



THE HIGH COURT

Record No: 2011/3709 P

Between:

**BRIAN COUGHLAN, COATES ENTERTAINMENT LIMITED t/a CITY LIMITS
COMEDY AND NIGHT CLUB**

Plaintiffs

-AND-

**AMANDA STOKES, MICHAEL WHELTON, CON O'LEARY, ELAINE O'LEARY
and JOHN DONEGAN**

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 8 March 2024

Introduction

1. This is the third and fourth defendants' application to strike out the plaintiffs' claim for want of prosecution. There is no dispute regarding the applicable principles, merely disagreement regarding how they should apply in the particular circumstances of this case.
2. These proceedings commenced by way of plenary summons in April 2011. The plenary summons seeks specific performance of a settlement agreement dated 5 May 2009, pursuant to which two earlier sets of proceedings had been compromised. Those earlier proceedings concerned allegations that an escape of water from the defendants' premises had caused damage to the plaintiffs' premises. The terms of the settlement agreement required each of the defendants to carry out particular works. The plaintiffs' complaint in these proceedings against the third and fourth defendants relates to the effectiveness of the work carried out by them pursuant to the settlement agreement.

3. As appears from the discussion below, there has clearly been inordinate delay in prosecuting these proceedings. This was not seriously contested by the plaintiffs. Moreover, no explanation at all has been provided for the vast majority of that delay. In circumstances where no excuse is offered for the delay, the delay is almost axiomatically inexcusable. The main dispute between the parties concerns whether, in light of the inordinate and inexcusable delay, the balance of justice favours dismissing the proceedings. For the reasons set out below, I have concluded that the balance of justice is decisively in favour of the proceedings being dismissed as against the third and fourth defendants.

Procedural History

4. The parties each delivered written submissions which included chronologies. Though both chronologies commence with the plenary summons issued on 21 April 2011, the events leading to the commencement of the proceedings are worth noting. In 2003, the plaintiffs issued proceedings, Record No. 2003/13234P (“**the 2003 proceedings**”) against the first and second defendants alleging water damage to their property from, *inter alia*, property owned by the first defendant, 22 St Patrick’s Hill, Cork (“the Property”). The third and fourth defendants purchased the Property in January 2004 and were joined to the proceedings on 7 December 2006. In consideration of the sale, the first defendant provided the third and fourth defendants with an indemnity in respect of any damages, costs, and expenses arising out of the 2003 proceedings. A further indemnity in similar terms was provided by letter dated 13 February 2009.

5. In 2006, the plaintiffs issued separate proceedings against the fifth defendant, Record No. 2006/5956P (“**the 2006 proceedings**”). The 2003 and 2006 proceedings were consolidated on 10 December 2007 and were thereafter compromised pursuant to a written agreement dated 5 May 2009. The within proceedings concern an alleged breach of that agreement. Pursuant to the agreement, each of the defendants agreed to carry out, what could fairly be characterised as, relatively minor works, and to permit the laying of asphalt to the rear of the affected properties by a nominated sub-contractor. The particular works which the third and fourth defendants were required to carry out were the installation of a hopper to the rear of the Property and, together with the first and fifth defendants, the filling and sealing of steps adjacent to the affected properties. The first and fifth defendants were liable

for the costs of all the works, which works were to be completed “as soon as possible”. The defendants were required to provide a certificate of compliance of the works with specifications agreed between the parties’ engineers. The plaintiffs were to receive a significant financial payment (€500,000) together with the costs of the consolidated proceedings.

6. The proceedings the subject of this judgment were issued on 21 April 2011. They were discontinued as against the second defendant on 31 January 2012. The fifth defendant entered an appearance on 20 October 2011, and an appearance was entered for the remaining defendants on 10 May 2012. The third and fourth defendants filed a notice of change of solicitor on 2 May 2013.

7. Somewhat unusually, the plaintiffs issued a motion for judgment in default of defence against the first, third and fourth defendants in 2012, prior to delivery of their own statement of claim. An order was made extending the time for delivery of the third and fourth defendants’ defence on 25 February 2013. The statement of claim was delivered on 18 June 2013, and a full defence was delivered by the third and fourth defendants on 1 November 2013.

8. The plaintiffs’ issued a further motion for judgment in default of defence against the first and fifth defendants on 7 November 2013. On 9 December 2013, judgment was entered against the first and fifth defendants in an amount to be assessed.

9. On 7 March 2014, the plaintiffs set the matter down for trial against all four remaining defendants.

10. In 2015, the first defendant entered a personal insolvency arrangement (PIA) to which I will refer below. In correspondence exchanged between the parties, the plaintiffs queried the outcome of summary summons proceedings taken by the third and fourth defendants against the first defendant in 2014. In a letter dated 18 October 2023, the third and fourth defendants’ solicitors confirmed that their clients obtained judgment in the sum of €189,653.29 against the first defendant in August 2014, which was registered as a judgment mortgage in January 2015. The letter states that the third and fourth defendants recovered the sum of €212,898.84 under the first defendant’s PIA in respect of the judgment mortgage plus costs. No other details of those proceedings or that judgment have been provided.

11. On 4 March 2016, the plaintiffs filed a notice of change of solicitor and a notice of intention to proceed. More than a year later, on 19 May 2017, the plaintiffs filed another notice of change of solicitor and another notice of intention to proceed. The plaintiffs' submissions refer to exchanges of correspondence in 2016 regarding a joint inspection, but this correspondence is not in evidence.

12. Despite the matter having been set down for trial in 2014, the plaintiffs' new solicitors issued a request for discovery in August 2017, three years and five months after the last substantive step in the proceedings. An order for discovery was made on 11 December 2017, and the third and fourth defendants filed an affidavit of discovery on 13 April 2018. The third and fourth defendants thereafter requested discovery, and the plaintiffs filed their affidavit of discovery on 4 November 2018.

13. There followed another fallow period in the progress of the proceedings, during which another notice of change of solicitors was filed by the plaintiffs on 20 April 2021, followed by a further notice of change of solicitors on 22 December 2021, the plaintiffs' fourth change of solicitors. It is appropriate to acknowledge that the last change of solicitors seems to have been prompted by the individual solicitor dealing with the plaintiffs' case changing firms.

14. The plaintiffs' submissions again refer to exchanges of correspondence regarding discovery and joint inspection in the period following the exchange of discovery, but which are not in evidence. I should note, in this regard, that the first plaintiff delivered two affidavits in response to this motion. Neither affidavit offered any excuse or explanation regarding the progress of proceedings prior to December 2021. At paragraph 17 of his first affidavit, the first plaintiff avers that "*since [the December 2021] Notice of Change of Solicitor was filed, every effort has been made to progress the within matter.*" That averment, of course, simply begs the question, what had been happening before December 2021?

15. On 20 May 2022, the plaintiffs raised a request for particulars on the third and fourth defendants' defence, three years and six months after they filed their affidavit of discovery and more than eight years after the defence was delivered. It appears that the parties then engaged in without prejudice discussions regarding a joint inspection, which discussions failed to result in an agreement. The parties had agreed that the period of the without

prejudice discussions would not be taken into account for the purpose of delay. On 21 March 2023, the plaintiffs issued a motion to compel replies to particulars. On 17 May 2023, the third and fourth defendants issued the within motion. The parties exchanged affidavits and submissions and the motion was heard, together with the motion to compel replies to particulars, on 25 January 2024.

Applicable Principles

16. The approach that a court must take when asked to strike out a claim for delay remains that set out in *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459. The Supreme Court summarised the principles (at pp 475/76):

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

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

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

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff’s action,

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

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

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute

an absolute bar preventing the defendant from obtaining a striking out order but is a relevant 3 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.”

17. There are, therefore, three limbs to the test:

- Has there been inordinate delay?
- If so, is the delay inexcusable?
- If the delay is inordinate and inexcusable, does the balance of justice favour the claim being dismissed?

Only if all three questions are answered in the affirmative can a claim be dismissed for delay.

18. There are a multiplicity of cases in which these principles have been applied since *Primor* was decided. In *Gibbons v N6 (Construction) Ltd* [2022] IECA 112, the Court of Appeal (Butler J) noted (at para. 11):

*“The general consensus appears to be that while the fundamental principles to be applied have not themselves changed since Primor, the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court's obligation to ensure that litigation is progressed to a conclusion with reasonable expedition. This obligation has been characterised (by Hogan J. in *Donnellan v. Western Textiles Ltd* [2011] IEHC 11 and by Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206) as a constitutional imperative, and, presumably, also a Convention imperative, to protect the public interest by ensuring the timely and effective administration of justice.”*

19. In *Cave Projects Ltd v Kelly* [2022] IECA 245, the Court of Appeal (Collins J) emphasised a number of aspects of the application of the *Primor* principles (at para. 36). He noted that the onus was on a defendant to establish all three limbs of the *Primor* test and that an order dismissing a claim was “*a far reaching one*”, a “*very serious remedy*” and “*an option of last resort*”. He noted that:

“[C]ourts 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.”

20. The Court described the nature of the assessment of the balance of justice:

“The court’s assessment of the balance of justice does not involve a free-floating inquiry divorced from the delay that has been established. The nature and extent of the delay is a critical consideration in the balance of justice. Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. A defendant cannot rely on matters which do not result from the plaintiff’s delay.”

21. And on the necessity for a defendant to establish prejudice:

“The absence of any specific prejudice (or, as it is often referred to in the caselaw, “concrete prejudice”) may be a material factor in the court’s assessment. However, it is clear from the authorities that absence of evidence of specific/concrete 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 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. As a matter of first principle, only such prejudice as is properly attributable to the period of inordinate and inexcusable delay

for which the plaintiff is responsible ought to be taken into account in this context. Many of the cases appear to proceed on the basis that, once there is any period of inordinate and inexcusable delay, general prejudice should be assessed by reference to the entire period between the events giving rise to the claim and the date of trial. That does not appear to me to be the appropriate approach.”

Application of Primor Test

i. Was the delay inordinate?

22. As noted above, the plaintiffs did not seriously dispute that the delay was inordinate. This was an appropriate concession. By the time this motion issued, proceedings had been in being for more than twelve years. As of the date of this judgment, it is almost exactly ten years since the plaintiffs set the matter down for trial. The intervening period includes two periods of over three years in which no progress at all was made in the proceedings. It is difficult to see how this could sensibly be regarded as anything other than inordinate. That would be so even if the proceedings were of some complexity, but no such complexity has been identified or is apparent here. In an averment no doubt directed to the question of the balance of justice, the first plaintiff avers that the defendants will not be prejudiced if the matter is to proceed, noting that the defendants’ expert engineer, who was to certify the works carried out under the settlement agreement, remains available to give evidence “*and that upon inspection by a competent expert, it will be quite clear to all parties whether the works to be carried out under the settlement agreement have been carried out to the standard required or not which is, essentially, the issue at hand in the within matter.*”

23. Whatever about prejudice, it is an argument which proves too much when it comes to the issue of delay. If that is all that required to be addressed for the purpose of determining liability in these proceedings, then there is simply no justification for the delay in bringing them to trial. The absence of complexity is, in any event, apparent from the settlement agreement itself, a 2-page document, pursuant to which the third and fourth defendants were required to carry out modest works, comprising the installation of a hopper (which collects the discharge from different pipes and feeds them into a single pipe), and the filling in and sealing of steps.

24. Moreover, it is significant that the proceedings involve an allegation of breach of a settlement agreement. Therefore, the parties were clearly identifiable, as was the scope of their obligations, and a history of engagement in litigation existed between them. This should have facilitated expedition, not prompted a dilatory approach to the prosecution of proceedings. There is, if anything, a greater onus to move with expedition, or at least progress proceedings in something other than the desultory manner exhibited here, where a party is seeking to enforce a compromise of earlier proceedings. The public policy which sees the courts encourage the settlement of disputes would be undermined if settlement agreements trigger further disputes, which are, in turn, not prosecuted with diligence.

25. I am entirely satisfied that the delay in this case has been inordinate.

ii. *Is the delay inexcusable?*

26. In circumstances where the plaintiffs have provided no explanation at all for the lion's share of the delay in bringing these proceedings to trial, the delay must *prima facie* be regarded as inexcusable. When considered in detail, it is apparent that there have been significant periods of unexplained inactivity by the plaintiffs, which means that the delay in prosecuting the proceedings is inexcusable within the meaning of the *Primor* jurisprudence.

27. The third and fourth defendants were themselves responsible for some minor delay at the outset of proceedings. No appearance was entered on their behalf until a little over a year after the plenary summons was issued. Unfortunately, there is no evidence regarding when the plenary summons was actually served, but as the defendants bear the onus of proof on this application, they must take responsibility for the entirety of this delay. There was a further delay in delivering their defence, necessitating a motion by the plaintiffs, although this period of delay must be seen in the context of the plaintiffs not having delivered their statement of claim.

28. The defence was delivered in November 2013, and judgment entered against the other defendants the following month. The pleadings were then closed, and the plaintiffs set the matter down for trial in March 2014. At this stage, it could not be said that there had been any inordinate delay in progressing the proceedings and therefore, there was no delay to explain or excuse. Unfortunately, no further progress was made in the proceedings until the

plaintiffs' requested discovery in August 2017. No explanation has been provided for this inaction. There were two changes of solicitor by the plaintiffs in that time and, apparently, some correspondence about a joint inspection. The plaintiffs' submissions seek to argue that the defendants are partially responsible for this delay by reason of their failure to fully engage with this correspondence, correspondence which is not in evidence. They refer to the observations of Clarke J (as he then was) in *Comcast International Holdings Inc v Minister for Public Enterprise* [2012] IESC 50 (at para. 3.11):

“There will, therefore, remain cases where the pace of litigation does lie, to a significant extent, in the hands of the parties. But, as McKechnie J. points out, that fact places obligations on defendants as well. The Rules of Court provide various mechanisms which allow a defendant, who is concerned by the slow pace of litigation, to seek to have the process accelerated. A defendant who does not avail of those procedures is, in my view, in a different position from a defendant who has sought to speed up the process but has been frustrated in that endeavour by a failure on the part of the relevant plaintiff to respond reasonably.”

29. The plaintiffs' submissions also, very fairly, reference the *dicta* of Fennelly J in *Anglo Irish Beef Processors v Montgomery* [2002] 3 IR 510 (at p. 519):

“When considering any allegation of delay or acquiescence by the defendants, [the court] will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiffs' claim dismissed.”

30. In light of the significant length of time between the setting down for trial and the request for discovery with no progress in the proceedings at all, it doesn't seem to me that the plaintiffs can escape the consequences of their own delay between May 2014 and August 2017, even if it had been established in evidence that there was some failure on the part of the defendants to respond further to correspondence from the plaintiffs.

31. From the point of the request for discovery in August 2017, the exchanges of discovery were completed by November 2018. This could, no doubt, have moved more quickly, but it is not in itself inordinate, and it certainly explains or excuses that portion of the overall delay in progressing the proceedings. However, once discovery was completed, there was a further

period of three and a half years before the next step was taken in the proceedings, the delivery of a notice for particulars. True, there were two further changes of solicitors by the plaintiffs and possibly some correspondence exchanged, but, as with the earlier period of inactivity, this doesn't excuse the further delay by the plaintiffs. Such delay must be regarded as all the more egregious having regard to the length of time that the proceedings had been in being by then and the previous unexplained period of inactivity.

32. Although I am satisfied that there was no culpable delay on the plaintiffs' part thereafter, overall the delay in progressing the proceedings, and in particular, the two periods between March 2014 and August 2017, and between November 2018 and May 2022, was, in my view, unexplained and inexcusable.

iii. *Balance of Justice*

33. The real issue between parties, therefore, is the question of whether the balance of justice lies in favour of dismissing the proceedings or permitting the plaintiffs to progress them to trial. It is clear from the authorities that the starting point for the assessment of the balance of justice is the conclusion that the proceedings are ones in which the plaintiffs have been guilty of inordinate and inexcusable delay.

34. It is also clear that a defendant seeking to have proceedings dismissed for delay must be able to point to some prejudice, which prejudice must arise from the delay, albeit that any prejudice relied on need not be confined to prejudice defending the proceedings. It is not essential that specific prejudice be identified, but any suggestion of general prejudice should be closely examined. As stated by Collins J in *Cave Projects* (at para. 36):

“The absence of any specific prejudice (or, as it is often referred to in the caselaw, ‘concrete prejudice’) may be a material factor in the court's assessment. However, it is clear from the authorities that absence of evidence of specific/concrete 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 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. As a matter of first principle, only such prejudice as is properly attributable to the period of inordinate and inexcusable delay for which the plaintiff is responsible ought to be taken into account in this context.”

35. In this regard, the defendants point to a number of matters which give rise to specific prejudice. In particular, they note that in 2015, the first defendant entered a PIA which included any liability under the indemnities provided to the third and fourth defendants in 2004 and 2009 (“**the indemnities**”). The third and fourth defendants say that had the plaintiffs progressed the proceedings, they would have been entitled to rely on these indemnities, but the plaintiffs’ delay has deprived them of that potential benefit. The third and fourth defendants also served a notice of indemnity and contribution on the first defendant on 25 March 2014, and they argue that the intervening PIA will deprive them of the benefit of that notice too.

36. The plaintiffs do not dispute that the first defendant’s PIA encompassed her liabilities under the indemnities but argue that the third and fourth defendants could not have relied on those indemnities in respect of any liability arising for breach of the settlement agreement. In addition, they say that it is not apparent that the PIA has any bearing on the notice of indemnity and contribution.

37. In addition to the prejudice identified in respect of the PIA, the defendants say that they bought the Property as an investment and have not been able to realise its potential or sell the Property, and that they have had difficulty obtaining insurance on the Property. They also refer to the fact that, since these proceedings were instituted, the plaintiffs have commenced at least three sets of proceedings against other parties for loss and damage associated with water egress, including Irish Water, Cork City Council (in 2012) and Foroige (in 2022), which will now render these proceedings more complicated and expensive to bring to trial and resolve. More generally, they point to the inevitable prejudice that they will suffer in defending a claim that works which were completed more than a decade ago were not carried out in accordance with the requirements of the settlement agreement.

38. The plaintiffs contend that the allegations of prejudice in relation to difficulties obtaining insurance are unsupported by any documentary evidence. In addition, they point out that there is no evidence of any intention to sell the Property. They argue that, overall, any prejudice suffered by the third and fourth defendants isn't attributable to any culpable delay on their part and does not meet the threshold to warrant a dismissal of their proceedings against those defendants.

39. The plaintiffs' main argument, however, is that the third and fourth defendants have acquiesced in the plaintiffs' delay, first by engaging in the discovery process, which took place between 2017 and 2018, and again, following the delivery of the request for particulars, by engaging in without prejudice discussions regarding a proposed inspection. They argue that the defendants are being opportunistic in pursuing this application, having raised other spurious objections based on an alleged conflict of interest of the plaintiffs' solicitor, when it became apparent that the plaintiffs now intended to progress the proceedings.

40. In my view, it is clear that the third and fourth defendants have been prejudiced by the plaintiffs' culpable delay in progressing the proceedings. The plaintiffs have not disputed that these defendants lost the opportunity to benefit from the indemnities provided by the first defendant by reason of the first defendant's PIA, rather they contend that, in effect, there was no benefit to lose. They argue that the third and fourth defendants couldn't be entitled to rely on the indemnities, because otherwise, they would have been able to carry out the works required by the settlement agreement without any risk of liability. Therefore, by losing an opportunity to rely on the indemnities against the first defendant, the third and fourth defendants haven't been prejudiced at all. I cannot agree. As appears from the settlement agreement, although there were specific works which had to be completed by the third and fourth defendants, the four defendants together were required to certify all works carried out. Under the indemnities, the first defendant indemnified the third and fourth defendants regarding "*any damages, costs and expenses arising out of*" the 2003 proceedings. It is, at the very least, arguable that the language used in the indemnities is sufficiently broad to encompass damages, costs and expenses arising out of *the settlement of* the 2003 proceedings. Whether or not that is an argument that will win the day, I do not need to decide. There was a clear benefit to the third and fourth defendants in being able to deploy that argument, as there would be a benefit to any litigant in having additional,

stateable arguments when defending or prosecuting a case. In circumstances where it is not disputed that the benefit of the indemnities has been lost by reason of the first defendant's PIA, the loss of the opportunity to deploy this argument represents a substantial prejudice to the third and fourth defendants.

41. Since the first defendant's PIA was entered more than a year after the proceedings were set down for trial by the plaintiffs, the prejudice suffered is also clearly referable to the plaintiffs' culpable delay. Nor is the prejudice merely notional. It is apparent from the exchange of correspondence between the parties that, subsequent to the plaintiffs' setting these proceedings down for trial, the third and fourth defendants commenced proceedings against the first defendant and obtained the benefit thereof in the PIA process. The plaintiffs' delay deprived them of that opportunity in relation to the indemnities in these proceedings.

42. It is tempting to assume that the third and fourth defendant's have also lost the benefit of their notice of indemnity and contribution in light of the first defendant's PIA. However, there is no evidence of the first defendant's current ability to pay any award of damages or to make any contribution to any award which might be made against the third and fourth defendants. Since the burden of proof rests on the third and fourth defendants in this application, I must conclude that no prejudice has been established in relation to the notice of indemnity and contribution.

43. The only evidence of prejudice in relation to the costs of insurance are averments in the affidavit of the fourth defendant. This can't be discounted entirely, especially since it seems entirely probable that the existence of these proceedings would have had an adverse impact on the third and fourth defendant's insurance premiums and, indeed, their ability to obtain insurance at all. However, in the absence of any detailed evidence, this prejudice must be regarded as slight.

44. Similarly, there are no specifics in relation to attempts or an intention to dispose of the Property, just an averment by the fourth defendant that they have been prevented from disposing of the Property or realising its full potential. I do note that the settlement agreement seems to have anticipated a possible sale of the Property, with express provision being made for waiver of confidentiality in relation to any sale of the defendants' premises. In the absence of specifics, however, this prejudice must also be regarded as slight.

45. There was no evidence, only submissions, regarding the potential impact of the other proceedings commenced by the plaintiffs on the progress of this case. In the circumstances, it is difficult to see this as anything other than an aspect of the general prejudice suffered in dealing with a claim the further one moves from the date of the cause of the action.

46. I have no doubt, having regard to the nature of the claim, that the overall delay in progressing the proceedings will have prejudiced the defendants in their defence. It may be, as the plaintiffs contend, that a competent expert can now examine the works and provide a view on whether they were carried out in accordance with the agreed specification, but, at best, any such expert will be reviewing works more than a decade after they were completed. This will inevitably diminish the value of that evidence, which has the potential to operate to the disadvantage of the third and fourth defendants. It may be, of course, that it prejudices the plaintiffs too, but it is the potential prejudice to the third and fourth defendants caused by the plaintiffs' delay which is of concern for the purpose of this application; it is no answer for plaintiffs whose delay has prejudiced a defendant to argue that they too have been prejudiced by the delay.

47. Taken together, I am satisfied that the prejudice to the third and fourth defendants, which is attributable to the plaintiffs' culpable delay, decisively tips the balance of justice in favour of the proceedings being dismissed. It is important to recall that the third and fourth defendants do not seek to deprive the plaintiffs of a remedy or access to justice entirely. Judgment has already been entered against the first and fifth defendants, and damages remain to be assessed. It appears that the plaintiffs have a variety of other proceedings against other defendants in relation to water damage to their property. These factors somewhat mitigate the otherwise draconian impact of an order dismissing the proceedings against these defendants.

48. The only remaining consideration is whether the third and fourth defendants' alleged acquiescence in that delay shifts that balance such that the plaintiffs should be entitled to continue with these proceedings. In my view, it does not.

49. The plaintiffs rely on acquiescence by the third and fourth defendants at two stages in the progress of the proceedings, first, when they engaged in the discovery process in 2017 and 2018, and second, when they engaged in without prejudice discussions in 2022 and

2023 regarding a potential joint inspection. The second of these can be readily discounted. Where parties agree to participate in without prejudice discussions on the basis that neither party will rely on any period of delay caused thereby, a sort of standstill agreement, it would plainly be improper to look behind that agreement and allow one party to characterise it as acquiescence for the purpose of defeating an application to dismiss for want of prosecution.

50. In relation to the third and fourth defendants' participation in the discovery process, the plaintiffs point to the fact that in *Primor*, both High Court judgments the subject matter of that appeal had determined that participation in the discovery process had compromised the defendants' position. However, crucially, the Supreme Court rejected these conclusions. O'Flaherty J noted that the High Court judgments had relied on an English Court of Appeal decision which had been subsequently overruled (at p. 515):

"With respect to both learned judges, I find the proposition relied upon by both to be without any sure foundation. O'Hanlon J. had the misfortune, in reaching his decision, to place reliance on a decision of the Court of Appeal in England which was over-ruled by the House of Lords some few days before he gave his reserved judgment. This was County & District Properties Ltd. v. Lyell [1991] 1 W.L.R. 683.

In the course of his opinion (with which the other noble Law Lords concurred) in Roebuck v. Mungovin [1994] 2 A.C. 224., which over-ruled Lyell, Lord Browne-Wilkinson said that the case had laid down a fixed rule which he described at p. 233 to be as follows:—

"... whenever the defendant has induced the plaintiff to believe that the case is to go to trial (for example by the defendant taking steps to move the case on) he must be taken to have made a representation that the action is to be allowed to proceed to trial and if the plaintiff has incurred more than minimal costs in reliance on that representation the defendant will be estopped from striking out the claim on the grounds of the plaintiff's delay. In *Lyell's* case the plaintiff had been guilty of inordinate and inexcusable delay which had prejudiced the defendant; even so, the Court of Appeal reversed the judge's decision to strike out, holding that comparatively minor acts of co-operation by the defendant in preparing for trial barred any striking out of the claim."

In stating the reason why Lyell should be over-ruled (at p. 236), he said:—

"Where a plaintiff has been guilty of inordinate and inexcusable delay which has prejudiced the defendant, subsequent 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. Such conduct of the defendant is, of course, 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. At one extreme, there will be cases like the present where the defendant's actions are minor (as compared with the inordinate delay by the plaintiff) and cannot have lulled the plaintiff into any major additional expenditure; in such a case a judge exercising his discretion will be likely to attach only slight weight to the defendant's actions."

I think this reasoning accords with our jurisprudence in this matter."

51. In this instance, the defendants did, as had the defendants in *Primor*, engage in the discovery process. As in *Primor*, that engagement does not, in my view, debar them from the relief to which they would otherwise be entitled on this motion. The plaintiffs may have been put to some additional cost in the discovery process, but there is no evidence before me that discovery approached the complexity of that which was in issue in *Primor* or was particularly burdensome or expensive. That said, had the plaintiffs sought to bring the matter to trial expeditiously after discovery was exchanged, the interests of justice between dismissing the proceedings or permitting them to continue may have been finely balanced. Instead, however, the plaintiffs allowed another very significant period of delay in the proceedings, exacerbating the prejudice already suffered by these defendants. In those circumstances, any acquiescence by these defendants is not such as to deprive them of relief.

52. For the foregoing reasons, I will make an order dismissing the plaintiffs' action against the third and fourth defendants for want of prosecution. In the circumstances, it is not necessary for me to address the plaintiffs' motion to compel replies to particulars. As this judgment is being delivered electronically, I will list the matter for mention on 22 March 2024 for the purpose of addressing any ancillary matters and costs.