

**THE HIGH COURT**

[2023] IEHC 164  
[Record No. 2011/5235P]

**BETWEEN**

**FRANCIS DOOLEY**

**PLAINTIFF**

**AND**

**CLANCY CONSTRUCTION LIMITED T/A AS CLANCY CONSTRUCTION AND MULCAHY  
MCDONAGH & PARTNERS**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Barr delivered on the 30<sup>th</sup> day of March, 2023.**

**Introduction.**

- 1.** In these proceedings, which were commenced by plenary summons issued on 10 June 2011, the plaintiff is suing the defendants in respect of alleged damage to his public house premises known as 'Skipper's Bar', Courtown Harbour, Courtown, County Wexford.
- 2.** It is the plaintiff's case that the activities of the first defendant in carrying out construction works on an adjoining plot of land, which was also owned by the plaintiff, caused extensive damage to his public house premises. It is alleged that the second defendant, which firm had been retained as project managers in respect of the construction works being carried out on the adjoining site, failed to supervise the first defendant adequately, or at all, in their carrying out of construction works on the adjoining site.
- 3.** As there are two sets of proceedings issued by the plaintiff, which are somewhat interrelated, these proceedings shall be referred to as the 'Skipper's Bar proceedings', where necessary.
- 4.** This action is one of a number of interrelated actions, which all stem from the carrying out of the construction works on the adjoining site. For the purpose of clarity in this judgment, the first defendant will hereinafter be referred to as 'the contractor'. The second defendant will be referred to as 'MMP'.
- 5.** The application that is before the court for determination, is an application brought by the contractor pursuant to a notice of motion issued on 15 September 2021, to strike out the plaintiff's case against it on grounds of inordinate and excessive delay and want of prosecution.
- 6.** In order to understand the issues that arise in relation to the issue of delay in this case, it is necessary to set out in some detail the background to this case, which will involve

giving brief details of the other civil actions that are extant, which touch upon, or concern the development that was carried out on the lands at Courtown Harbour, Courtown, County Wexford.

**Background.**

**7.** In 2003, the plaintiff purchased lands in Courtown, County Wexford, known as the Courtown Entertainment Complex. These lands included the licensed premises known as Skipper's Bar, and the adjoining lands, which included a fast-food outlet and other ancillary areas.

**8.** In or around December 2004, the plaintiff secured planning permission from Wexford County Council for a development on the site adjoining Skipper's Bar, for a development comprising thirty-four apartments and nine retail units.

**9.** It is the plaintiff's case that in or about 2006, he entered into a contract with MMP to act as project managers in relation to the development for which he had obtained planning permission in relation to the site adjoining the Skipper's Bar premises. The plaintiff has pleaded that on or about 20 August 2006, he formed a company called Ocean Point Development Company Limited (hereinafter 'OPD') to carry out the development of the apartments and the retail units on the adjoining site. The plaintiff has pleaded that after a tender process, the contractor was recommended by MMP as contractor for the development works. The plaintiff accepted the recommendation of MMP in this regard. Pursuant to a written contract between OPD and the contractor, the contractor was retained to carry out the construction works on the adjoining site. These development works commenced on 2 March 2007.

**10.** The plaintiff has pleaded that due to the negligence and breach of duty of the contractor, extensive damage was caused to the Skipper's Bar premises as a result of the development works on the adjoining site being carried out in an unsafe and negligent manner. The plaintiff has pleaded that due to the breach of contract and negligence on the part of MMP, and in particular, due to their failure to supervise the contractor in the carrying out of the said construction works, extensive damage was caused to his licensed premises. The plaintiff has pleaded that due to the damage caused to the Skipper's Bar premises, it has suffered a diminution in value of €1,570,000. The plaintiff has further pleaded that he has lost rental income from the property in the sum of €231,429 per annum, from March 2008, which loss is continuing.

**11.** A dispute also arose between the plaintiff and OPD and the contractor in relation to the adequacy of the construction works which it had carried out on the adjoining site. In particular, it was claimed by the plaintiff in other proceedings, which he commenced against the contractor and against MMP and other construction professionals, that the development works had been carried out in an unsafe manner and in particular, that the building, as constructed, was both structurally unsafe and was unsafe from a fire safety point of view.

**12.** Arising out of a refusal by the plaintiff and OPD to pay one of the interim certificates that had been issued in favour of the contractor in respect of the works on the adjoining site, the contractor ceased work on that site in October 2008. Those construction works did not recommence. Subsequent to that, the plaintiff's bank appointed a receiver over the development and also over Skipper's Bar on 5 March 2009. A number of sets of proceedings were issued between the bank and the plaintiff and also at the suit of the plaintiff, against the bank and the receiver. All of these proceedings will be outlined later in the judgment.

**Chronology of Key Dates.**

**13.** The key dates of relevance to the present action can be summarised in the following way: -

10 June 2011	Plenary summons.
4 July 2011	Appearance by contractor.
29 October 2013	Order made joining MMP.
23 January 2014	Amended plenary summons.
6 March 2014	Statement of claim.
8 April 2014	Appearance of MMP.
19 May 2014	Notice for particulars from contractor.
10 October 2014	Replies to particulars to contractor.
26 January 2015	Notice for further and better particulars from contractor.
26 January 2015	Defence of contractor.
27 February 2015	Notice for particulars from MMP
March 2015	Defendants serve notices of indemnity/contribution on each other.
24 April 2015	Defence of MMP.
16 October 2015	Replies to particulars to MMP.

17 June 2016	Notice for further and better particulars from MMP.
13 November 2018	Further particulars of loss and damage.
21 December 2018	Replies to MMP.
8 January 2019	Replies to further notice from contractor.
12 November 2019	Further particulars of negligence and breach of duty of contractor and MMP.
31 January 2020	Reply to defences.
4 February 2020	Letter from plaintiff in relation to certificates of readiness.
15 May 2020	Notice for particulars from MMP.
9 June 2020	Replies to particulars from MMP.
21 July 2020	Notice of trial (plaintiff).
12 August 2020	Certificate of readiness filed by plaintiff.
December 2020	Plaintiff agrees to furnish discovery to contractor.
11 May 2021	Affidavit of discovery of plaintiff.
22 June 2021	MMP issues motion to dismiss on basis that wrong entity sued and/or on grounds of delay.
15 September 2021	Contractor issues motion to dismiss for delay.
21 June 2022	Judgment of Heslin J. rejecting MMP's application.
7 March 2023	Hearing of within application.
30 March 2023	Appeal by MMP against judgment of Heslin J, listed for hearing in Court of Appeal.

**Other Proceedings.**

**14.** In proceedings bearing the title Francis Dooley v. Patterson Bannon Architects Limited, PH McCarthy Consulting Engineers Limited, Mulcahy McDonagh & Partners Limited, Callan Maguire Partnership, Clancy Project Management Limited trading as Clancy Construction (Record No. 2011/6564P), (hereinafter referred to as 'the Dooley proceedings'), the plaintiff sued the contractor and other professionals arising out of the alleged unsafe and defective construction of the main development on the site adjoining the Skipper's Bar site.

**15.** As matters stand at present, the first and second defendants in those proceedings have been dissolved and are not participating in the action. On 20 December 2021, Heslin J. acceded to an application by MMP to be let out of the proceedings. The fourth defendant,

having brought a motion to strike out the action on grounds of delay, was let out of the proceedings on consent, by order of the High Court made on 7 March 2023. The fifth defendant, being the contractor, remains in the action; their application to be allowed out of those proceedings on grounds of delay, having been refused by this Court in a written judgment delivered on 30th March 2023.

**16.** When construction work ceased on the site in October 2008, the plaintiff's bank took action against him. A receiver was appointed over the development on 5 March 2009. On 18 October 2010, the plaintiff's bank instituted proceedings against him on foot of his loans. Those proceedings were remitted to plenary hearing on 12 May 2011. The plaintiff has stated that when the matter was remitted to plenary hearing, there was a protracted dispute in relation to the making of discovery, in which four affidavits of discovery were sworn by ACC/Rabobank group, including discovery made on foot of a written judgment from Baker J. dated 30 March 2017. The court is not aware of the current status of this action, save that the debt appears to have been transferred to Pepper Finance Corporation (Ireland) Ltd.

**17.** The plaintiff has also sworn that on 4 August 2015, he commenced proceedings on his own behalf and on behalf of the company against the receiver, who had been appointed by the bank over the development. He further stated that on 12 July 2016, he had instituted proceedings against Rabobank Group. The exact nature of those proceedings, or the current status of them, has not been made known to the court.

**18.** On 5 September 2014, OPD issued parallel proceedings (hereinafter 'the OPD proceedings') in almost identical terms to the Dooley proceedings and against the same five defendants.

**19.** On the application of the contractor, in the OPD proceedings, Barniville J. (as he then was) in a written judgment delivered on 10 May 2019, ruled that the company's proceedings against the contractor be stayed, pending a referral of the dispute under the contract to arbitration. That arbitration is due to be heard on 24 April 2023. It is listed for hearing for six days.

**20.** While the Dooley proceedings and the OPD proceedings, are separate actions, they are in effect mirror images of each other. The liability issues are identical. It is only in terms of quantum that they differ. Thus, the progress of one action, inevitably had an effect on the progress of the other.

**Submissions on behalf of the Contractor.**

**21.** On behalf of the contractor, Mr. Keaney BL submitted that the delay in this case by the plaintiff was both inordinate and inexcusable. It was submitted that the plaintiff had delayed in instituting the within proceedings; such that they had to be regarded as being "late start" proceedings, notwithstanding that they were issued within the relevant limitation period. In this regard, counsel pointed out that the events in respect of which complaint was made by the plaintiff, occurred in 2007/2008. It was submitted that in these circumstances, particularly as far as the Skipper's Bar proceedings were concerned, there was no valid excuse for the delay by the plaintiff in not instituting the proceedings until June 2011. Thereafter, the plaintiff had waited until October 2013, before obtaining an order joining MMP into the proceedings. It was only after that, that the statement of claim was delivered on 6 March 2014. Thus, there had been a thirty-three month delay from delivery of the plenary summons until delivery of the statement of claim.

**22.** Counsel submitted that notwithstanding the late start to the proceedings, the plaintiff had engaged in extensive post-commencement delay. There had been a thirty-month delay from the delivery of the contractor's defence in January 2015, until the plaintiff requested voluntary discovery in July 2017. There had been a sixty-month delay from receipt of the contractor's defence, until a reply to defence was eventually provided in January 2020.

**23.** Insofar as it was argued on behalf of the plaintiff that the reason why the MMP application had failed, because it had sought discovery from the plaintiff and had obtained same subsequent to the issuance of its notice of motion to strike out on grounds of delay; it was submitted that the discovery issue with the contractor was quite different. In particular, it was submitted that the discovery request by the contractor had not been reactive to service of the notice of trial by the plaintiff. In this regard, counsel pointed out that the contractor had sought discovery from the plaintiff on 16 April 2018. At that stage, the contractor's solicitor had sought two categories of documents being: all documents evidencing the damage caused to Skipper's Bar by the construction works carried out by the first named defendant; and all documents evidencing the costs, loss, damage and expense allegedly sustained by the plaintiff, as a result of the alleged defects in the property.

**24.** Counsel submitted that that request had been completely ignored by the plaintiff. The request for voluntary discovery had been repeated by the contractor's solicitors on 19 February 2020, in response to the plaintiff's letter of 4 February 2020, seeking to certify that the proceedings were ready for hearing. On 21 July 2020, the contractor's solicitors repeated

their request for voluntary discovery, in response to the plaintiff's proposal to certify the proceedings as being ready for hearing. On 9 December 2020 the contractor's solicitors repeated their request for voluntary discovery, in response to a further proposal from the plaintiff to certify that the proceedings were ready for hearing. It was at that stage that the plaintiff agreed to make voluntary discovery. However, the plaintiff did not do so until 15 May 2021, when he provided an affidavit of discovery and documentation.

**25.** While the discovery provided by the plaintiff comprised all minutes of meetings, the contract, bills of quantities and experts reports; there was no attempt to discern those minutes of meetings, which fell into the category requested and therefore very limited time and expense was incurred in copying and issuing the discovery documentation. Counsel pointed out that correspondence had issued from the contractor's solicitor in June 2021, pointing out the inadequacies in the discovery that the plaintiff had made. These concerns were repeated in correspondence issued in October and November 2021. The issue of discovery remains live between the parties.

**26.** It was submitted that when one looked at the overall conduct of the litigation, it could not be said that it had been progressed by the plaintiff in a reasonable and timely manner. In these circumstances it was submitted that the delay was both inordinate and inexcusable. That being the case, it was submitted that the contractor only had to prove moderate prejudice in order to be successful in its application: see *Cassidy v. The Provicialate* [2015] IECA 74; *Millerick v. Minister for Finance* [2016] IECA 206; *Cave Projects Limited v. Gilhooly* [2022] IECA 245.

**27.** On the balance of justice, counsel submitted that in this case due to the inordinate lapse of time between the events complained of by the plaintiff and the likely date for the hearing of the action, which on a reasonable estimate and given that there was an outstanding discovery issue between the parties, would not come on for hearing before the Michaelmas Term in 2024; it was submitted that this gave rise to general prejudice on the part of the contractor. This prejudice arose due to the fact that it was well established at law, that the memories of witnesses diminish with the passage of time: see *Anglo Irish Beef Processors v. Montgomery* [2002] 3 IR 510; *Manning v. Benson & Hedges Limited* [2004] 3 IR 556; *Rogers v. Michelin Tyre PLC & Anor.* [2005] IEHC 294; *Tanner v. O'Donovan* [2015] IECA 24.

**28.** It was submitted that in the present case, the relevant witnesses, who might be called on behalf of the contractor, would be asked to recall events and discussions that took place approximately 16/17 years prior to the trial of the action. It was submitted that this clearly gave rise to prejudice, in that their memories would have diminished over such a long period of time.

**29.** Finally, it was submitted that there had been no acquiescence by the contractor in the inordinate delay on the part of the plaintiff; nor had the contractor been guilty of any culpable delay in the progress of the proceedings to date.

**Submissions on behalf of the Plaintiff.**

**30.** On behalf of the plaintiff, Mr. Hayden SC submitted that this action could not be classed as "late start" proceedings, as alleged by the contractor. It was submitted that in this case extensive damage had been caused to the plaintiff's licensed premises. However, the fact that this was indirect damage, caused by the actions of the contractor on the adjoining site, meant that ascertaining the true cause of the damage to the licensed premises was more difficult. Furthermore, the plaintiff had had to investigate the liability of MMP, as project manager on the development works on the adjoining site, and had had to take steps to join them into the proceedings. It was submitted that in these circumstances, where proceedings had issued against the contractor, when only half of the relevant limitation period had expired, there was no question that there had been unreasonable delay on the part of the plaintiff in commencing the proceedings.

**31.** It was submitted that it was clear from the chronology of relevant dates in the case, that each of the defendants in the present action, had only issued their motions seeking to strike out the plaintiff's proceedings, when the plaintiff was pressing strongly to get the action on for hearing. It was submitted that, contrary to what was asserted by the contractor, the present application should be refused, due to the fact that the plaintiff had been pressing hard to get the action on for hearing and the defendant had sought discovery of documents, which discovery had been made by the plaintiff in May 2021, some four months prior to the issuance of the contractor's motion herein.

**32.** It was further submitted that the court should not look at this case in isolation, but should take account of the myriad of other actions in which the plaintiff became embroiled, due to the disastrous construction works that had been carried out by the contractor on the adjoining site. That had led to the cessation of the construction works by the contractor,



which in turn had brought about the appointment of a receiver over the development by the plaintiff's financiers. That in turn had given rise to proceedings being issued by the bank and there had been cross proceedings brought by the plaintiff against the bank and the receiver.

**33.** In addition, counsel pointed out that proceedings had issued by OPD claiming damages for breach of contract against the contractor and other relevant professionals, arising out of the construction works carried out by the contractor. Insofar as those proceedings concerned the contractor, they had managed to have that matter remitted to arbitration, which was due to be heard before the arbitrator on 24 April 2023.

**34.** It was submitted that the court should take account of the full extent of all of the interconnected litigation that had arisen, of which this action was but a constituent part.

**35.** In relation to the balance of justice, counsel submitted that there was no prejudice to the contractor in having to meet the action at this remove. It was submitted that the core elements in the action would turn on expert evidence, as to whether the carrying out of various works on the adjoining site in relation to the main construction works on that site, had in fact caused damage to the plaintiff's pub. The evidence in that regard would turn exclusively on the evidence of expert witnesses, such as architects and engineers. There was no suggestion that the contractor had been denied the opportunity to carry out all relevant inspections and examinations, in order to be put in a position to properly defend itself at the trial of the action.

**36.** It was submitted that having regard to the minimal prejudice that may be suffered by the contractor as a result of the delay in bringing on the proceedings to a hearing, when balanced against the enormous prejudice that would be suffered by the plaintiff in having his proceedings dismissed; in particular, having regard to the very large losses that had been pleaded in the action to date, it was clear that the greater injustice would be done to the plaintiff, if the action were to be dismissed at this stage.

**37.** It was submitted that it would be all the more unjust to dismiss the plaintiff's action as a result of this application, when the application had only been brought by the contractor, when the plaintiff had been pressing hard to bring his action on for hearing. Counsel submitted that the court should have regard to the dicta of Collins J. in the Cave decision, where it had been stated that the reliefs sought by the contractor herein was a draconian remedy, which should only be issued in clear cases. It was submitted that this was not such a case and that the balance of justice lay in favour of allowing the action to proceed.

**The Law.**

**38.** The principles which the courts must apply when considering an application to strike out a plaintiff's action on grounds of delay and want of prosecution are well known. They were set out in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR 459. It is not necessary to set out those principles again.

**39.** Since the decision in the *Primor* case was handed down, there have been multiple decisions applying those principles to various factual situations. This has given rise to a plethora of decisions, which sometimes differ one from the other, in emphasis and tone. In *Cave Projects Limited v. Gilhooley & Ors.*, the Court of Appeal carried out an extensive review of the principles and summarised the case law on which they were based. That summary is set out at para. 36 of the judgment; which is itself, a very long paragraph. For that reason, I will not quote it in full, but instead, I will highlight some of the relevant principles that were identified by Collins J. in the course of that judgment. He outlined the following principles as being applicable in applications such as the present one before the court:

- The onus is on the defendant to establish all three limbs of the *Primor* test *i.e.*, that there has been inordinate delay in the prosecution of the claim, that such delay is inexcusable and that the balance of justice weighs in favour of dismissing the claim.
- An order dismissing a claim is a far reaching one; such order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed.
- Case law has emphasised that defendants also bear a responsibility in terms of ensuring the timely progress of litigation; while the contours of that responsibility have yet to be definitively mapped out, it is clear that any culpable delay on the part of the defendant will weigh against the dismissal of the action.
- The issue of prejudice is a complex and evolving one. It is central to the determination of the balance of justice. It is clear from the authorities that absence of evidence of specific prejudice, does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice.
- The authorities suggest that even moderate prejudice may suffice where the defendant has established that there was inordinate and inexcusable delay on the part

of the plaintiff. However, Collins J. stated that marginal prejudice, if interpreted as being of a lesser standard than moderate prejudice, would not be sufficient.

- Collins J. noted that notwithstanding certain *dicta* in the *Millerick* case, which suggested that even in the absence of proof of prejudice, it may still be appropriate to dismiss an action, it had to be remembered that the jurisdiction was not punitive or disciplinary in character and the issue of prejudice had been acknowledged as being central to the court's consideration of the balance of justice.

**40.** Collins J. concluded his summary of the relevant principles by stating as follows at para 37:

*"It is entirely appropriate that the culture of "endless indulgence" of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the Primor test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant."*

**Conclusions.**

**41.** The court has carefully considered the extensive documentation both in this case and also in the Dooley proceedings; together with the helpful submissions, both written and oral, of counsel for each of the parties.

**42.** When one looks at the overall circumstances that existed on the ground in 2007/2008, and in particular, when one has regard to the serious nature of the defects, that were disclosed in the Perri report and which were, to an extent, confirmed in the later Watts

report, it was clear that the plaintiff, as the owner of the development site and the owner of Skipper's Bar, was faced with an extraordinarily complex and difficult situation.

**43.** The main contractor had ceased works on the site in October 2008. There was evidence which suggested that the building, in its state at that time, was both structurally unsound and dangerous from a fire safety point of view. In addition, it has been pleaded that there was extensive damage done to the Skipper's Bar premises, as a result of the works carried out by the contractor, under the supervision of MMP, on the adjoining site. All of these matters would have required in depth investigation. In these circumstances, the court is not satisfied that these can be characterised as "late start" proceedings.

**44.** When one has regard to the chronology of dates in relation to these proceedings and when one has regard to the fact that the plaintiff was both bringing actions and fighting actions on various fronts, as outlined earlier in the judgment, it is clear that there was no single inordinate period of inactivity in the carriage of these proceedings. In other words, when one looks at the chronology as set out above, one sees that there was some action taken by the plaintiff to address the litigation in each of the years after issuance of the plenary summons in June 2011.

**45.** However, the court finds that a period of nine years from June 2011, when the plenary summons issued, to July 2020, when the plaintiff first sought to serve a notice of trial, has to be characterised as being inordinate and inexcusable, even when one has regard to the issues that arose, not only in these proceedings, but in other allied proceedings, which were intimately connected with these proceedings. Accordingly, the court finds that the delay in this case was inordinate and inexcusable.

**46.** However, the court finds that the balance of justice, which is the third limb of the test set out in *Primor PLC v. Stoke Kennedy Crowley* [100] 2 IR 459, is in favour of allowing the action to proceed.

**47.** The court has reached that conclusion for the following reasons: First, the court is not satisfied that there is any real prejudice suffered by the contractor in this case. This is not a case that will turn on the recollection of witnesses as to specific events that may have happened during the relevant period, being 2007/2008; nor does it concern in any material respect, discussions or representations, that were made in that period.

**48.** The court is satisfied that, having regard to the issues which are raised on the pleadings, the key issue in this case will be whether the works that were carried out by the

contractor on the adjoining site, were such as to cause damage to the structure of the licensed premises owned by the plaintiff. The burden of proof will rest on the plaintiff to establish that that was in fact the case. The evidence in that regard, both on behalf of the plaintiff and the evidence in contradiction of that assertion, that may be called on behalf of the first defendant, will be expert evidence, as to what damage, if any, was caused to the pub and if such damage is established, what was the cause thereof.

**49.** There is no suggestion that the contractor has been inhibited in any way due to the delay in the case, from either obtaining expert evidence in relation to the issues that may arise, or in producing same at the trial of the action. There is no suggestion that any critical witnesses have died, or are otherwise unavailable; nor is it suggested that any relevant documentation is missing, or is otherwise unavailable.

**50.** The court is mindful of the principles set down by Collins J. in the Cave decision and in particular to the following dicta: -

*"The caselaw suggests that the form of general prejudice most commonly relied on in this context is the difficulty that witnesses may have in giving evidence – and the difficulty that courts may have in resolving conflicts of evidence – relating to events that may have taken place many years before an action gets to trial. That such difficulties may arise cannot be gainsaid. But it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis."*

**51.** The court finds that, having regard to the issues that arise on the pleadings and that will fall for determination at the trial of the action, the bulk of the oral evidence that will be called at the trial of the action, will concern expert evidence in relation to the nature of any damage caused to Skipper's Bar and the causation of same. The production of that evidence on behalf of the contractor, has not been prejudiced as a result of the delay that has occurred in this case. Accordingly, the court finds that the contractor has not established that it has been prejudiced as a result of the passage of time between the events complained of and the likely date of the hearing of the action.

**52.** The court also finds that due to the actions of the contractor, it has acquiesced in such delay as occurred prior to that time. In particular, the court has had regard to the fact that it was only after the plaintiff had sought to serve a notice of trial and had produced a certificate of readiness in July and August 2020, that the contractor raised the issue of

discovery. The court appreciates that the contractor had requested voluntary discovery much earlier, on 16 April 2018, but it had not followed up on that request when the plaintiff had failed to respond to it. It was only when the plaintiff was seeking to push the matter on for hearing, that the defendant reactivated its previous request for discovery.

**53.** The contractor complained that having agreed in December 2020, to make discovery within a period of eight weeks, the plaintiff did not do so until May 2021, some twenty weeks later. I do not regard this as being either excessive or relevant. The court is of the view that it was only when the plaintiff was vigorously seeking to push the matter on for hearing, that MMP issued its motion to strike out on grounds of delay on 22 June 2021 and the contractor did likewise with its motion, issued on 15 September 2021. The court accepts the argument put forward on behalf of the plaintiff, that it was only when he was vigorously trying to get the action on for hearing, that the two defendants opted to seek to strike out the action on grounds of delay.

**54.** The court also accepts the submission made by Mr. Hayden SC, on behalf of the plaintiff, that due to the onset of the Covid-19 Pandemic, it was not possible to set down any witness actions for hearing in the period March 2020 to June 2021. However, by that stage, the motion to strike out on grounds of delay had been issued by MMP, therefore the action could not have been set down for hearing, until that issue had been resolved; which only occurred with delivery of the judgment of Heslin J. on 21 June 2022; but even then, the issue remained live due to the fact that that judgment has been appealed to the Court of Appeal, which will hear the appeal on 30 March 2023. Therefore, in real terms, the plaintiff could not have set down the action for hearing in the period from May 2020, when the onset of the Covid-19 restrictions occurred, and until after final resolution of the application brought by MMP, which will only occur when the Court of Appeal delivers its judgment thereon.

**55.** In considering the balance of justice, the court is also entitled to take judicial notice of the fact that at the time when the difficulties with the development became manifest, the country as at the start of an economic recession, which lasted from approximately September 2008, until somewhere between 2013/2015.

**56.** During that time land values and the entire construction sector, were decimated. Law does not exist in a vacuum. It has to be applied to the circumstances that exist in real life. Accordingly, when considering the balance of justice, the court has had regard to the

fact that this plaintiff had to mount multiple actions, at a time when he must have been under enormous financial pressure.

**57.** In considering the balance of justice, the court also notes the fact that notices of indemnity/contribution were served by the defendants on each other in March 2015. The effect of the service of such a notice by a defendant on another defendant, has given rise to some controversy. These difficulties were adverted to in the judgment of this Court in *Sneyd v. Stripes Supports Services Limited* [2023] IEHC 68. However, as this issue was not specifically raised in argument on the hearing of this application, the court does not propose to deal with it any further.

**58.** It was also suggested in argument, that the court should have regard to the fact that the parties entered into a multilateral mediation in an attempt to resolve the plethora of cases that had arisen out of the development carried out at Courtown Harbour, which mediation was held in March 2022. The court is not prepared to make a finding that entering into mediation after the service of a motion to strike out on grounds of delay, should be held as constituting acquiescence on the part of the defendant in the delay. In this case the mediation occurred while the contractor's motion was awaiting a hearing date. There was no delay caused by the holding of the mediation. Public policy strongly favours the holding of mediations in an attempt to resolve litigation. Mediation is a time effective and very cost-effective method of resolving complex disputes. This court would be most reluctant to make any finding that could in any way dissuade parties from entering into mediation in the future. Accordingly, this has not weighed in the court's consideration of where the balance of justice lies in this case.

**59.** Finally, the court is of the view that when one weighs in the balance the injustice that would be caused to the plaintiff by dismissing the proceedings at this stage and thereby depriving him of an opportunity to go to court to seek a remedy for what he alleges are very substantial losses that have been suffered by him as a result of the wrongdoing of the defendants; as against the possible injustice of requiring the contractor to meet the case at this remove, when it is not prejudiced in so doing; the court is satisfied that the balance of justice is in favour of allowing the action to proceed.

**60.** For the reasons outlined herein, the court will refuse the reliefs sought by the first defendant in its notice of motion dated 15 September 2021.

**61.** As this judgment is being delivered electronically, the parties will have four weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

**62.** The matter will be listed for mention at 10.30 hours on 4 May 2023 for the purpose of making final orders.