

THE HIGH COURT

[2022] IEHC 502

[Record No. 2012/3641P]

BETWEEN

WAYNE BARRETT

PLAINTIFF

AND

TRAYMOUNT CONSTRUCTION LIMITED, LM DEVELOPMENTS
LIMITED (IN RECEIVERSHIP), ROADSTONE WOOD LIMITED,
ROADSTONE DUBLIN LIMITED AND CRH PLC

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 3rd day of August, 2022.

Introduction.

1. The plaintiff is the owner of 99A, North Road, Finglas, Dublin 11.
2. The first named defendant is the company which constructed the plaintiff's house in 2003/2004.
3. The plaintiff purchased the property from a Mr. Barry Teeling, who had developed a number of houses on the road. After the houses had been constructed, Mr. Teeling had leased the house to a tenant, until it was sold to the plaintiff in 2006.
4. In 2008, the plaintiff noticed cracks in the walls of his house. In 2012, the plaintiff issued proceedings against the first defendants and also against a number of

other defendants, who had been involved in the supply of infill, which had contained pyrite. However, following expert advice, the plaintiff changed the focus of his claim to one alleging that the defective condition of his house was primarily due to the negligence and breach of duty on the part of the builder in laying the foundations to the building, rather than being due to the presence of pyrite therein. A notice of discontinuance was served by the plaintiff on the second to fifth named defendants on 6th June, 2014. He delivered his statement of claim on 25th June, 2014. The first named defendant (hereinafter referred to as ‘the defendant’) filed a full defence to the action on 1st March, 2016.

5. In this application, the defendant seeks an order pursuant to O.122, r.11 of the Rules of the Superior Courts, or alternatively, pursuant to the inherent jurisdiction of the court, striking out the plaintiff’s action against it for want of prosecution.

6. In essence, the defendant submits that as the action will not come on for hearing until 2023, or 2024, it will not receive a fair trial of the action, as that will involve the principal of the company, Mr. Tony Travers, having to recall events that occurred almost twenty years earlier.

7. The defendant points to the fact that it does not have documents relating to the building works carried out at the locus; it does not have the benefit of any engineering report on the state of the foundations as originally laid by the defendant; and a number of crucial witnesses may not be available to it at this remove. It was submitted that the plaintiff has been guilty of inordinate and inexcusable delay and that the balance of justice lies in favour of striking out the proceedings against the defendant.

8. In response, it was submitted on behalf of the plaintiff that with a latent defects case, time cannot possibly run from when the work is done, as the defect caused by the defective workmanship, only becomes apparent later on. In this case, it

was submitted that the plaintiff acted quickly to investigate the cause of the cracks that appeared in his house in 2008.

9. It was submitted that the proceedings had been issued in a timely manner. While it was conceded that there were periods of delay thereafter, it was submitted that some of these were caused by the defendant, *e.g.* it delayed in entering its appearance to the summons; it delayed in providing a proper affidavit of discovery; and the directors of the company caused delay in the litigation by having the company voluntarily dissolved and removed from the Register of Companies in 2017, when they knew that there were two sets of legal proceedings extant against the company.

10. It was submitted that, insofar as it had been asserted by the defendant that it did not have any relevant documentation, according to the director of the defendant who had sworn the affidavit of discovery, those documents had not been retained after the house had been constructed in or about 2003/2004, which was long before the defects appeared in the plaintiff's house and long before the plaintiff's action commenced; accordingly, it was submitted that if there was any delay on the part of the plaintiff in instituting or prosecuting the proceedings herein, he could not be blamed for the non-availability of that documentation.

11. It was submitted that while the defendant did not have its own engineering inspection of the foundations as originally laid, that was the fault of the engineer retained by the first defendant, who did not attend at an arranged joint engineering inspection, when the ground had been opened up. Any deficit that arose in the expert evidence available to the defendant in this regard, could not be said to be the fault of the plaintiff.

12. The plaintiff submitted that the balance of justice lay in favour of allowing the action to proceed, as the action would turn almost exclusively on expert evidence. In

this regard, the plaintiff was willing to make available the reports and documents of his experts in relation to their inspection and analysis of the original foundations. It was submitted that this would enable the defendant to engage its own expert to examine these documents. This would enable him to give an expert opinion as to whether the foundations as originally laid, had been laid in a proper and workmanlike manner. Thus, it was submitted that there was no real prejudice to the defendant in the conduct of its defence at the trial of the action. It was submitted that in these circumstances, the defendant's application should be refused.

Relevant Chronology.

13. It is necessary to set out the background to these proceedings in some detail, because the parties have laid emphasis on different periods in the conduct of the litigation to bolster their respective submissions.

14. The dates of the construction of the property; the purchase of it by the plaintiff and the date on which he first noticed cracks in the property, have been set out above. According to his statement of claim, upon becoming aware of the cracks throughout the interior and exterior of the property in or about March/April 2008, the plaintiff engaged a surveyor in May 2008 to investigate the cracks. On foot of that survey, the plaintiff was compelled to carry out further investigations. Those investigations began in or around October 2008. They apparently revealed that the cracking was structural, was severe and was worsening over time and that the concrete ground floor of the property was being subject to pressure, which was causing bending and curvature of the floor, which was in turn causing the structural cracking to occur. It was concluded at that stage that remedial works would be needed in order to safeguard the structural integrity of the property.

15. On 8th April, 2009, a letter was sent on behalf of the insurers of the plaintiff's property to the defendant, in which it was indicated that the owners of the property intended to make a claim in relation to alleged pyrite contamination in the infill used in the property. The letter went on to inform the defendant that while their enquiries were ongoing, they were giving notice that if liability under the policy was established, it was their intention to recover their losses from any negligent party involved. The defendant was told that as he had an obligation to inform his liability insurers of their intention, he should regard the correspondence as a formal letter of notification in that regard.

16. On 16th February, 2010, a letter was sent by Messrs Eugene F. Collins, on behalf of the plaintiff, but in effect acting on behalf of the plaintiff's home insurers, which letter was sent to Mr. Tony Travers, company secretary of the defendant. In that letter the defendant was informed that the underwriters had confirmed liability to the insured on the basis of major damage to the structure of the insured's property. The insurers were proceeding to arrange the carrying out of remediation works to the insured's property. The defendant was informed that a firm of loss adjusters had been appointed to manage the claim and to arrange for the carrying out of the remediation works. The defendant was further informed that it was the intention of the plaintiff's insurers to mount a claim against the defendant in respect of the defective condition of the works and the defendant was being put on notice of same. The defendant was told that should it wish to arrange for the carrying out of a test or inspection, they should reply immediately.

17. By letter dated 18th February, 2010 Messrs Dominic Dowling, Solicitors, responded on behalf of the defendant. They stated that they would like to arrange for an inspection of the property. They asked for a note of suitable times for such

inspection within the coming weeks. By letter dated 23rd February, 2010, the plaintiff's solicitors responded, stating that the defendant's solicitor should contact Mr. Chris Kerrigan of the firm of loss adjusters in connection with an inspection of the premises. His contact number was furnished.

18. By letter dated 15th September, 2010, the plaintiff's solicitors wrote to the defendant's solicitor requesting copies of the dockets in connection with the supply of infill material for the development. They also asked them to clarify the identity and nature of the engagement of the architect and engineer for the project. The defendant was asked to confirm if the architect/engineer was engaged directly by the defendant, or by the developer. By letter dated 17th November, 2010, the defendant's solicitor informed the plaintiff that his client had subcontracted the works to a third party, which was in liquidation. They had written to the liquidator in order to seek copy documentation in respect of the infill material. The developer was identified as being Mr. Barry Teeling, who was also the owner of the property and was the architect who engaged the services of the first defendant. The first defendant recollected that the engineer engaged was a colleague or friend of Mr. Teeling. The letter asked the plaintiff's solicitor to confirm whether or not it was possible for the defendant's engineer to visit the site.

19. On 25th October, 2011, the plaintiff's solicitor wrote to Mr. Travers formally putting him on notice that it was the plaintiff's intention to institute proceedings against the defendant for any losses suffered by the homeowner and/or his insurer. It was further indicated that the plaintiff proposed to institute proceedings against the second to fifth named defendants. The usual provisions pursuant to s.78 of the Courts of Justice Act 1936 were set out in the letter, in relation to costs.

20. In an affidavit sworn on 29th October, 2021, the plaintiff's solicitor, Mr. David Heneghan, stated that a joint engineering inspection had been arranged for the property on 2nd December, 2011. Mr. Barry Tennyson, Consulting Engineer, who had been retained on behalf of the defendant was due to attend that meeting. However, the inspection had been cancelled by Mr. Tennyson that day. A further meeting was arranged for a few days later. However, Mr. Tennyson failed to attend same. Mr. Heneghan went on to state that Mr. Tennyson visited the housing unit at a later date, but by that stage, the pilling had been completed with the ground beams supporting the blockwork in the process of being reconstructed, so Mr. Tennyson was unable to view the exposed groundworks of the housing units.

21. On 11th April, 2012, the plenary summons was issued. It was served on the defendant on 5th April, 2013. An appearance was entered on behalf of the defendant on 7th March, 2014. As already noted, a notice of discontinuance was served on the second to fifth named defendants on 6th June, 2014. The statement of claim was served on the defendant on 25th June, 2014.

22. A notice for particulars was raised by the defendant on 19th September, 2014. It was replied to by the plaintiff on 7th August, 2015. A full defence was delivered on behalf of the defendant on 1st March, 2016.

23. On 29th June, 2016, the plaintiff's solicitor wrote to the defendant's new solicitor, requesting that the defendant would make voluntary discovery of four categories of documents. When no response was received to that letter, the request was repeated in letters dated 25th July, 2016 and 6th September, 2016. By letter dated 23rd September, 2016, Messrs. Crowley Miller, on behalf of the defendant, acknowledged the request for voluntary discovery. However, there was no substantive engagement with the request.

24. On 4th October, 2016, the plaintiff's solicitor wrote again to the defendant's solicitor repeating the request for the defendant to make voluntary discovery. On 30th November, 2016 the defendant's solicitor again acknowledged receipt of the correspondence and stated that the issue of discovery was "in hand".

25. Separately, by letter dated 30th June, 2016, the plaintiff's solicitor had written to the defendant's solicitor enclosing a notice for particulars arising out of the defence, with seven discreet particulars requested. On 6th September, 2016, the plaintiff's solicitors wrote again to the defendant's solicitor requesting that the defendant would furnish replies to its notice for particulars. That request was repeated by further correspondence dated 4th October, 2016 and 8th November, 2016.

26. By letter dated 30th November, 2016, the defendant's solicitor acknowledged receipt of the correspondence and stated that the replies were now "in hand".

27. Given that the requests for both voluntary discovery and replies had effectively gone unanswered, the plaintiff issued a motion in late 2016, compelling the defendant to provide replies and discovery. However, prior to the motion coming on for hearing, it was agreed that the defendant would furnish replies and make discovery within six months. Mr. Tony Travers swore an affidavit of discovery on 10th March, 2017, wherein he stated that the defendant had no documents in any of the four categories requested by the plaintiff. In the second schedule of that affidavit, the defendant identified "drawings, site maps, emails and invoices" but stated that the defendant did not have the originals of these documents and that same had been sent to the parties to whom they had been addressed.

28. In a supplemental affidavit of discovery sworn by Mr. Travers on 14th June, 2017, he gave further information in relation to the documents that had been identified in the second schedule to his first affidavit of discovery. He stated that he recalled

having the documents in the course of the development of the properties the subject matter of the proceedings, but he could not recall what happened to them when the development was concluded. Insofar as he was aware, he stated that they were “probably thrown out when the works were finished in 2003, but I cannot recall specifically doing so”. He went on to state that he had made extensive inquiries of the defendant’s accountants, who had informed him that they only ever had books and records which related to the accounts of the first defendant. They further confirmed that their records for the defendant to the year 2010 had been shredded, as they had a practice of shredding records after a six-year time lapse. Mr. Travers further stated that none of the accounts records were relevant to the discovery in any event.

29. On 19th December, 2017, the plaintiff’s solicitors wrote to the defendant’s solicitor stating that they were surprised to note that the defendant had been dissolved and had been removed from the Companies Register on 23rd August, 2017. That had apparently been done on the application of the directors of the defendant company, who had applied to the Registrar of Companies to have the company struck off the register on a voluntary basis. The plaintiff’s solicitor stated that that was a most unusual and unexpected step for a company to take, having regard to the fact that it was involved in ongoing litigation. They pointed out that such an application could only have been made on the basis of a certificate signed by each of the directors of the company, certifying that as of the date of the application, the company was not a party to ongoing or pending litigation.

30. When there was no response to that letter, the plaintiff’s solicitor sent a reminder letter on 16th January, 2018. They issued a further letter on 8th August, 2018 informing the defendant’s solicitor that as they had not received any correspondence, the plaintiff had had to issue a motion seeking an order pursuant to s.738 of the

Companies Act 2014 to have the company restored to the register. By letter dated 30th August, 2018 the defendant's solicitors stated that they were advised by Mr. Tony Travers that he had consulted with his accountants about having the defendant restored to the register and that he and/or the company's accountants had recently filed the appropriate form for that purpose. They stated that they had seen from a company search that the CRO had received the form H1. By letter dated 11th September, 2018, the plaintiff's solicitor noted that from a CRO search that morning, the company's status was still recorded as "dissolved" and that the relevant form H1 was "returned amended" to the company. They asked that the defendant's solicitor would ascertain the up-to-date position. It appears that the company was in fact restored to the Register of Companies prior to the hearing of the motion on 15th October, 2018.

31. On 30th July, 2020, the plaintiff took steps to issue a notice of intention to proceed. That notice issued out of the Central Office of the High Court on 4th August, 2020 and was served on the defendant's solicitor on the following day. By letter dated 20th May, 2021, the plaintiff's solicitors indicated that they would shortly be delivering a reply to the defence that had been delivered on behalf of the defendant. They inquired as to whether the defendant's solicitor had authority to accept service of that document on behalf of the defendant.

32. On 2nd June, 2021, the defendant issued its motion seeking to have the proceedings against it struck out for want of prosecution. That motion was initially returnable for 1st November, 2021. Thereafter, it was adjourned into the non-jury/judicial review list. It ultimately came before this Court for hearing in July 2022.

Submissions on behalf of the defendant.

33. Mr. Dowling SC on behalf of the defendant, submitted that the case had been characterised by gross delay on the part of the plaintiff. The cracks had allegedly first appeared in 2008, yet the plaintiff did not issue his plenary summons until 2012. He did not serve the summons on the defendant for almost one year after that. Given that the defendants were all corporate entities registered in Ireland, there was no valid reason for the delay in serving the summons on the defendants.

34. In 2014, before delivering his statement of claim, the plaintiff had decided to change his case from a “pyrite case”, into a defective foundations case, by which time the plaintiff was statute barred in relation to any proceedings that he may have brought against the developer, the architect or the engineer. It was submitted that this put the defendant at a considerable disadvantage, given that it was merely the builder, which had carried out the construction work as per the plans and directions given by the architect and/or engineer.

35. It was submitted that the plaintiff had delayed for an inordinate time in bringing the action on for a hearing, which had had the result that the defendant, the principal director of which company was an elderly man of 76 years of age, who had a poor memory in some respects, will have to deal with the issue of its alleged liability in respect of things that were done approximately twenty years before the time when the action was likely to get a hearing date. It was submitted that this was an inordinate delay which should not be tolerated by the court. In this regard counsel referred to *Granahan v. Mercury Engineering* [2015] IECA 58 and *Collins v. Minister for Justice* [2015] IECA 27, as support for the proposition that, having regard to the provisions of the Constitution and of the European Convention on Human Rights, there was an obligation on the court to ensure that litigation was processed in a timely manner.

36. Counsel further submitted that the court was entitled to have regard to the fact that the plaintiff was mounting an almost unstateable legal case, insofar as it was well established at law, that where a builder constructs a house pursuant to a contract with a developer, he does not thereby incur any duty of care to subsequent purchasers, who may purchase the property from the developer. It was submitted that the court was entitled to have regard to the fact that the plaintiff's case was legally very weak. In this regard counsel referred to "Delaney and McGrath on Civil Procedure", 4th Edition, para. 15-61 and *Daly v. Limerick Corporation* (Unreported Supreme Court, 7th March, 2002).

37. It was submitted that in considering whether the balance of justice lay in favour of striking out the proceedings, the court could have regard to the following: relevant witnesses may not be available at this remove and even if they were, their memories were likely to be greatly diminished; the developer, Mr. Teeling had emigrated to Australia; the defendant did not have any documents relating to the construction works carried out in 2003/2004; and the defendant did not have any engineering evidence in relation to the condition of the foundations as originally laid at the property. It was submitted that these matters flowed directly from the lapse of time, which in turn was caused by the delay on the part of the plaintiff in instituting and progressing the proceedings, with the result that it was not possible for the defendant to obtain a fair trial at this remove. Accordingly, it was submitted that the action should be struck out at this stage.

Submissions on behalf of the Plaintiff.

38. Mr. Redmond SC accepted that the court was likely to find that there was inordinate delay in this case. However, he submitted that due to the unusual

circumstances in the case, the delay in progressing matters had been excusable. Even if the court were to find that the delay was both inordinate and inexcusable, it was submitted that when one looked at the litigation in its entirety, it was apparent that there was considerable delay on the part of the defendant; it was submitted that in the circumstances, the balance of justice lay in favour of allowing the action to proceed.

39. It was submitted that the action was commenced within a reasonable time, having regard to the very considerable investigations that had to be carried out by the plaintiff and his insurers, in order to ascertain both the nature of the problem and the extent of remedial works that were necessary to be carried out at the property. It was submitted that while the defendant complained that there would be approximately twenty years between the original construction works and the likely date for the hearing of the action, there was always going to be an element of delay where one was dealing with a latent defects case. That was due to the fact that latent defects by their nature, only become apparent at a date after the original construction works had been carried out. It was submitted that having regard to the nature of the defects in this case and the nature of the investigations that had to be carried out, as pleaded in the statement of claim, there was no undue delay on the part of the plaintiff in either instituting the proceedings, or in delivering his statement of claim.

40. It was submitted that the defendant had been guilty of significant delay at various points in the progress of the action to date. The defendant had delayed for almost one year in entering an appearance to the plenary summons. It had delayed for almost seven months from receipt of the replies to the notice for particulars, before delivering its defence. There had been protracted delay in obtaining discovery of documents from the defendant, which had effectively failed to engage with the request for voluntary discovery and, when it ultimately did make discovery, the first affidavit

of discovery was grossly defective. This necessitated the filing of a supplemental affidavit of discovery in a form which complied with the rules of court.

41. It was submitted that the court was also entitled to have regard to the fact that the directors of the defendant company took the step of voluntarily dissolving the company and having it removed from the Register of Companies. It was submitted that that was an extraordinary thing for them to do, when they knew that there were two substantial sets of proceedings extant against the company at that time. There had been considerable delay in having the company restored to the register.

42. It was submitted that while the defendant's primary period of complaint in relation to delay was in the period between 26th June, 2017, when an order had been made striking out the plaintiff's motion seeking discovery and replies to particulars raised in respect of the defence, and 7th June, 2021, when the defendant issued the present notice of motion; the court was entitled to have regard to the fact that the Covid-19 Pandemic had arisen during that period, which resulted in the work of the courts being greatly limited. There was no question of a witness action proceeding to trial during 2020 and into the early part of 2021.

43. Insofar as the defendant complained of a lack of documents, that was not a matter that had been caused by any delay on the part of the plaintiff, as the documents had been destroyed upon completion of the construction project in or about 2004. Similarly, insofar as the defendant complained of a lack of expert evidence, that was entirely the fault of the defendant in failing to avail of the inspection opportunities that were made available to it.

44. Finally, counsel submitted that where a case was going to turn almost entirely on expert evidence, rather than eyewitness testimony in relation to particular events, the prejudice to a defendant in having to meet a claim many years after the events,

was greatly lessened: see *Walsh v. Mater Hospital* [2022] IEHC 126 and in particular paras. 42/44 thereof. Furthermore, counsel stated that he had received instructions from his client that they would make available to the defendant all relevant reports and records of their independent experts, who had viewed the original foundations at the time when the matter was being investigated by the plaintiff's insurers. It was submitted that in these circumstances, there was very little prejudice, if any at all, to the defendant in having to meet the claim at this remove.

The Law.

45. The principles of law applicable to applications to strike out proceedings on grounds of delay are very well known. Accordingly, the court proposes to only set out a brief summary of the relevant principles that are pertinent to the present case.

46. The classic statement of the relevant principles, was that given by Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459, where he stated as follows at p.475/476:

- “(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.”*

47. In *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J. (as she then was) gave the following summary of the test that has to be applied in such applications: -

“18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff’s delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay.”

48. In *Mangan v. Dockeray & Ors.* [2020] IESC 67, McKechnie J. stated as follows at para. 105: -

*“To this day, the dicta of Hamilton C.J. in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 (“*Primor*”) is without doubt the most generalised statement of the law on this topic. Whilst it has been joined by many other authoritative decisions, it remains, as described by McMahon and Binchy, the “locus classicus”, in this area (*Law of Torts, 4th ed., [46.115]*). As the relevant passages from the judgment of the Chief Justice are well known, it will be sufficient to simply indicate the following:-*

- *The delay complained of must be both inordinate and inexcusable: it is for the moving party to so prove.*
- *Even where such is established, the balance of justice test must be applied: does it favour the continuation or termination of the proceedings?*
- *In considering the latter, there may be several diverse factors at play, but in essence all lead to an assessment of whether it is unfair to allow the action to proceed or is unjust to strike the action out.*
- *The individual circumstances of every case and the conduct of each party feeds into this assessment. The earlier cases of Dowd v. Kerry County Council [1970] I.R. 27 and the authorities therein relied upon, as well as Rainsford v. Limerick Corporation [1995] 2 I.L.R.M. 561: (judgment date: 31st July, 1979), were highly influential in the formation of these principles.”*

49. It appears that there is some disagreement in the Court of Appeal as to whether the onus of proof in relation to establishing that the balance of justice rests in favour of permitting the proceedings to proceed where there has been inordinate and inexcusable delay, shifts to the plaintiff, once the first two elements have been established; or rests with the defendant moving party throughout. A number of decisions of the Court of Appeal support the proposition that once inordinate and inexcusable delay on the part of the plaintiff had been established by the defendant moving party, the onus then shifted to the plaintiff to establish that the balance of justice lay in favour of permitting the proceedings to continue: see *Flynn v. Minister for Justice* [2017] IECA 178; *Carroll v. Seamus Keegan Limited* [2017] IECA 66 and *Sweeney v. Cecil Keating Limited* [2019] IECA 43.

50. However, in *Barry v. Renaissance Security Services Limited* [2022] IECA 115, the Court of Appeal disagreed with that approach, where Faherty J., having looked at the earlier case law, stated as follows at para. 48:

“I do not consider that what is said by Irvine J. in Carroll or Baker J. in Sweeney can be read in the broad sense suggested here by counsel for the defendants. As the moving party in the application to dismiss, the onus rests on the defendants to establish that the balance of justice favours the dismissal of the plaintiff’s claim. My view that that the burden of proving that the balance of justice favours the dismissal of the proceedings lies with the defendant is reinforced by the dictum of Irvine J. in Cassidy v. The Provincialate [2015] IECA 74 where, at para. 35, she opined:

“Having reflected upon many of the authorities in relation to the “delay” jurisprudence, 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.” (emphasis added)”.

51. It seems to me that where this Court is faced with conflicting decisions of the Court of Appeal, the appropriate course for this Court to take is to follow the decision that is the most recent in time and which gave consideration to the earlier decisions. Accordingly, for the purposes of this application the court will hold that the burden of proof rests throughout on the defendant moving party to establish that the balance of justice lies in favour of striking out the proceedings.

52. Having said that, the court would point out that there is probably not a great deal in the allocation of the burden of proof. When the court comes to the third question in the *Primor* test, being the issue of the balance of justice, the court is engaged in a balancing exercise, wherein it must look at all the circumstances of the case and decide in light of those factors, whether the balance of justice tilts in favour of striking out the proceedings, or is in favour of allowing the proceedings to continue. It is not the same as the burden of proof in respect of a normal issue of fact, where the party propounding a particular assertion, be it as part of their statement of claim, or as part of their defence, must assemble the relevant evidence to support that assertion. In looking at the balance of justice under the *Primor* test, the court is carrying out a different exercise, wherein the onus of proof resting on one party or the other is not of great relevance.

53. In looking at the issues of delay by a defendant, in *Campbell v. Geraghty* [2022] IEHC 241, Butler J. noted that when the court was considering delay on the part of the defendant, there were two types of delay, being “active delay” and “inactive delay”, which she described in the following terms at para. 44:

“Courts now distinguish between active delay (i.e. the failure to take a step positively required) and inactive delay (i.e. the failure to intervene by taking a step requiring the plaintiff to act) on the part of a defendant.”

54. It was submitted by the plaintiff that the defendant in these proceedings had been guilty of substantial active delay, which was significant for two reasons. Firstly, the defendant’s generalised assertion about the passage of time in the present case, coupled with the fact that it, rather than the plaintiff, was responsible for much of the delay which occurred during that period, was such that the defendant had failed to discharge the burden of proving that the plaintiff was guilty of inordinate and

inexcusable delay. Secondly, it was submitted that delay or acquiescence on the defendant's part, was also relevant when it came to assessing where the balance of justice lay in this application: see *Millerick v. Minister for Finance* [2016] IECA 206, at para. 19.

55. Where a defendant establishes that there has been culpable delay on the part of the plaintiff, then moderate prejudice to the defendant will suffice to prevent the action being allowed to continue: see *McNamee v. Boyce* [2016] IECA 19 (para. 35); *Flynn v. Minister for Justice* [2017] IECA 178.

56. As previously noted, the conduct of both parties is relevant to the issue of the balance of justice. If a defendant has caused delay, or has acquiesced in the delay, that is a matter that can be considered by the court.

57. When considering the likely effect of delay on a defendant, the court must look at the period from the date of the events giving rise to the proceedings, up to the likely date for the hearing of the action.

58. In considering where the balance of justice lies, the court can have regard to the nature of the cause of action and also to the question of whether the plaintiff may have an alternative remedy, either against an existing defendant, or against some other party, such as his or her solicitor, in the event that the proceedings are struck out against one of the defendants.

59. In considering the balance of justice, the court can have regard to whether liability will turn exclusively, or to a large extent, on oral evidence. If it will turn on such evidence, then delay of itself is more relevant, because it is well established that people's memories fade and become less reliable as time passes. If the action will turn on documentary evidence and where the relevant documents are available for use at

the trial of the action, the prejudicial effect of delay may be less: see *O'Reilly v National Document Management Group Ltd & Anor.* [2022] IEHC 37.

60. Similarly, if liability will turn on expert evidence, rather than on the evidence of witnesses as to fact, the prejudicial effect of delay will be lessened. The court is also entitled to have regard to the question of whether all relevant witnesses and documents remain available, to give evidence or be used at the trial of the action.

61. Finally, the case law makes it clear that each case must be examined on its own particular circumstances; for that reason the authority of other cases where delay of a particular length may have been found not to have been overly prejudicial, will not be determinative of the issue in subsequent cases with similar periods of delay. Each case will turn on its own facts.

Conclusions.

62. In applying the principles set out above to the circumstances of this case, as set out in the various affidavits filed on behalf of the parties, the court finds that the delay in this case on the part of the plaintiff was both inordinate and inexcusable.

63. The court accepts that there would inevitably have been a period of time after the cracks first became apparent, during which extensive investigations would have had to have been carried out, prior to the issuance of the plenary summons. Thus, the court does not criticise the plaintiff for the delay between 2008, when the cracks first appeared and the issuance of the proceedings in 2012. However, one has to have regard to the fact that by that time, the plaintiff and more particularly, the plaintiff's insurers, had all the information that was needed to mount the appropriate action. The ground had been opened up and extensive investigations had been carried out by a number of experts, who had presumably provided reports to the plaintiff's insurers in

relation to what they had found, what had caused the defects in the foundations and what remedial works were necessary. Thus, as of 2012, the plaintiff probably had most of the information needed to progress his action.

64. It is not exactly clear when the full extent of the extensive investigations, as outlined in the statement of claim, were actually carried out. It is clear that those investigations were carried out in advance of delivery of the statement of claim; because it was at that time, that a decision was made to discontinue the action against the second to fifth defendants and to continue with the proceedings, not as a “pyrite case” *per se*, but as a defective workmanship case in relation to the foundations that had been laid at the property. Even allowing for that change in direction, there is really no excuse why the plaintiff did not proceed to have the matter brought on for hearing. Looking at the circumstances that were known to the plaintiff in the period 2012-2014, the court is not satisfied that there is any excuse for the delay in bringing these proceedings on to a hearing. Accordingly, the court finds that the delay in this case has been both inordinate and inexcusable.

65. This brings the court to a consideration of the third question in the *Primor* test, being the balance of justice. In argument, Mr. Dowling SC, suggested that the court could have regard to the fact that the plaintiff was trying to mount an unstateable case at law, that a builder owes a duty of care to the ultimate purchaser of the house. He stated that it was well settled at law, that no such duty of care arises at common law. There was never any contract between the plaintiff and the defendant. No breach of contract had been pleaded in the statement of claim. It was submitted that in these circumstances, the court should have regard to the legal infirmity in the plaintiff’s case, when considering the balance of justice issue.

66. The court does not accept the submission that in considering the defendant's application to strike out the plaintiff's action for want of prosecution, the court must have regard to the strength or weakness of the plaintiff's case against the defendant. To do so, would oblige the court to engage in a mini trial to ascertain whether the defendant could be found to have any liability for the losses allegedly suffered by the plaintiff. That would involve an assessment of the issues of fact and the issues of law that arise in the case. It is not appropriate for the court to embark on such an examination on an application such as this.

67. In this application, the court is solely concerned with considering whether the plaintiff's action against the defendant should be struck out for want of prosecution. If the defendant is of the view that the plaintiff's action should be struck out on some other basis, such as because it is bound to fail, or because it does not disclose a cause of action known to the law, or because the action is frivolous or vexatious, the defendant has a different remedy in that regard.

68. The court is satisfied that in assessing whether the balance of justice demands that the plaintiff's action should be struck out for want of prosecution, the court must have regard to the fact that if allowed to proceed, the defendant will have to defend itself in relation to acts, namely the laying of foundations, that it carried out *circa* twenty years prior to the likely date of the hearing of the action. While some delay in instituting proceedings is inevitable in a latent defects case, one has to have regard to the fact that it can be a significant hardship to call on a defendant to defend itself in relation to events or actions taken over twenty years prior to the trial of the action.

69. In this regard, much will depend on the nature of the act or event that is the subject of scrutiny in the litigation. As pointed out in *Walsh v. Mater Hospital*, some cases will turn almost entirely on oral evidence concerning eyewitness accounts of an

actual event, such as in relation to the circumstances of an RTA. In such circumstances, there is a strong argument that a trial many years later, where liability will turn on the recollection of the parties and the recollection of independent witnesses, as to what happened at a specific time many years earlier, cannot be a fair trial at that remove.

70. However, where liability will turn on expert evidence relating to events which happened many years earlier, but the occurrence of which may not be greatly in dispute, or where they have been meticulously recorded, such as in medical negligence cases, the lapse of time, of itself, may not be that significant. Independent experts will be retained to examine the records and give an opinion whether the treating doctor acted reasonably in adopting the course of action that he or she did on the evidence that was presented to him or her at that time. In such cases liability turns almost entirely on the records that were made by the treating doctors at the time and the opinion evidence thereon of the expert witnesses, which is given at the trial of the action.

71. In the present case, the key issue will be whether the foundations laid by the defendant in the plaintiff's home, were adequate. It is alleged by the plaintiff that they were not. The defendant is at an evidential disadvantage because his engineer did not examine the foundations when the ground had been opened up. That was his own fault.

72. As set out in the affidavit sworn by Mr. Heneghan on 29th October, 2021, the defendant's engineer was afforded the opportunity to inspect the original foundations. To that end, a meeting had been arranged for 2nd December, 2011. That was cancelled by the defendant's engineer on the day. A further meeting was arranged for a few days later. However, the defendant's engineer failed to attend same. It appears that

when he did visit the housing unit at some later date, by that stage remedial works in that area had largely been completed.

73. In these circumstances, the defendant only has itself to blame for its lack of expert evidence in relation to the original foundations. However, that is not the end of the matter, it has been indicated on behalf of the plaintiff that he is willing to make available all the reports and records from his independent experts, who inspected the foundations and advised in the matter generally at that time. The court is satisfied that this offer goes a long way to remedying any evidential deficit that the defendant may have at this remove in relation to expert evidence; which deficit was entirely the fault of the defendant.

74. The defendant also complains that it does not have any documents or records in relation to the works that it carried out at the site in 2003/2004. From the affidavit of discovery sworn by Mr. Travers, it appears that his records were not retained after he completed the construction works in or about 2004. Thus, the loss of these documents occurred long before the cracks became apparent in the walls of the property and long before the proceedings were instituted. The fact that they are no longer available to the defendant, was not due to any delay on the part of the plaintiff in progressing his proceedings.

75. The defendant has also complained that it will suffer prejudice due to the fact that it may not be able to call various witnesses in its defence at the trial of the action. In this regard, the defendant's solicitor referred to the fact that Mr. Teeling had emigrated to Australia in or about 2008 and he is unaware of the availability of Mr. Mullally, or Mr. Carney, who are the engineers, who directed the works. There are two points to be made in relation to this assertion. Firstly, having regard to the fact that the defendant blames these people in its defence, it is highly unlikely that the

defendant would ever have called them as witnesses at the trial of the action. Where a party calls a witness on his own behalf, he is bound by their answers. He cannot cross-examine them if they give evidence that is adverse to the party that called them. In these circumstances, the court is satisfied that it would be highly unlikely, indeed it would be foolhardy in the extreme, for the defendant to have called these witnesses in its defence at the trial of the action. Thus, whether they are available to give evidence at this remove is irrelevant.

76. Insofar as those parties may have relevant documents, the defendant was aware of the case that was being made by the plaintiff in relation to the defective foundations, certainly from as far back as delivery of the statement of claim in 2014. If the defendant had wished to obtain documents from these parties, it could have applied for an order for third party discovery against them at that time. However, it did not do so and has not done so to date. Accordingly, it cannot complain of any lack of documents at this remove.

77. In argument, the defendant complained that by the time that the plaintiff discontinued his action against the second to fifth defendants and issued his statement of claim, wherein he was focussing his claim on the basis of there being defective workmanship in the foundations that had been originally laid at the property, the plaintiff was by that time, out of time to bring any proceedings against the developer, the architect or the engineer. The defendant submitted that this put him at a considerable litigious disadvantage.

78. The court is not persuaded that there is merit in this argument. If, upon receipt of the statement of claim, the defendant felt that it had a viable claim to either a complete indemnity, or to a contribution, from either the developer, the architect or the engineer, it could have applied to have joined those people as third parties to the

action. Section 27 of the Civil Liability Act 1961 provides that an application to join a third party must be made “as soon as is reasonably possible”. While the initial correspondence made the case that the plaintiff was alleging that the foundations were defective due to the presence of pyrite therein, which effectively did not allege that the foundations themselves were inadequately designed or negligently put *in situ*, once the defendant was disabused of that impression by delivery of the statement of claim in June 2014, it could have applied to bring in the developer, the architect and the engineer, as third parties; however, it did not do so. In the absence of bringing such an application, the defendant cannot complain about the absence of such parties from the action.

79. The defendant has adopted a strategy which may yield almost the same result in practical terms. The defendant has pleaded that if the plaintiff can establish liability against the defendant *qua* builder for the defective foundations, the defendant can make an argument pursuant to s.35 of the Civil Liability Act 1961, that in such circumstances the defendant was a concurrent wrongdoer with the architect and the engineer and that as they were not sued by the plaintiff, the contribution of the architect and the engineer, would have to be assessed by the court and such contribution would be deemed to be contributory negligence on the part of the plaintiff pursuant to the provisions of s.35 of the Act.

80. This Court is not ruling on that submission, it is merely noting that the argument under s.35 has been pleaded by the defendant. The plaintiff has sought to counter that pleading by a plea based on an estoppel point. All of that will have to be determined at the trial of the action. The important point for the purpose of this application, is that the absence of the developer, the architect and the engineer from the proceedings, may in fact inure to the benefit of the defendant.

81. The court accepts the submission on behalf of the plaintiff that in considering the balance of justice and in particular, the length of time for which these proceedings have been in being, the court must have regard not only to the delay on the part of the plaintiff, but also to the periods of delay, both active and inactive, on the part of the defendant.

82. The defendant delayed for an inordinate period in entering an appearance to the plenary summons. The defendant delayed in relation to addressing the issue of discovery. It ignored the initial correspondence and then issued merely a holding response, acknowledging that it had received the request. When eventually the plaintiff issued a motion seeking an order for discovery, the defendant consented to make the discovery sought. However, its first affidavit of discovery was grossly defective. It merely stated that it had no documents. It did not go on to explain, as it was required to do, what had become of those documents. That is a very important averment that must be contained in a proper affidavit of discovery. This omission led to further delay, while a supplemental affidavit was provided, in which the defendant explained that to the best of the knowledge and belief of Mr. Travers, the relevant documents had been destroyed upon completion of the construction project in 2004.

83. The defendant also acted outrageously in voluntarily having the company dissolved and removed from the Register of Companies. This only became apparent to the plaintiff when his lawyers did a CRO search. It is extraordinary, to put it no further, that the directors of the defendant elected to dissolve the company and have it struck off the register, when they knew that there were two substantial sets of proceedings extant against the company. This action on the part of the directors of the defendant, caused further delay while the company was put back on the register.

84. In addition to the foregoing, the court has to have regard to the fact that when the plaintiff served his notice of intention to proceed in 2020, there was no realistic prospect of having a witness action brought on for hearing, due to the Covid-19 restrictions that were operating in the courts at that time. While a substantial amount of business was being undertaken by the courts, that was confined to applications which did not involve the calling of witnesses. It was not until the latter part of 2021 that witness actions generally were permitted to resume in the courts. Thus, in reality, there was no prospect of the action being brought on for a hearing between March 2020 and in or about October 2021.

85. In conclusion, the court is satisfied that while the proceedings have been in existence for a very considerable period, there has been active delay on the part of both parties to this action. What persuades the court that it should refuse the reliefs sought by the defendant in this application and should allow the action proceed to a hearing, is the fact that the central issue in this case is the adequacy of the foundations that were originally laid in the property, and in light of the fact that the burden of proving that the foundations as originally laid were defective, rests on the plaintiff, and in light of the fact that the plaintiff has offered to make available to the defendant all of the reports and records of its independent experts, and as the defendant may be able to obtain other relevant documentation by way of third party discovery from the architect and the engineer, the court is satisfied that the defendant will be in a position to adequately defend itself at the trial of the action, even if it is heard in 2023, which appears likely.

Determination

- 86.** For the reasons set out above, the court refuses the reliefs sought by the defendant.
- 87.** In order that the action may proceed to a hearing without any further delay, the court proposes to give the following directions in its order: -
- (a) The court will extend the time within which the plaintiff may file a reply to the defendant's defence; the court directs that this be done within four weeks of perfection of the order herein.
 - (b) The court directs that the plaintiff make discovery of all reports, sampling documents and records in its possession concerning the foundations as laid at the locus and the necessary remedial works thereto, including such reports and records of Patrick Murray of Thorntons Chartered Surveyors; JJ. Campbell & Associates Limited; Ground Investigations Ireland and Geomaterials Research Services Limited, that are in the possession of the plaintiff; such discovery to be made on affidavit within eight weeks of the perfection of the order herein.
- 88.** As this judgment is being delivered electronically, the parties will have six 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.
- 89.** The matter will be relisted for mention for the purpose of making final orders at 10:30 hours on 11th October, 2022.