who commences legal proceedings close to the expiry of the statute of limitations, Irvine J. (as she then was) stated at para. 21 in *Millerick*, that:-

"In assessing whether the High Court judge correctly classified the delay in the present case as inordinate it is relevant to note that the proceedings were issued very close to the expiry of the limitation period prescribed for claims of this nature. In such circumstances there is a special obligation of expedition on the plaintiff to move matters forward once proceedings are commenced."

Late start

304. An analysis of the evidence demonstrates, beyond doubt, that the Ocean Point claim can fairly be regarded as one involving a very “late start”. Earlier in this judgment, I compared the contents of the statement of claim in the Dooley proceedings with that which was delivered in the Ocean Point proceedings and it is fair to say that the majority of the Ocean Point statement of claim constitutes a *verbatim* repeat of the contents of the Dooley statement of claim.

23rd May, 2006 – 6th October, 2008

305. The causes of action in the Ocean Point claim relate to the self-same events, dates and parties against which the Dooley proceedings have been brought. In other words, the key period, for the purposes of the Ocean Point claim, just as in the Dooley proceedings, is the period commencing on 23rd May, 2006 (when, *per* para.16 in the Ocean Point statement of claim, Mr. Dooley is said to have approached the third named defendant to discuss his requirement) and 6th October, 2008, (when, *per* para.51 of the Ocean Point statement of claim, the fifth named defendant purported to suspend works and, two days later, abandoned the site). The Ocean Point plenary summons was not issued until 5th September, 2014, which is some eight years after the first of the relevant events and almost six years after work on site ceased.

Inordinate delay

306. Notwithstanding the late start, and the special obligation on the plaintiff to move matters forward, a period of over two years and three months elapsed between the Ocean Point plenary summons being issued (on 5th September, 2014) and a statement of claim being delivered (on 21st December, 2016).

307. Furthermore, after delivering Replies (dated 7th November, 2017) to the Notice for particulars raised by the third named defendant (dated 4th August, 2017), Ocean Point took no further step whatsoever to progress its claim against the third named defendant.

308. In other words, the plaintiff did nothing from 7th November, 2017 onwards and complete inaction on the part of the plaintiff, as regards progressing its claim against the third named defendant, resulted in the present motion which issued a year and nine months later, being the third named defendant’s 6th August, 2019 motion to dismiss the Ocean Point proceedings.

309. On any reasonable analysis, the foregoing delay on the part of the plaintiff is, without doubt, inordinate.

Inexcusable delay

310. It is clear from the contents of the affidavits sworn by Mr. Dooley, on behalf of Ocean Point, that he does not accept that there has been *any* delay. In para. 17 of Mr. Dooley’s replying affidavit, the following is *inter alia*, averred on behalf of Ocean Point: -

“I refer to paragraphs 8-12 of the affidavit of Lisa Mansfield, and dispute that the plaintiff has delayed...”.

Later, at para. 22, the following averment is made:-

“I say and believe that the aforesaid matters clearly demonstrate that the plaintiff has not delayed in the prosecution of the said proceedings.”

Furthermore, at para. 42 of his affidavit, Mr. Dooley makes *inter alia*, the following averment on behalf of Ocean Point: -

“In summary, therefore, I say and believe that the plaintiff has not delayed in prosecuting said proceedings...”.

311. Despite the foregoing averments I am entirely satisfied that the plaintiff has indeed delayed and that Ocean Point's delay is inordinate. Mr. Dooley goes on to aver on behalf of Ocean Point that any delay (*if found*) is neither inordinate nor inexcusable. In circumstances where it has never been accepted on behalf of Ocean Point that there was any delay with regard to the prosecution of its claim against the third named defendant, it is fair to say that (just as in the Dooley proceedings), Ocean Point does not proffer explanations for any delay.

312. Insofar as "points" are made by Mr. Dooley on behalf of Ocean Point which might be considered "reasons" proffered in an attempt to explain or excuse delay, paras. 19-29 of his 2nd December, 2019 are particularly relevant.

313. The first "point" relates to the motion, issued by the fifth named defendant on 27th March, 2018, in which the fifth named defendant sought a stay in respect of the plaintiff's proceedings against it, which motion was heard on 2nd and 3rd April, 2019, resulting in a judgment delivered by Mr. Justice Barniville in May 2019, granting the stay sought by the fifth named defendant. Earlier in this judgment I referred to the same motion in the context of the attempt by Mr. Dooley to suggest that it somehow was relevant to his delay in his proceedings.

314. In my view, the averments regarding the said motion neither explain nor excuse the plaintiff's inordinate delay. It cannot be disputed that the fifth named defendant's motion was issued over three and a half years after Ocean Point issued the plenary summons dated 5th September, 2014. Thus, it cannot conceivably explain the plaintiff's delay *prior* to 27th March, 2018 (the date of the fifth named defendant's motion) against the backdrop of what was a very late start to the commencement of legal proceedings (which relate to events between May 2006 and October 2008, i.e. a full decade prior to the fifth defendant's motion).

No contact from Ocean Point regarding alleged difficulties

315. Furthermore, there is no evidence before this Court that Ocean Point contacted the third named defendant to apprise them of anything which, accordingly to Ocean Point, would prevent the timely progress of the claim. Nor is there any question of the third named defendant having confirmed to Ocean Point that it was aware of the fifth named defendant's motion and regarded the plaintiff's opposition to that motion as accounting for Ocean Point's failure to progress the claim; or that the third named defendant regarded the plaintiff's opposition to the fifth named defendant's motion as, in some way, an indication of the plaintiff's intention to progress Ocean Point's claim against the third named defendant.

316. On the contrary, once Ocean Point delivered replies to particulars on 7th November, 2017, it took no further step. It cannot be disputed that the fifth named defendant's motion had not even been *issued* by that point.

317. Furthermore, in circumstances where Mr. Justice Barniville delivered his decision on 10th May, 2019, it is fair to ask what Ocean Point did, as of 11th May, 2019? The answer is that Ocean Point did *nothing*. Weeks and months continued to pass even *after* the High Court's decision to stay Ocean Point's proceedings as against the fifth named defendant, without Ocean Point taking any step whatsoever to progress its claim against the third named defendant.

318. Ocean Point did not even issue a Notice of intention to proceed. Ocean Point did not write a single letter. Rather, matters were "brought to a head" only because the third named defendant took the initiative and issued the motion to dismiss on 6th August, 2019.

319. It cannot be in doubt that a plaintiff in proceedings has the primary responsibility to progress its claim. The evidence demonstrates that Ocean Point failed in this obligation and, in my view, Ocean Point's involvement in respect of a motion issued by a separate defendant provides no explanation or excuse, whatsoever, for the plaintiff's delay.

Conduct

320. In submissions on behalf of Ocean Point, it was also suggested that the *conduct* of the third named defendant excuses the plaintiff's delay; that the delay was *caused* by the third named defendant failing to put in a defence; and that the plaintiff did not take any steps in the proceedings as against the third named defendant, from 2nd March, 2017 until 6th August, 2019, at the *request* of the third named defendant.

Hold off motioning "at this time"

321. Earlier in this judgment, I looked at each of the foregoing propositions and none stand up to scrutiny. It is true that, on 2nd March, 2017, Messrs. DWF (being the *former* solicitors on record for the third named defendant) responded to a letter from the plaintiff's solicitor, dated 24th February, 2017, and stated "*we expect to be in receipt of instructions in the short term and we would appreciate if you could hold off motioning at this time*" (emphasis added). What happened immediately thereafter, however, is of relevance in that, on 24th March, 2017, a notice of change of solicitors was filed, confirming that Messrs. RDJ had come on record as the new solicitors for the third named defendant. Following delivery of a notice of intention to proceed on 29th June, 2017, a notice for particulars was subsequently raised by the third named defendant, on 4th August, 2017, which was responded to by the plaintiff on 7th November, 2017. By that stage, it was plain that events had overtaken the request made on 2nd March, 2017 that the plaintiff "*hold off motioning at this time*". That time had long passed and there was no bar to the plaintiff, if they so wished, writing to the third named defendant to call for the delivery of a defence or, indeed, issuing a motion to compel the delivery of a defence. The plaintiff did neither and the proposition that a request, by the former solicitors for the third named defendant, that a motion not be issued "*at that time*", can explain away the plaintiff's delay thereafter, in particular, the plaintiff's delay of one year and nine months between 7th November, 2017 (when the plaintiff delivered replies to particulars) and 6th August, 2019 (when the third named defendant issued the present motion to dismiss) is, with respect, fanciful and wholly inconsistent with the evidence before this Court.

No defence delivered

322. It is true that the third named defendant did not deliver a defence, but that must be seen in the context of the relevant facts and circumstances. From the third named defendant's perspective, they were facing a claim by Ocean Point which, on any analysis, had a very late start. It was also a claim which was characterised by lengthy periods of delay, even after what was a very late start. For Ocean Point not to have delivered a statement of claim until some two years and three months *after* the plenary summons issued, could fairly be interpreted by the third named defendant as the act of a plaintiff who was not necessarily committed to progressing its claim.

323. The bald assertion is made by Mr. Dooley on behalf of the plaintiff that the delay was *caused* by the third defendant failing to put in a defence to the proceedings. That is a claim which is wholly undermined by the facts. How can the delay of two years and three months between 5th September, 2014 (the date the plenary summons was issued) and 21st December, 2016 (the date a statement of claim was delivered) be explained by the alleged failure of the third named defendant to deliver a defence

to the statement of claim? It plainly cannot, in circumstances where Ocean Point did not deliver a statement of claim until 21st December, 2016, so the question of a defence simply did not arise. It did not arise because of the plaintiff's delay.

324. It should also be noted that, by the time the statement of claim was delivered, a full *decade* had elapsed since the first of the key events alleged to provide the basis for the claim. Nor can the plaintiff's delay from 7th November, 2017 *onwards* be explained, or excused, by reason of a failure on the part of the third named defendant to deliver a defence, given that the plaintiff did not even write a single letter requesting a defence and issued no motion to compel the delivery of a defence. The plaintiff could have done the foregoing, but simply failed to and there is simply no reason, still less an acceptable excuse, put forward for this failure and the plaintiff's delay.

325. Litigation is, of course, a two-way process and I have had careful regard to the actions of *both* the plaintiff and the third named defendant in the context of applying the *Primor* principles and coming to the decision herein. The primary obligation to progress Ocean Point's claim lay, however, with Ocean Point and, having regard to the very late start, coupled with lengthy periods of delay on the part of Ocean Point, considered alongside the nature of the claim, it was not unreasonable for the defendant to take a view that the plaintiff might well have decided not to progress the claim further.

The nature of the Ocean Point claim

326. Earlier in this judgment, I noted that, in the context of the six-year period provided for in the statute of limitations, it is uncontroversial to say that 5th September, 2008 is precisely six years prior to 5th September, 2014 (when the Ocean Point plenary summons was issued). This is significant, given the specific pleas made in the statement of claim, many of which relate to events of 2006 and 2007. Indeed, in the manner analysed earlier in this judgment, the fifth named defendant entirely ceased work on the relevant development as of 6th October, 2008, according to the pleas made by Ocean Point.

327. An element of Ocean Point's claim is undoubtedly that the third named defendant failed to supervise the development works properly, but the only period which would not *prima facie* appear to fall foul of the statute of limitations is the period commencing on 5th September, 2008 and ending on 6th October, 2008, insofar as the carrying out of works or their supervision is concerned.

328. In submissions on behalf of the plaintiff, it is suggested that this Court is not entitled to have any regard to the statute of limitations. Counsel for the plaintiff argues that the statute of limitations is only relevant if specifically pleaded in a defence and, therefore, this Court should ignore it. I do not accept this submission and I say so for the following reasons. The Court of Appeal in *Millerick* felt able to observe, at para. 21, in the context of assessing whether the High Court judge correctly classified the relevant delay as inordinate, that the proceedings were issued "*very close to the expiry of the limitation period prescribed for claims of this nature*", going on to emphasise the special obligation of expedition on any plaintiff to progress proceedings in such circumstances. Furthermore, it is very clear from the submissions made on behalf of the third named defendant that the latter is very much "alive" to the statute of limitations issue. In addition, the *Primor* decision makes it clear that, in the context of this Court coming to a decision as to whether, in its discretion, the balance of justice lies in favour of, or against, the proceeding of the case, such a judgment must be made "*on the facts*". In the present case, the facts include the pleas made in the statement of claim which demonstrate that the alleged actions and omissions, as well as alleged advices, discussions, meetings and understandings, which form the basis of the plaintiff's claim against the third named defendant all relate to a period of time between May 2006

and October 2008. It is a matter of fact that, with the exception of one month, all of that period is in excess of six years prior to the Ocean Point plenary summons being issued. That is not to suggest for a moment that this Court is *determining* any statute of limitations point definitively. Nor is it to say that the fact that a statute of limitations issue appears to exist in respect of a material part of Ocean Point's claim is determinative of the present application. It is, however, to say that the fact that the proceedings were commenced so late as to give rise to an obvious statute of limitations issue, imposed upon Ocean Point an additional obligation to ensure that its claim was prosecuted with reasonable expedition, which obligation Ocean Point utterly failed in.

329. The foregoing also provides part of the context, in which any "*points*" or reasons which are said by or on behalf of the plaintiff to excuse delay, fall for consideration, and, in the manner explained in this decision, I am entirely satisfied that the third named defendant's conduct, and any delay on its part, does not explain or *excuse* the plaintiff's delay. In short, I am entirely satisfied on the evidence before this Court that Ocean Point's delay is inexcusable as well as inordinate.

The balance of justice

330. Earlier in this decision, I quoted from the Supreme Court's judgment in *Desmond v. MGN Limited* [2009] 1 IR 737, wherein Geoghegan J. agreed with Macken J. that "*in assessing where the balance of justice lies as between the parties...the scope and ambit of the defence...is a factor which, in an appropriate case may be taken into account*". I am satisfied that, in assessing where the balance of justice lies in the present case, this Court should not ignore the nature and scope of the claim made by Ocean Point, including the existence of an obvious statute of limitations issue in respect of events which pre-date 5th September, 2008.

331. In other words, for the purposes of assessing where the balance of justice lies, this Court cannot be "blind" to the difficulties which Ocean Point would appear to face, insofar as maintaining a claim against the third named defendant with regard to causes of action alleged to have arisen *prior* to 5th September, 2008. In this regard, para. 64(s) comprises a plea made against the third named defendant to the effect that the latter misrepresented to the plaintiff the importance and significance of proceeding with a development which was not in compliance with planning, in circumstances where it is clear from para. 23 of the statement of claim, the Development was proceeded with in 2006.

332. Similarly, the plea at para. 64(t) to the effect that the third named defendant negligently failed to inform the plaintiff of the risks which he ran as a consequence, is a plea which relates to events of September 2006.

333. Equally, the plea at para. 64(u) to the effect that the third named defendant failed to ensure that Cleary Doyle did not enter into possession of the site without there being an effective dispute-resolution clause, also relates to events of 2006, in particular, a 22nd June, 2006 "letter of intent" which, according to para. 17 of the statement of claim, was issued by Mr. Dooley, via the third named defendant, on foot of advices received from the first and third named defendants.

334. The plea at para. 64(w) to the effect that the third named defendant failed to ensure that an overhead line traversing the site was not a source of delay, is a plea which relates to events of April 2007.

335. The pleas at para. 64(v), (x) and (y) to the effect that the third named defendant failed to properly supervise works or ensure that works proceeded in a workmanlike fashion or failed to properly oversee the quality of the fifth named defendant's works, all relate to works which concluded as of 6th October, 2008.

336. At para. 35, it is pleaded that Ocean Point entered into a contract with the fifth named defendant on or about 2nd April, 2007. That was well over seven years prior to the Ocean Point plenary summons being issued.

337. It is also explicitly pleaded that Ocean Point was aware that the quality of the fifth named defendant's work was wholly inadequate and that the plaintiff was so aware long *before* October 2008.

338. For example, the plea at para. 40 begins as follows:-

"As the works progressed, it became clear that the quality of the fifth named defendant's works was wholly inadequate. A non-exhaustive list of defects in the fifth named defendant's works, which were not rectified during the course of those works, include inter alia..."

339. The fact that the plaintiff was aware of the alleged defects long before October 2008 is also made clear from the plea at para. 43 of the statement of claim which begins as follows: *"The plaintiff highlighted defects in the works to the defendants at every site meeting..."*. Elsewhere in the statement of claim it is made clear that, as early as October 2007, the plaintiff was aware of what it regarded as a lack of progress and an absence of quality control on the site, in that the plea at para. 45 of the statement of claim begins as follows:-

*"In attempt to expedite matters and to address the lack of progress and absence of quality control on site, in or around **October 2007** the plaintiff appointed Michael Morrissey of M.J. Morrissey & Associates to assist it in its interactions with the defendants. Matters had reached such a pitch at this juncture that the plaintiff requested that Mr. Morrissey advise it on the merits of terminating the fifth named defendant's contract, such as was the quality and pace of the work, but ultimately this option was not exercised."* (emphasis added).

340. Having regard to the foregoing, it is uncontroversial to say that Ocean Point has pleaded an awareness on its part, in October 2007, that the relevant works were of an inadequate quality and that there were delays of which the plaintiff also complains. Despite this, Ocean Point did not issue proceedings until seven years later.

341. At para. 46 of the statement of claim, it is pleaded that:-

*"The Works were scheduled to complete on 31 March, 2008, but because of the negligence and breach of contract of the defendants in failing to either progress the works (in the case of the fifth named defendant) or procure the advancement of the works (in the case of the other defendants) this was not achievable. The fifth named defendant seemed incapable of accelerating the progress of the works, and the first, second, third and fourth named defendants were incapable of either compelling it to do so, or even properly supervising the standard of its work. In a meeting dated in or around **31 January 2008**, the plaintiff raised a number of specific items of concern of which he had already notified the third named defendant of by writing. The only result of this meeting was a request from the fifth named defendants that henceforth the plaintiff and Mr. Morrissey, his adviser should be excluded from site meetings."* (emphasis added).

342. In the foregoing manner, Ocean Point has specifically pleaded a failure to complete the relevant works and a failure to supervise the relevant works resulting in a failure to meet the deadline of 31st March, 2008 as a result of the alleged negligence and breach of contract of, *inter alia*, the third named defendant. Six years after 31st March, 2008 is 31st March, 2014, which is six months *before* the Ocean Point plenary summons was issued.

343. Six years after 31st January, 2008 (being the date of a meeting at which Ocean Point explicitly pleads that it raised specific items of concern with the defendants), takes one to 31st January, 2014. Both dates are well *before* 5th September, 2014 when the plaintiff chose institute the present proceedings.

344. To point out the foregoing is not, as I say, to determine any issue in the underlying proceedings, but these observations seem to me to be appropriate for this Court to make in assessing the nature of the case, in the context of consideration of where the balance of justice lies.

345. In short, the pleadings very strongly suggest that there is a significant statute of limitations issue in respect of a material part of Ocean Point's claim and a careful analysis of the statement of claim reveals that each of the particulars alleged as against the third named defendant appear to arise out of events which pre-date 5th September, 2008.

346. Also of relevance in the context of the nature of the claim, is the contents of Mr. Porter's affidavit sworn on 9th June, 2020 where he positively avers that the wrong defendant has been sued in the Dooley proceedings and he avers that the correct entity is MMP-PM. Mr. Porter also makes an uncontested averment to the effect that the third named defendant was only incorporated in 2007, whereas, from para. 16 onwards of the Ocean Point statement of claim, it is alleged that Mr. Dooley approached the third named defendant in or about 23rd May, 2006.

347. That the third named defendant may not have been incorporated until 2007, coupled with pleas made by Ocean Point to the effect that the third named defendant was approached in May 2006, also speak to the nature of the case and create obvious issues which, to my mind, properly form part of the Court's consideration in the context of assessing where the balance of justice lies.

348. Even if I am entirely wrong in the foregoing view, I am satisfied that a consideration of the evidence before it entitles this Court to hold that the third named defendant has established at least moderate or general prejudice, in the sense used in the authorities to which I have referred earlier in this judgment, as regards the third named defendant's ability properly to defend Ocean Point's claim against it. This arises from the likely impairment of witness memories as a result of delay for which Ocean Point is responsible, in circumstances where oral evidence as to events (including discussions, advices and understandings) between May 2006 and October 2008 is central to a determination of relevant facts by a trial judge (at a trial which could not take place before 2022 at the earliest).

349. In *Carroll v. Crawford* [2017] IECA 66, Irvine J. (as she then was) stated the following from para. 24 onwards:-

"24. There is, in any event, a long line of authority to support the dismissal of actions in the presence of moderate prejudice where the court has found the plaintiff guilty of inordinate and inexcusable delay. In Stephens v. Paul Flynn Ltd [2008] 4 I.R. 31 Kearns J. concluded that a defendant need only establish moderate prejudice arising from delay as justification for dismissing the proceedings on the third leg of the Primor test. He summarised the findings that had been made by Clarke J. in the Court below in the following manner at p. 38:-

'In considering where the balance of justice lay, he concluded that there had been a very significant delay. Not only had the plaintiff failed to render that delay excusable, he had failed to do so by a significant margin. He also concluded that the defendant, were he to be compelled to meet the case, would suffer prejudice, although he did not place that prejudice at a higher degree than moderate. He also held that there was no significant delay on the part of the

defendant in exercising his right to apply for the dismissal of the action for want of prosecution.”

350. The plaintiff in the present case has undoubtedly been guilty of inordinate and inexcusable delay and has failed to proffer anything like a credible excuse for the delay since the proceedings were issued, compounding significant and obvious pre-commencement delay.

351. It is fair to say that, on the facts before this Court, Ocean Point has failed to render its delay excusable by a very significant margin. I have no doubt whatsoever about the fact that moderate or general prejudice has been established. The nature of the pleaded case makes it clear that oral evidence would be required at any future trial and it is plain that the contents of meetings, discussions, advices and understandings, going back to 2006, are issues for which such oral evidence would be essential. The passage of time caused by Ocean Point’s delay has created moderate prejudice at the very least, insofar as the ability of witnesses to assist the court by giving accurate testimony is concerned. In *Carroll v. Crawford*, the current High Court president continued, from para. 26, as follows:-

“26. While the respondent has not asserted any particular prejudice, 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 over 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.”

352. In the present case, findings of fact relating to events of fifteen years ago would need to be made on the basis of oral evidence even if Ocean Point’s case were to be heard before the end of 2022. It should also be pointed out that in the present case, as well as moderate prejudice existing, the third named defendant has referred to specific prejudice as follows. As averred by Ms. Mansfield on behalf of the third named defendant, at para. 4 of her 1st August, 2019 affidavit, Ocean Point’s claim relates to alleged professional negligence on the part of the third named defendant. At para. 11, Ms. Mansfield avers that the third named defendant is a professional company with a professional reputation to maintain and she avers that *“a serious consequence of the plaintiff’s delay is that outstanding claims interfere with the third named defendant’s reputation and has an ongoing effect on its professional indemnity insurance”*.

353. Furthermore, Ms. Mansfield avers at para. 8 of her affidavit that, on 5th March, 2009, a receiver was appointed to the plaintiff. She also avers that the second named defendant was dissolved in 2014, following the appointment of a liquidator in 2012. In addition, Mr. Porter avers, at para. 6 of his 9th June, 2020 affidavit that MMP-PM was appointed as project managers of the Ocean Point project (not the third named defendant) and he goes on to aver, at para. 14 of his affidavit, that when the project was abandoned in 2008, MMP-PM was left with unpaid fees and *“the MMP-PM files on the jobs were thinned out and many files disposed of before the current proceedings were launched in 2014”*. Later, in para. 14, he refers to *“the further thinning out of the files”* following an interview conducted by the consultancy firm Watts, in March 2009, with MMP-PM.

354. Thus, the Court has before it uncontested averments to the effect that the Ocean Point proceedings have negatively impacted, *inter alia*, on the third named defendant's professional reputation and professional indemnity insurance; that the plaintiff may not be a "mark"; and that documents concerning the Development have been disposed of. Individually, or taken together, these seemed to me to constitute evidence of specific or actual prejudice to the third named defendant which properly forms part of the Court's consideration as to where the balance of justice lies.

355. In addition, it is averred that Mr. Pat Walsh, the MMP-PM director in charge of the Ocean Point project and the client contact person, left MMP-PM permanently in February 2012 and has had no connection with either MMP-PM, the third named defendant or any related company since then (para. 11 of Mr. Porter's affidavit). It is averred (at para. 12) that Mr. Ferry, the senior project manager on the project who carried out the week-to-week management, left MMP-PM in 2008 and has had no contact with either MMP-PM or the third defendant or any related company since. It is also averred by Mr. Porter (at para. 13 of his 9th June, 2020 affidavit) that Mr. Cornelius O'Sullivan, former director of MMP-PM, retired in June 2015 and, having reached age 70, planned to move to Portugal.

356. Even if it is permissible for me to take into account that in a separate claim Mr. Walsh swore an affidavit (and assuming as I do that all relevant witnesses would be available for a future trial) the fact that there had been no contact with Mr. Walsh for a decade; no contact with Mr. Ferry in thirteen years; and that Mr. O'Sullivan retired six years ago seems, to me to underline the likelihood that their memories concerning events (including meetings, conversations and advices going back to 2006, 2007 and 2008) are likely to be impaired or degraded to a material extent, due to delay attributable to the plaintiff. A degrading of memory seems to me to be something this Court can safely assume as regards *all* potential witnesses, including any representing Ocean Point, regardless of the availability of witnesses or, for that matter, documents, at a future trial. The courts have recognised the reality that witness memories fade due to the passage of time and I am entitled to take it that such is the position here.

Relevant period of delay

357. The Court of Appeal's 24th February, 2015 decision in *Tanner v. O'Donovan* [2015] IECA 24 concerned a claim by the plaintiff/appellant for damages against the first and second named defendants (architects) and third defendant (consulting engineer) arising from the construction of a hotel, at various dates between 1998 and 1999. By 2009, the action had not been set down for trial and the first and second defendants issued a motion on 10th September, 2009 seeking to have the claim struck out on the grounds of inordinate and inexcusable delay. It is appropriate to observe, at this juncture, that, in the case before this Court, the passage of time between the construction works and the motion to dismiss is even *greater*. From para. 24 onwards, Hogan J. stated as follows:

"Relevant period of delay

*24. It is necessary, first, to consider the relevant period of delay for the purposes of the Primor test. It is the period since the commencement of the proceedings up to the date of hearing of the motions to dismiss by the High Court Judge which is the period which must be considered for this purpose. For the reasons next set out, however, **the period from the date of the accrual of the cause of action to the issue of proceedings is also relevant to the assessment of the question as to whether post issue delay is inordinate or inexcusable.***

25. While it is not easy to be precise as to when the plaintiff's cause of action first arose, judged by the particulars contained in the statement of claim it would seem that it is contended that very

serious problems arose at a relatively early stage in the construction process. Thus, for example, among the allegations is the contention that the roof of the hotel was so badly designed that it was in danger of a collapse and that this was drawn to the defendants' attention in February 1998. It is further contended that the building as so constructed was unsafe and not in compliance with the Building Regulations, with the result that the site was in fact closed from April 1998 to July 1998." (emphasis added).

358. Earlier in this judgment, I looked at the specific pleas made by the plaintiff in the Ocean Point proceedings. Fairly examined, they disclose causes of action said to accrue in 2006 and 2007, whereas the plenary summons was not issued by Ocean Point until September 2014. Insofar as it is contended on behalf of Ocean Point that the substance of the claim relates to the alleged failure on the part of the third named defendant to supervise works, a specific plea is made at para. 43 of the statement of claim that "*The plaintiff highlighted defects in the works to the defendants at every site meeting, but its concerns were brushed aside*" and it expressly pleaded at para. 45 that, in October 2007, the plaintiff appointed a Mr. Michael Morrissey of MJ Morrissey and Associates to assist in its interaction with the defendants in what is pleaded to have been an "*attempt to expedite matters and to address the lack of progress and absence of quality control on site*". Thus, it appears that the plaintiff's cause of action, including in respect of alleged defects or insufficient quality in terms of the work which the plaintiff claims the third named defendant failed to supervise adequately, arose in 2007.

359. Para. 46 of Ocean Point's statement of claim refers *inter alia* to a meeting held in or around 31st January, 2008 at which the plaintiff raised a number of specific items of concern of which he had already notified the third named defendant; and that paragraph pleads an inability on the fifth named defendant to accelerate progress of the works and an incapacity on the part of the first, second, third and fourth defendants of compelling the fifth defendant to do so or properly supervising the standard of its work. A plea is also made at para. 46 that the scheduled completion of 31st March, 2008 was not achieved because of the negligence and breach of contract of the defendants, including the third named defendant. Once more, this suggests strongly that Ocean Point's cause of action arose (in that the alleged wrongs on the part of the third named defendant were known to Ocean Point) well over six years *before* Ocean Point issued the plenary summons in September 2014.

360. In the *Tanner* case, Hogan J. found that the essence of the claim related to defective works which were said to have occurred in the period between February 1998 and March 1999 and, at para. 26, he stated the following:-

"Hence the commencement of the proceedings in September 2003 must in these particular circumstances be adjudged to be a late start. This made it all the more incumbent on the plaintiff to proceed with expedition thereafter. As Lord Diplock observed in Birkett v. James [1978] A.C. 297, 322:

'A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which have been excusable if the action had started sooner may be inexcusable in the light of the time that has already passed before the writ was issued.'"

361. In *Tanner*, Hogan J. asked whether the delay in that case was inordinate and answered the question in the following terms:

"27. By any standards, the delay was inordinate. The plenary summons issued in September 2003 and yet by the date of the issue of these motions to dismiss for want of prosecution in September

2009, the matter had not been set down for trial and no active steps had been taken by the plaintiff in the proceedings for a year (and then only in response to motions brought by first and second named defendants). Nor had any such steps been taken prior to the hearing of these motions by Feeney J. in July 2010.

28. The pace of the present proceedings was so leisurely - the late start notwithstanding - that, as I have already observed, no less than eight separate motions were issued by the defendants' respective solicitors in relation to either default of pleading by the plaintiff on the one hand or a failure to comply in a timely fashion with court orders on the other.

29. It follows, accordingly, that the first limb of the Primor test has been satisfied."

362. In the present case, the essence of Ocean Point's claim relates to events between 2006 and 2008 and, having regard to the specific pleas made, the causes of action would appear to have arisen over six years prior to the plenary summons in question having been issued. Without purporting to determine any statute of limitations point, this was the very latest of starts. Moreover, having had an extremely late start, did Ocean Point proceed with all due speed? It most certainly did not.

363. Having issued a plenary summons on 5th September, 2014, the plaintiff did nothing for a period of almost two years and three months until a statement of claim was delivered, dated 21st December, 2016. To my mind, that alone constitutes inordinate delay, but this was not the only delay on the part of the plaintiff. After delivering replies to particulars, on 7th November, 2017, in response to a notice for particulars raised on behalf of the third named defendant, dated 4th August, 2017, the plaintiff did nothing more to progress its claim against the third named defendant at any point.

364. Whereas Hogan J. deprecated the fact that, in *Tanner*, no active steps had been taken by the plaintiff in the proceedings for a year, in the present case a year and nine months elapsed between 7th November, 2017 (when the plaintiff furnished replies to particulars) and 6th August, 2019 (when the third named defendant issued the motion to dismiss).

365. The Court of Appeal's decision in *Tanner* also addresses the question of prejudice insofar as the impairment of witnesses to assist the court due to the passage of time. It is instructive to quote paras. 37-40 inclusive, as follows:-

"37. Perhaps the most obvious consideration here is that the delays up to October 2010 have been prejudicial. It is clear from the pleadings that the agreement contended here for by the plaintiff was an oral one, but, for example, the third defendant has denied the existence of any such agreement or that, as also claimed, that he made representations to the plaintiff prior to any such appointment. Accordingly, the case rests largely on the existence of an oral contract, the terms of which (if there was one) are in dispute. Any fair hearing of the claim would thus be very dependent on oral evidence and the recollection of detail associated with architectural and engineering services, and the construction of a building.

38. **The lapse of time between 1998 and 2010 was accordingly inherently prejudicial, since the capacity of the witnesses – on all sides – to recollect this detail has doubtless been considerably impaired.** As Finlay Geoghegan J. said in *Manning v. Benson & Hedges Ltd.* [2005] 1 I.L.R.M. 190,208:

'Delays of four to five years as a matter of probability will reduce the potential of such witnesses to give meaningful assistance or to act as a witness.'

39. In *Rogers v. Michelin Tyres* [2005] IEHC 294 Clarke J. stated that as the delay affected the ability of witnesses to recall the minutiae of an important meeting some ten years earlier, this meant that the defendant had suffered what he described as 'at least a moderate degree of prejudice in defending this action.' Likewise, in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290, 293-294 Hardiman J. spoke to the same effect then he observed that:

'... 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.**'

40. All of this necessarily compromises the basic ability of the courts to discharge their fundamental constitutional mandate to administer justice as prescribed by Article 34.1 of the Constitution. As Finlay Geoghegan J. said in *Manning* ([2005] 1 I.L.R.M. 190, 202):

'The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial.'" (emphasis added).

366. The foregoing dicta seems to me to be particularly relevant in light of the facts in this case. It is clear from the pleadings in this case that a fair trial would be dependent to a material extent on oral evidence as to the recollection, not only of details associated with such construction works as were carried out between 2006 and 2008, but also in relation to conversations, discussions, advices and understandings at a range of meetings, involving a range of parties, said to have been held in 2006, 2007 and 2008, being a period of between thirteen and fifteen years ago. It cannot be doubted, in my view, that the ability of witnesses on both sides to recollect detail will have been impaired as a result of the passage of such a long period of time. Moreover, the prejudice which arises for the third named defendant, insofar as the ability of witnesses to give meaningful assistance at any future trial, can be said to result directly from delay for which the plaintiff is exclusively responsible.

367. For the principles explained in *Tanner* to be relevant to the present case does not require the death or unavailability of any witness. The fact that it may prove possible to secure the attendance of all relevant witnesses is not the point. The prejudice arises from the inevitable degrading of memories and their ability to assist the court due to delay for which the plaintiff is responsible. In my view, this properly forms a part of the court's consideration as to where the balance of justice lies.

368. Similarly, in assessing the question of the balance of justice, this Court is also entitled to have regard to the fact of the plaintiff's late start to the proceedings in the context of the greater obligation which was undoubtedly on them to proceed with action thereafter, an obligation which the plaintiff patently failed to discharge.

Professional reputation

369. With regard to the issue of a defendant's professional reputation in the context of a consideration by the court of where the balance of justice lies, the Court of Appeal stated *inter alia* the following at para. 43 of its decision in *Tanner*:-

"43. ... while the details of the adverse impact on the defendants' professional reputations are admittedly sparse, it is nonetheless plain that **the very existence of such proceedings could in itself potentially impact on those reputations, possibly even in a far-reaching way.** A finding that that there had been negligence on the part of any of the defendants had caused or brought about a state of affairs where a hotel was structurally unsafe and had been closed for a three month period as a result would seriously impact upon their professional reputations. Indeed,

in other circumstances **the very existence of a claim of this kind could affect a professional person's capacity to secure or renew professional indemnity insurance** (not least having regard to the significant quantum of damages claimed by the plaintiff) and might even require to be notified to professional bodies. All of this is to recognise that proceedings of this (sic) is not simply about the recovery of a monetary award, but may well have significant reputational implications.

44. The unfairness associated with undue delay in this context has long been recognised. As O'Hanlon J. observed in this context in *Celtic Ceramics Ltd. v. Industrial Development Authority* [1993] I.L.R.M. 248, 258-259:

'It seems very unfair and unjust that persons whose professional standing and competence are under attack should be left with litigation hanging over their heads for years by reason of the inordinate and inexcusable delay on the part of a plaintiff and I would respectfully echo the view expressed by Henchy J. in *Sheehan v. Amond* [1982] I.R. 235 that it should be possible to invoke 'implied constitutional principles of basic fairness of procedure' to bring about the termination of such proceedings.'

45. To this I would add that the effective protection of the right to a good name expressly guaranteed by Article 40.3.2 of the Constitution necessarily implies that claims of this kind – with obvious implications for the good name of a professional defendant – should be heard and determined within a reasonable time. Any other conclusion would undermine the substance and reality of that express constitutional guarantee.

46. All of this means that the courts are obliged, where possible, to ensure that claims of this kind are adjudicated within a reasonable time if they are to remain faithful to the constitutional commitment to protect the right to a good name as protected by Article 40.3.2." (emphasis added).

370. In the present case the existence of the plaintiff's claim (which undoubtedly calls into question the third named defendant's competence as professionals and a claim in which an extremely large sum in damages is sought) plainly could impact negatively on the professional reputation of the third named defendant. Indeed, there is a positive averment that the claim interferes with the third named defendant's reputation and has an ongoing effect on its professional indemnity insurance. This constitutes prejudice which this Court is entitled to have regard to in the context of an assessment of the question of the balance of justice.

371. The fact that a claim, in respect of causes of action which arose between 2006 and 2008, has no realistic prospect of being heard and determined until 2022 at the earliest seems also to me to be wholly inconsistent with Article 6 of the European Convention on Human Rights and Fundamental Freedoms and also inconsistent with the rights of a defendant, flowing from Article 40.3.2 of Bunreacht na hÉireann, to have a claim which impacts on their good name and professional reputation, heard and determined within a reasonable timeframe. This, too, seems to be an appropriate consideration for the Court to weigh in the balance in the context of an assessment of where the balance of justice lies.

372. In light of the evidence and for the foregoing reasons, I must reject the submission made by counsel for the plaintiff to the effect that, "if there was an issue as to professional reputation, the better thing for the third named defendant to do was to progress the matter to trial and to vindicate their so-called good name". Implicit in that submission is a criticism of the third named defendant for bringing the present motion and I am obliged, in light of the facts, to reject any such criticism as wholly unfounded.

373. In conducting the assessment in accordance with the *Primor* principles as to where the balance of justice lies, I have had careful regard to the conduct of both the plaintiff and the third named defendant insofar as these proceedings are concerned. It is true to say that the third named defendant never filed a defence and I have not overlooked this in conducting the assessment as per the principles outlined in para. (d) (i) to (vii) of *Primor*. It has to be said, however, that, given the very late start to the proceedings and given that the first act of the plaintiff was to delay for well over two years after issuing the plenary summons; and given the complete inaction on the part of the plaintiff after replying to particulars in November 2017; and given the fact that the plaintiff did not write a single letter after November 2017 calling for a defence; and did not issue any motion after November 2017 pressing for a defence from the third named defendant, it was not unreasonable for the latter to believe that the plaintiff may well have decided not to pursue the litigation further, particularly in circumstances where obvious issues arise both in respect of the statute of limitations and, indeed, whether the plaintiff has pursued the correct defendant.

374. I also wish to make clear that insofar as counsel for the plaintiff made submissions in the Dooley proceedings of application to the Ocean Point proceedings, I have carefully considered same and none can avail the plaintiff in either case.

375. In short, there has undoubtedly been inordinate and inexcusable delay on the part of the plaintiff and nothing proffered on behalf of Ocean Point could fairly be said to be a “countervailing” consideration or circumstance, still less a “weighty” one mitigating in favour of the case being permitted to proceed and, taking all relevant matters into account and giving them due weight, I am entirely satisfied that the balance of justice requires the dismissal of Ocean Point’s claim.

Conclusion in respect of the third named defendant’s motions

376. Inordinate and inexcusable delay has been established in both cases and the factors taken into account in determining where the balance lies include real prejudice which has flowed from the plaintiff’s delay (both general or moderate prejudice, insofar as the likely degrading of witness memories; and specific prejudice, as regards the third defendant’s reputation and professional indemnity insurance).

377. By contrast, the plaintiff has not advanced, in either case, anything which amount to “countervailing circumstances”. The plaintiff has not put forward anything “weighty” which would argue for a different outcome to the balance of justice assessment.

378. In my view the balance of justice is undoubtedly in favour of granting the relief sought by the third named defendant and dismissing the plaintiff’s claims in both cases.

379. Nor did the outcome of a careful consideration of where the balance of justice lies come down to what might be called “fine margins”. In my view, the balance of justice tilts very strongly and very clearly in favour of the dismissal of the Dooley and Ocean Point proceedings on a proper application of the *Primor* principles.

380. For the reasons detailed in this decision, the third named defendant is entitled to an order dismissing the plaintiff’s claim in each of the proceedings, namely, an order dismissing the proceedings brought by Francis Dooley, bearing Record No. 2011/6564P, and an order dismissing the proceedings brought by Ocean Point Development Company Ltd. (In Receivership) under Record No. 2014/7827P.

381. On 24th March, 2020 the following statement issued in respect of the delivery of judgments electronically:-

"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

382. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs, which should be made. My preliminary view on the issue of costs is that I see nothing which would justify the Court from departing from what might be called the "normal rule", i.e. that costs should "follow the event". Given the upcoming Christmas and New Year holiday, in the event of disagreement between the parties as to the final form of order, short written submissions should be filed in the Central Office within 28 days.