APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

Appeal Number: 2024/112

Neutral Citation Number [2024] IECA 299

Whelan J.

Faherty J.

Allen J.

BETWEEN/

BRIAN COUGHLAN AND COATES ENTERTAINMENT LIMITED

T/A CITY LIMITS COMEDY AND NIGHT CLUB

PLAINTIFFS/APPELLANTS

- AND –

AMANDA STOKES, MICHAEL WHELTON, CON O'LEARY, ELAINE O'LEARY

AND JOHN DONEGAN

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 16th day of December, 2024

Introduction

1. This is an appeal by the plaintiffs *("the appellants")* against the judgment of the High Court (Mulcahy J.) delivered on 8th March, 2024 ([2024] IEHC 133) and consequent order made on 22nd March, 2024 dismissing the appellants' action against the third and fourth defendants *("the respondents")* for want of prosecution.

2. It is common case that the appellants were guilty of inordinate and inexcusable delay in the prosecution of their action. The issue on the appeal is whether the High Court judge erred in finding that the balance of justice lay in favour of dismissing the action, specifically in his conclusion that the respondents had established that they had been prejudiced by the appellants' culpable delay.

Background

3. The respondents are the owners and occupiers of a house at 22 St. Patrick's Hill, Cork: which, as the address suggests, is on a hill. The first appellant is the owner of a property at Coburg Street, Cork, from which he and/or the second appellant carry on the business of a comedy club and night club. The appellants' premises is below the respondents' house. For upwards of twenty years the appellants have been complaining of water ingress emanating from what is now the respondents' property.

4. To understand the case made by the respondents in the High Court in support of their motion to have the action against them dismissed for delay, it is necessary to go back twenty three years.

5. On 27th November, 2003 the appellants issued High Court proceedings against Ms. Amanda Stokes and Mr. Michael Whelton, who appear to have been at that time the legal personal representatives of the previous owner of 22 St. Patrick's Hill, claiming damages – presumably for negligence and nuisance – in respect of flooding of their premises in Coburg Street. Ms. Stokes had been notified by Mr. Coughlan of the flooding in the summer of 2001. Ms. Stokes had insurance and the insurer indemnified her against the appellants' claim.

6. In January, 2004 the respondents bought the house from Ms. Stokes who it appears was, by then, the legal and beneficial owner. The respondents were then notified of the appellants' then pending proceedings and given an indemnity by Ms. Stokes in respect of

damages, costs and expenses arising out of the then pending proceedings. The insurer had confirmed indemnity and nominated solicitors to defend the action.

7. On 4th December, 2006 the appellants issued separate proceedings against Mr. John Donegan, the then owner of 23 St. Patrick's Hill, claiming damages in respect of flooding which was claimed to be emanating from No. 23. On 7th December, 2026 the respondents were joined as defendants to the appellant's 2003 action and on 10th December, 2007 the two actions were consolidated.

8. On 13th February, 2009 Ms. Stokes, by her solicitors – that is, the solicitors who had been nominated by her insurer to act on her behalf in the defence of the by then consolidated action – confirmed the indemnity. The letter confirmed the indemnity to the respondents in full in respect of the proceedings and the costs and expenses incurred by them in respect of the proceedings and was expressed to be given without prejudice to any rights which the respondents had on foot of *"any"* indemnity given to them previously by Ms. Stokes. I pause here to say that it is by no means clear what the 2009 indemnity added to the indemnity given to the respondents at the time they bought the house. It was suggested by counsel that there might have been a concern that the 2004 indemnity was somehow limited to six years.

9. On 5th May, 2009 the consolidated actions were settled on terms that the defendants would pay to the appellants the sum of €500,000; and that the defendants – other than Mr. Whelton – would pay the appellants' costs of the proceedings, to be taxed in default of agreement. The terms of settlement provided that the respondents would ensure that a hopper was installed in a good and workmanlike manner at the outlet of the downpipes to the rear of No. 22 so as to ensure that the discharge from those pipes was from a single pipe directly into the gulley trap beneath, and that the defendants – other than Mr. Whelton – agreed to the laying of *"ashphalt"* in the rear gardens of Nos. 22 and 23 by a specialist company to a specification which was acceptable to *"both"* identified engineers. The defendants other than

Mr. Wheldon also agreed to fill in and seal to a specification to be agreed by the engineers the steps to the left of a passageway to the front of Nos. 22 and 23, St. Patrick's Hill. The terms of settlement referred to undertakings given by the respondents and Mr. Donegan on 11th May, 2007 by which those defendants were said to have agreed to provide a certificate of compliance with specifications said to have been agreed between the engineers and set out in a letter written by the appellants' engineer of 24th May, 2007.

10. By order of the High Court of 5th May, 2009 the terms of settlement were received and filed, and the proceedings struck out with an order for the appellants' costs.

11. I pause here to say that the terms of settlement were less than entirely clear. The appellants were to be paid €500,000 by the defendants, collectively, but it is unclear how, between the defendants, that was to be funded. Mr. Whelton was not to be liable to pay or contribute to the appellants' costs, but he was not excluded from the collective liability of the defendants to pay the €500,000. But nothing turns on that.

The action

12. By this action, which was commenced by plenary summons issued on 21st April, 2011, the appellants claimed against Ms. Stokes, Mr. Whelton, the respondents, and Mr. Donegan, specific performance of the settlement agreement of 5th May, 2009; an injunction requiring the defendants and/or each or either of them to carry out the works specified in the settlement agreement and to provide certification of the works in accordance with the terms of the settlement agreement; and damages. The summons was served on the respondents on 29th September, 2011.

13. On 31st January, 2012 the action was discontinued against Mr. Whelton.

14. On 10th May, 2012 – following a motion for judgment in default of appearance in the meantime – an appearance was entered on behalf of Ms. Stokes and the respondents by the solicitors who had acted for them in the 2003 action. On 2nd May, 2013 – following a motion

for judgment in default of defence in the meantime – notice of change of solicitors was filed and served on behalf of the respondents and their defence was delivered on 1st November, 2013 by a new firm of solicitors.

15. There was some confusion as to the date of delivery of the statement of claim – which was undated. The judgment suggests that it was delivered on 18th June, 2013. The appellants' chronology suggests that it was delivered on an unspecified date between 10th May, 2012 and 8th November, 2012. The respondents' chronology suggests that it was delivered on 18th June, 2013. An affidavit of the appellants' solicitor filed on 7th November, 2013 in support of a motion for judgment in default of defence shows that the statement of claim was delivered on 18th June, 2023 to the solicitors for Ms. Stokes and the solicitors for Mr. Donegan. Previously, the appellants' solicitor had sworn an affidavit of 7th November, 2012 in support of a motion for judgment in default of defence against Ms. Stokes and the respondents in which he had deposed to the service on them of the summons but not the statement of claim. The cause of the confusion may have been that the solicitors previously nominated by Ms. Stokes' insurers initially entered an appearance for the respondents as well as Ms. Stokes. In the event, nothing turns on the precise date on which the statement of claim was delivered.

16. By order of the High Court dated 9th December, 2013 the appellants recovered judgment in default of defence against Ms. Stokes and Mr. Donegan for such amount in respect of damages and costs as might be assessed by a judge sitting alone.

17. On 7th March, 2014 the appellants served notice of trial and the action against the respondents, and the assessment of damages against Ms. Stokes and Mr. Donegan, were set down for hearing. On 25th March, 2014 the respondents' solicitors served a general notice to produce documents on the appellants' solicitors and a notice claiming indemnity and contribution on the solicitors for each of Ms. Stokes and Mr. Donegan. By that notice, the

respondents claimed indemnity and/or contribution against both Ms. Stokes and Mr. Donegan pursuant to s. 27 of the Civil Liability Act, 1961 and against Ms. Stokes on foot of the specific indemnities provided by her in January, 2004 and February, 2009.

18. Thereafter it appears that nothing was done to progress the action until 19th May, 2017 when notice of change of solicitors was filed and served on behalf of the appellants. In the meantime, a notice of change of solicitors and a notice of intention to proceed had been served on 24th March, 2016 but no step was taken.

19. On 31st August, 2017 the appellants' new solicitors wrote to the respondents' solicitors seeking voluntary discovery of a single category of documents said to be relevant and necessary for the fair disposal of the proceedings and for saving costs which was:-

> *"All notes, correspondence, records, reports evidencing recording and/or referring to compliance by [the respondents] with the agreement dated 5th May, 2009, the incurring of expenditure in complying with the said agreement and in particular the installation of a hopper at St. Partick's Hill, Cork and/or the laying of asphalt at the rear of 22 and/or 23 St. Patrick's Hill, Cork and the filling and/or sealing of steps to the left of the passageway at the front of 22 and 23 St. Patrick's Hill, Cork."*

20. The respondents' solicitors did not reply. Following a reminder of 6th October, 2017 a motion for discovery was issued on 3rd November, 2017 on which an order was made on 11th December, 2017, by consent, directing the respondents to make discovery in the terms sought, with the costs of the motion to the appellants. The order directed that the discovery on behalf of the respondents should be made within eight weeks and that the affidavit be made by Mr. O'Leary.

21. On 4th April, 2018 Mrs. O'Leary swore an affidavit of discovery on behalf of the respondents in which she listed, in the first schedule, first part, sixteen letters, e-mails and invoices; and in the first schedule, second part, twenty eight privileged communications

between the respondents and their solicitors. The earliest of the documents listed in the first schedule, first part was dated 30th April, 2009 and the latest 8th October, 2014. The earliest of the documents listed in the first schedule, second part was dated 7th May, 2009 and the latest 23rd January, 2015.

22. By letter dated 18th June, 2018 the respondents' solicitors sought voluntary discovery by the appellants of four categories of documents. By letter dated 26th July, 2018 the appellants' solicitors agreed to make the discovery sought and an affidavit of discovery was sworn by the first appellant on 26th October, 2018. As had been requested, the appellants discovered in the first schedule, first part, the title documents to the property at Coburg Street; 137 letters (commencing on 7th July, 2009 and ending on 31st August, 2017) concerning or relating to compliance by the respondents with the terms of settlement; 18 fire certificates dating from 8th May, 2001 and 21st September, 2017; and 40 documents under the heading *"documentation relating to any notification of damage and insurance claims made by [the appellants] and their predecessors in title in respect of any leaking in the properties."* The suggestion in the first schedule, second part that the appellants had *"Nil"* records of privileged communication with their solicitors is hard to credit.

23. On 20th April, 2021 the appellants appointed a new firm of solicitors. A fourth notice of change of solicitors was filed and served on 22nd December, 2021 but this was because the solicitor immediately previously dealing with the file had moved.

24. By a notice for particulars dated 20th May, 2022 the appellants' solicitors sought a number of particulars of the respondents' defence. In a covering letter of the same date it was said that the appellants' solicitors had a draft reply which they wished to deliver and they sought consent to do so.

25. Between about July, 2022 and February, 2023 there was a truce while the parties engaged in without prejudice discussions. The armistice was arranged on the express

condition that any time lapse would not later be taken into consideration for the purpose of delay.

26. The discussions did not result in a solution and by letter dated 13th February, 2023 the appellants' solicitors asked that the particulars previously requested be provided within 28 days, and they renewed their request for consent to the late delivery of a reply. By notice of motion dated 22nd March, 2023 the appellants' solicitors applied for an order compelling the respondents to reply to the notice for particulars. The respondents countered with a motion to dismiss for delay, issued on 17th May, 2023.

The motion to dismiss

27. For reasons which will become apparent, it is necessary to trace the evolution of the respondents' application in some detail.

28. The respondents' motion was grounded on an affidavit of Mrs. O'Leary. Mrs. O'Leary summarised the background to the proceedings and set out the chronology. She deposed that a period of two years had elapsed between 7th March, 2014 when the action was down for trial and 24th March, 2016 – she said it was three, but it was two – when the appellants had served a notice of change of solicitor and a notice of intention to proceed. Thereafter, she said, a further fourteen months had elapsed between then and 19th May, 2017 when the appellants changed solicitors again; at which stage there had been no step taken in the proceedings for 38 months.

29. Mrs. O'Leary then turned to the exchange of discovery between the appellants' first request on 31st August, 2017 and the making of the appellants' affidavit of discovery sworn on 26th October, 2018 following which, she said, a further period of two years and six months elapsed until a further notice of change of solicitor was served by the appellants on 20th April, 2021. She calculated that eight years and six months had elapsed between the time the

delivery of the respondents' defence and the service of the appellants' notice for particulars on 22nd May, 2022.

30. At para. 18 of her affidavit, Mrs. O'Leary deposed that the respondents' ability to defend the claim had been severely prejudiced due to the in ordinate and inexcusable delay of the appellants in prosecuting the proceedings: but she did not say how. She pointed again to the delay of three years and five months between the service of notice of trial and the first request for voluntary discovery; and to the delay of three years and seven months between the filing of the appellants' affidavit of discovery in October, 2018 and the first request for particulars of the defence. This was undoubtedly evidence of unexplained delay but it did not go to the respondents' ability to defend the claim.

31. At para. 19, Mrs. O'Leary deposed that the respondents had suffered prejudice as a result of the delay on the part of the appellants in bringing the claim – which I understood to mean progressing the claim – which, she said, included that the respondents had bought the property as an investment and that she had been *"prevented from realising the full potential of that investment and ultimately disposing of the property"* and *"obtaining insurance to protect them against all risks connected with the property."*

32. I pause here to say that there is no appeal against the judge's finding that in the absence of any detailed evidence of any difficulty or inability to obtain insurance or any specifics as to any intention or attempt to dispose of the property, this prejudice must be regarded as slight.

33. The main alleged prejudice relied on by the respondents related to a personal insolvency arrangement *("PIA")* entered by Ms. Stokes. As to this, Mrs. O'Leary deposed at para. 19.C that:-

> *"[Ms. Stokes] entered into a Personal Insolvency Arrangement (PIA) in December 2015 which PIA included the liabilities arising from the indemnity provided to [the*

respondents]. As a result of this delay [the respondents] will now be prevented from recovering any and all costs and expenses relating to [the appellants'] claims and proceedings from [Ms. Stokes] from the date of the said PIA."

34. That was all that Mrs. O'Leary had to say about Ms. Stokes' personal insolvency arrangement. She did not say how she came to know about it, or whether she and her husband had participated in it, or how it prevented the respondents from recovering any or all costs or expenses relating to the appellants' claims. Nor did Ms. O'Leary – beyond her general assertion that it was an element of the prejudice said to have been suffered by the respondents by reason of the appellants' delay – make any connection between the appellants' delay prior to December, 2015 and the personal insolvency arrangement. As I will come to, there was a great deal more that might have been said – and could and should have been said – but was not.

35. A replying affidavit of Mr. Coughlan was filed on 2nd June, 2023. Without wishing to get ahead of myself, it was not terribly helpful. Mr. Coughlan denied that there was no explanation or excuse for the delay; but did not engage with the delay complained of and – although denying that there was no explanation or excuse – did not suggest that there was an explanation or excuse or, if there was, what it might be. Instead, he had a lot to say about the engagement between the parties between July, 2022 and February, 2023 suggesting that the respondents had acted unreasonably in the course of that engagement. He asserted that the purpose of the engagement had been to arrange an engineering inspection, which, he said, had not taken place due to the respondents' insistence on unreasonable terms and conditions; and he asserted – he did not say that he did so on the basis of advice – that he was entitled to exhibit his side of what was clearly a privileged exchange of correspondence, which he did.

36. This was very unedifying. Mrs. O'Leary had deposed to the fact of the without prejudice engagement only to say that the parties had agreed that any time lapse during the

course of those discussions would not be regarded as delay. The delay complained of by the respondents did not go beyond the start of that engagement in July, 2022. It was wholly inappropriate that the appellants should have sought to litigate the rights and wrongs of what was clearly and expressly a privileged engagement. Moreover, although Mr. Coughlan acknowledged that there was agreement for a standstill, he nevertheless complained that the respondents had not provided the particulars or letter of consent sought on 22nd May, 2022. And he went down a rabbit hole about a complaint of a conflict of interest on the part of the respondents' solicitor which had first been raised in July, 2022 and so was entirely unrelated to the delay complained of.

37. Mr. Coughlan did say a number of things which were potentially relevant. He denied that the respondents' ability to defend the claim had been severely prejudiced. He suggested that it was most likely that the respondents would not in any event have been able to rely on the indemnities in respect of a failure to correctly carry out works for which they had assumed responsibility. And he suggested that the plaintiffs and their engineer were available to give evidence as to whether the agreed works had been carried out to the standard required.

38. In a supplemental affidavit filed on 21st June, 2023 Mrs. O'Leary took issue with the fact that Mr. Coughlan had exhibited the appellants' side of the privileged correspondence but – fighting fire with fire, I suppose – went on to exhibit the respondents' side of it. Mrs. O'Leary – on advice – suggested that the only issue before the court was whether the appellants' delay in prosecuting the proceedings was inordinate and inexcusable: which was plainly wrong. She contested Mr. Coughlan's averment that there was continuing damage to his property as a result of flooding emanating from the respondents' property. And she repeated her assertion that by reason of the appellants' delay the respondents were unable to rely on the indemnities. Mrs. O'Leary rejected Mr. Coughlan's averment that the respondents would suffer no injustice or prejudice if the action were to proceed. She said that

she had set out that prejudice in her earlier affidavit and would not repeat it. Mrs. O'Leary repeated her assertion that there was a real risk of an unfair trial but again did not identify how it arose. She did not take issue with Mr. Coughlan's assertion or assumption that the respondents and their engineer were available to give evidence on the question of whether the agreed works had been properly carried out.

39. In a letter of 16th June, 2023 – after the motion had been adjourned to the list to fix dates – the respondents' solicitors asserted that the appellants had made claims for loss and damage over a prolonged period against various adjoining land owners including Cork City Council and Irish Water, Mr. Donegan, Mr. Whelton, and Foróige. They identified two 2012 actions against Cork City Council and Irish Water; four actions against Mr. Donegan – the 2003 and 2006 actions (which were consolidated), this action, and another 2011 action; and a 2022 action against Foróige. They asserted that the appellants were entitled to assert that their property continued to be flooded by water emanating from the respondents' property – which they denied – but suggested that these proceedings related only to the respondents' compliance with the terms of settlement.

40. I pause here to say that the proposition that the only issue in the action was whether the respondents had complied with the settlement agreement was not immediately convincing. It is true that the focus of the appellants' complaint was that the agreed works had not been properly completed and that the primary relief claimed was an order for specific performance. However, it seems to me that the substance of the complaint was that because the agreed work had not been carried out properly, the appellants' property continued to be flooded and they continued to suffer loss and damage. Moreover, while the respondents' solicitors identified the several actions said to comprise claims for loss and damage associated with water ingress from a number of adjoining properties, it was not suggested that the existence of these other actions was a cause of any prejudice to the respondents.

Reference was made to a previous joint engineering inspection – it was not said when this had taken place – at which, it was said, the parties' respective engineers had agreed that the water ingress was not originating from the respondents' property.

41. All that the appellants' solicitors had to say in their response of the same day about the other actions was that they did not need to be made aware of the other matters in which their client had brought High Court actions.

42. A second affidavit of Mr. Coughlan filed on 6th July, 2023 was repetitive and argumentative. He attempted to stand over the fact that he had exhibited his side of the *"without prejudice"* correspondence on the basis that it did not discuss any overall resolution of the matter. At the same time, he acknowledged that it would not have been appropriate for him to have exhibited the respondents' solicitors' correspondence: which was the other side of the same coin.

43. On 14th July, 2023 the motion was assigned a hearing date for 25th January, 2024, with directions for an exchange of written legal submissions in the meantime.

44. The respondents' submissions were filed on 6th October, 2023 and the appellants' on 1st December, 2023.

45. In the meantime, on 4th July, 2023 the appellants' solicitors wrote to the respondents' solicitors enclosing a copy of Mr. Coughlan's second affidavit. They had – they said – they did not say how – become aware of an action brought by the respondents against Ms. Stokes, and gave the record number. The appellants' solicitors said that they were surprised that no reference had been made to this in the affidavits filed on behalf of the respondents and asked what it was all about. There having been no reply in the meantime, the appellants' solicitors followed up on 12th October, 2023 and the respondents' solicitors replied on 18th October, 2023.

46. In their letter of 18th October, 2023 the respondents' solicitors – who had ignored the request in July and who in the meantime had sought or acquiesced in the fixing of a date for the hearing of their motion – first protested that the time for raising any issue or introducing further evidence had passed and suggested that it was inappropriate that the appellants should seek to do so after the respondents' written submissions had been filed. They continued:-

> *"Without prejudice to the above, our clients obtained judgment against Mrs. Stokes for the sum of €189,653.29 plus costs of €436 on 12 August 2014. See enclosed summary summons and order for your attention. Our clients took steps to enforce the judgment against Mrs. Stokes including the registration of a judgment mortgage to afford our client secured creditor status in January 2015. Mrs. Stokes obtained a Protective Certificate however on 16 July 2015. Our clients recovered the sum of €212,898.84 under her PIA, being the secured judgment amount plus costs, interest and legal fees related to our clients' enforcement."*

47. The letter did not disclose the nature of the claim or debt and by all accounts the copy summary summons and order were not enclosed. Nor were they included in a book of correspondence prepared for the High Court hearing, but they were provided to the appellants after the books had been lodged and at the oral hearing of the appeal were said to have been handed into the High Court, loose. I will return to this.

The High Court judgment

48. In his written judgment delivered on 8th March, 2024 the judge found that there had clearly been inordinate and inexcusable delay and identified the issue which he had to decide as being whether the balance of justice favoured the dismissal of the proceedings.

49. In the course of his summary of the procedural history of the litigation, the judge referred to account given in the respondents' solicitors' letter of 18th October, 2023 of the proceedings against Ms. Stokes and said that *"No other details of those proceedings or that*

judgment have been provided." I will come back to this, but I observe for the moment that this conveys to me that the judge did not have the summary summons or the order of 15th January, 2015.

50. Having referenced *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and *Gibbons v. N6 (Construction) Ltd.* [2022] IECA 112, the judge considered first whether the delay was inordinate; secondly, whether it was inexcusable; and thirdly, whether the balance of justice lay in favour of dismissing the proceedings or permitting the appellants to progress them to trial. He found that the delay was both inordinate and inexcusable and, as I have said, there is no appeal against that finding.

51. Starting at para. 34, the judge said – perfectly correctly – 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 in defending the proceedings.

52. At paras. 35 and 36 the judge summarised the arguments in relation to Ms. Stokes' PIA. The respondents' argument was that if the appellants had progressed the proceedings, they would have been entitled to rely on the indemnities but were deprived of that potential benefit by the appellants' delay. The appellants, he said, did not dispute that Ms. Stokes' PIA encompassed her liabilities on foot of the indemnities, but argued that the respondents could not have relied on them in any event in respect of a claim for breach of the settlement agreement.

53. At para. 37, the judge records a submission by the respondents that the proceedings against Irish Water, Cork City Council and Foróige would render these proceedings more complicated and expensive to bring to trial and resolve; and more generally that they would suffer inevitable prejudice in defending a claim arising out of works completed more than a decade ago. At para. 45, he found that there was no evidence, only submissions, regarding

the potential impact of the other proceedings on the progress of this case and, in those circumstances, that it was difficult to see the respondents' argument as anything other than a claim of general prejudice in dealing with a claim the further one moves from the date of the cause of action. There is no appeal against this conclusion, but I would add that the other proceedings identified by the respondents clearly predated the appellants' delay in progressing this action, so that it is difficult to see any link between the other proceedings and the delay in progressing these proceedings.

54. I pause here to say that in the appellants' written submissions on the appeal as well as in oral argument it was suggested that the appellants were required to deal with four sets of proceedings and that this had impacted on the progress of this action but – apart altogether from the absence of any appeal against the judge's conclusion that the delay was entirely unexplained – there was no evidence of this.

55. At para. 39 the judge identified the appellants' main argument as being that the respondents had acquiesced in the delay, first by engaging with the discovery process between 2017 and 2018, and later by engaging in without prejudice discussions. At para. 49, he readily discounted the second argument on the basis that the parties had agreed to the engagement and that it would be improper to look behind the standstill agreement. At para. 51 he found that the respondents' engagement in the discovery process was not decisive.

56. At para. 40 the High Court judge found that it was clear that the respondents had been prejudiced by the appellants' culpable delay in progressing the proceedings. He rejected the appellants' argument that the indemnities could not have covered the respondents' liability in respect of a failure to perform the settlement agreement by properly carrying out the agreed works. It was, he said, at the very least arguable that the indemnities were sufficiently broad to cover damages, costs and expenses arising out of the settlement agreement. He noted that it was not disputed that the respondents had lost the benefit of the indemnities by reason of

the PIA. At para. 41, the judge found that because the PIA was entered more than a year after the proceedings were set down for trial, the prejudice was clearly referable to the appellants' culpable delay.

57. At para. 42, the judge rejected the respondents' argument that by reason of Ms. Stokes' PIA, they had lost the benefit of their notice claiming indemnity and contribution. There was, he said, no evidence of Ms. Stokes' ability to pay any award of damages or meet any order for contribution that might be made against her.

58. At para. 46 the judge accepted that the respondents had been prejudiced in their defence. He said that it might be that a competent expert could now examine the works and provide a view as to whether they had been carried out in accordance with the agreed specification, but at best such an expert would be reviewing the works more than a decade after the works had been completed; which, he said, would inevitably diminish the value of that evidence, which had the potential to operate to the disadvantage of the respondents. I pause here to say that whatever submissions might have been made, there was no evidence that the engineers – on both sides – who had agreed the specification of the works were unavailable or that, if the action were permitted to proceed, the respondents would be forced to engage a new engineer.

59. For the reasons set out in his judgment, the High Court judge concluded that the balance of justice was decisively in favour of the proceedings being dismissed and he made an order accordingly.

The appeal

60. By notice of appeal filed on 29th April, 2024 the appellants appealed against the judgment and order of the High Court on twelve numbered grounds, most of which are related, one way or another, to the judge's finding that by reason of the delay, the respondents had been prejudiced by Ms. Stokes' PIA. While there was no appeal against the judge's

finding that the respondents' engagement with the discovery process was not decisive, it was also contended that the judge had erred in failing to have sufficient regard to the respondents' acquiescence in the delays subsequent to the PIA.

Standard of review

61. Before examining the grounds of appeal in detail, it is useful to recall the role of this Court in reviewing a judgment of the High Court, specifically, on an appeal – such as this – against a decision made on an application heard on affidavit.

62. *Darcy v. Allied Irish Banks plc* [2022] IECA 230 was an appeal by the plaintiff against an order dismissing his action for delay. As to the approach to be taken by this Court, Noonan J. (Ní Raifeartaigh and Butler JJ. concurring) said at para. 27:-

> *"27. I think the first thing to be said about this appeal is that it is not simply a rehearing on the merits of the motion that was before the High Court. It is for the appellant to establish error on the part of the trial judge and the standard of review, or the burden of proof on the appeal, has been discussed in a number of judgments of this court and the Supreme Court. It was most recently considered by this court in A.K. v U.S. [2022] IECA 65 in which Murray J., speaking for the court, in commenting on the different standards of review applicable to different types of cases, said the following of matters heard on affidavit in the High Court:*
>
> > *"52. As explained in Ryanair Limited v Billigfluege.de GmbH [2015] IESC 11, in cases of this kind [heard on affidavit] the party appealing the decision bears the burden of demonstrating that the trial judge was incorrect in relation to the findings of fact which underpinned the decision so that 'the appellant must establish an error in those findings that is such as to render the decision untenable' (per Charleton J. at para. 5). Charleton J. explained this further in*

McDonagh v Sunday Newspapers Limited [2017] IESC 46 (at para. 163) as follows:

> *'… the role of an appellate court in reassessing what in the court of trial was affidavit or documentary evidence is easier than when witnesses were involved, but even where that is the case, the party claiming that the trial judge assessed the facts wrongly bears the burden of proving that the trial judge was wrong.' "*

63. It is clear on the authorities – for example *Lismore Homes (In receivership) v. Bank Of Ireland Finance Ltd.* [2013] IESC 6, *Collins v. Minister for Justice* [2015] IECA 27 and more recently *Ahearne v. O'Sullivan* [2023] IECA 134 – that while the High Court judge must be afforded a significant margin of appreciation as to the manner in which he or she has exercised his or her discretion, this Court retains jurisdiction to exercise its own discretion in an appropriate case. The appellant need not necessarily establish an error of principle in the approach taken by the High Court. As Collins J. (Ní Raifeartaigh and Pilkington JJ. concurring) put it in *Cave Projects Ltd. v. Gilhooley* [2022] IECA 245, at para. 34, errors of assessment may justify appellate intervention, even in the absence of any error of principle by the High Court.

Discussion

64. I have set out at para. 33 the entirety of the evidence tendered on behalf of the respondents in relation to Ms. Stokes' PIA; and, at para. 34, what was not said about the prejudice which the respondents claimed to have suffered by reason of it. Mrs. O'Leary's evidence was later supplemented by the respondents' solicitors' letter of 18th October, 2023 and the provision on the eve of the High Court hearing of the copy summary summons and High Court order which had been referred to in the letter of 18th October, 2023.

65. To my mind it was remarkable that in moving to have the action against them dismissed by reason of Mrs. Stokes' PIA, the respondents did not disclose how or when they had come to learn of the PIA and did not either exhibit a copy of it or – if that was the case – explain why they did not have a copy. The respondents' solicitors' letter of 18th October, 2023 shows that the respondents knew much more about the PIA than had theretofore been disclosed. It was less than satisfactory that this additional information came so late in the day. I am bound to say that I find it concerning that this information appears to have come to light only because the appellants' solicitors discovered that the respondents had brought an action against Ms. Stokes in 2014; and then only after they had reminded the respondents' solicitors on 12th October, 2023 that they had not provided the explanation sought on 4th July, 2023.

66. The respondents' solicitors' letter of 18th October, 2023 disclosed that Ms. Stokes obtained a protective certificate on 16th July, 2015. This was obviously a necessary step in the process which led to the PIA. It is theoretically possible, I suppose, that the insolvency arose suddenly; but not, I think, very likely. It also disclosed that the respondents had recovered a default judgment against Ms. Stokes on 14th August, 2014 for €189,653.29 plus six day costs. It could be inferred from the fact that the judgment was recovered on a summary summons that the underlying liability was a debt or liquidated demand but there was no indication in the letter of the nature of the underlying obligation. Absent any suggestion that Ms. Stokes had wilfully refused to pay a debt which she could pay, it could only have been inferred that she was unable to pay her debts as they fell due no later than the date on which the summary summons had issued. This coincided, more or less, with the service by the appellants' solicitors of notice of trial of the action against the respondents and the setting down of the action and the assessment of damages against Ms. Stokes and Mr.

Donegan. It follows that the delay thereafter was not material to Ms. Stokes' PIA or to her ability to have satisfied any award of damages against her.

67. I have previously noted that in addressing the letter of 18th October, 2023 the judge observed that no other details of the proceedings or the judgment had been provided. As I have said, it was unsatisfactory that significant additional information should have been provided – or winkled out – so late in the day. It was also unsatisfactory that the information should have been put before the High Court by simply handing in a copy of the letter without confirmation by evidence of the facts disclosed. If – as was suggested at the hearing of the appeal – the copy summary summons and order referred to in the letter were handed in to the High Court loose, this was also unsatisfactory. I recall at this point that the book of copy correspondence provided to the High Court was not among the books of appeal which were filed and that the Court had to send for it. Moreover, when, in preparation for the hearing, it became evident that the summons and order referred to in the letter of 18th October, 2023 were not in the book of correspondence, the Court had to send for those, also.

68. The summary summons was highly material to the respondents' claim that they were prejudiced by the appellants' delay in progressing the action by reason of Ms. Stokes PIA.

69. The special indorsement of claim recited the indemnities provided by Ms. Stokes to the respondents in January, 2004 and on 13th February, 2009; the settlement agreement of 5th May, 2009; and the fact that the appellants – described as *"the plaintiffs in the proceedings"* – had subsequently claimed an order for specific performance of the settlement agreement. It went on to plead that the appellants *"ultimately"* – it was not said when – issued a bankruptcy summons against *"the first named plaintiff"* – which I understand to have been Mr. O'Leary – it was not said for what – which summons was said to have been settled – it was not said when – in the sum of €120,000. Then it was pleaded that by letter dated 25th March, 2014 the respondents, by their solicitors, demanded payment by Ms. Stokes of

€189,653.29 for the settlement sum *"together with the costs and expenses of the within proceedings"* which Ms. Stokes had failed to pay. The particulars showed a sum of €120,000 for *"amount of settlement"* and €69,653.79 for *"other costs including engineer and legal costs incurred."* How Mrs. O'Leary came to be a plaintiff in an action to recover money paid by Mr. O'Leary to settle a bankruptcy summons against him is a mystery to me. The order was an order of Noonan J. made on 15th January, 2015 appointing a receiver by way of equitable execution over a property owned by Ms. Stokes at Grand Parade, Cork.

70. None of this was properly put in evidence but the copy correspondence and documents were handed in, at least to this Court. There was no copy of the bankruptcy summons served on Mr. O'Leary or of the demand on Ms. Stokes, and no breakdown of the €69,653.79. The special indorsement of claim on the summary summons is in many respects unclear but on its face, it suggests that after the commencement of these proceedings Mr. O'Leary paid the appellants €120,000 in respect of a liability which somehow arose either out of the settlement agreement of 5th May, 2009 or the appellants' claim that it had not been performed; which, in turn – with another €69,65.79 – was recovered from Ms. Stokes. There is no explanation in the letter of 18th October, 2023 for the difference of €22,809.55 between the amount of the judgment and six day costs – €190,089.29 – and the amount recovered by the respondents under the PIA – €212,898.84. Some of it may have been for interest and some of it for the costs of the application for the appointment of the receiver by way of equitable execution but it – or some of it – may have been for something else.

71. What is absolutely clear is that the respondents participated in Ms. Stokes PIA – and were paid – for their claims on foot of the indemnities. This is perfectly consistent with Mrs. O'Leary's evidence that:- *"[Ms. Stokes] entered into a Personal Insolvency Arrangement (PIA) in December 2015 which PIA included the liabilities arising from the indemnity provided to [the respondents]"* but, at the very least, fundamentally undermines her assertion

that:- *"As a result of this delay [the respondents] will now be prevented from recovering any and all costs and expenses relating to [the appellants'] claims and proceedings from [Ms. Stokes] from the date of the said PIA."*

72. Six of the appellants' grounds of appeal are addressed to the respondents' participation in the PIA. The High Court judge is said to have erred:-

(1) in determining that the respondents were prejudiced by Ms. Stokes having obtained a PIA where no evidence and/or insufficient evidence in respect of it was put before the court;

(2) in inferring prejudice on the part of the respondents arising out of Ms. Stokes' PIA without having regard to the actual terms of the PIA;

(3) in failing to have sufficient regard to the fact that the respondents had recovered €212,898.84 from Ms. Stokes in respect of the indemnity subsequent to Ms. Stokes having obtained the benefit of a PIA;

(4) in failing to have regard to *"the fact of the proceedings being heard and determined"* – which I understand to mean the prospects that the action might have been heard and determined before the PIA, i.e. in or about July, 2015;

(5) in failing to have sufficient regard to his finding that the respondents had not lost the benefit of their notice claiming indemnity and contribution because of the PIA;

(6) in failing to have sufficient regard to the absence of evidence as to Ms. Stokes' ability to pay any award of damages or satisfy any order for contribution.

73. As they did in the High Court, the appellants now submit that the height of the evidence offered by the respondents in support of the motion to dismiss was a bald assertion of prejudice, principally that by reason of the delay they would be unable to rely on their indemnities. They are critical of the respondents' failure to exhibit the PIA but submit – most

crucially, they say – that the respondents failed to apprise the judge of the fact that they recovered €212,898.84 from Ms. Stokes on foot of the indemnities. Pointing to the *dictum* of Collins J. in *Cave Projects*, at para. 46 that:- *"Lack of candour on the part of an applicant is a factor that may weigh – and, perhaps, weigh significantly – against the exercise of the court's jurisdiction in favour of that applicant"*, the appellants submit that the respondents' failure to amounted to a lack of candour.

74. I have already found that the respondents' failure to disclose all that they knew of the PIA was unsatisfactory. I am not persuaded, however, that Mrs. O'Leary can properly be condemned for a lack of candour. One of the peculiarities of our legal system is that while on a *viva voce* examination in chief of a witness, solicitors and counsel are not permitted to ask leading questions, they are perfectly entitled to draft affidavits which the witness will later be asked to confirm and swear. In the way of things, the witness will be to a greater or lesser extent reliant of the draftsman as to what needs to be disclosed. If, as Mrs. O'Leary deposed in her second affidavit, she was advised that the only issue before the court was whether the appellants' delay in prosecuting the proceedings was inordinate and inexcusable, that was plainly wrong advice. However, if she was so advised and believed, the particulars of the PIA – which went to prejudice – were not relevant. The record shows that the same firm of solicitors has been acting for the respondents since May, 2013 but it is not evident that the same solicitor has had carriage of the proceedings or, if it was, that the same solicitor acted in the proceedings against Ms. Stokes as well as the action against the respondents. While it is not material to the significance of the failure to disclose the nature of the claims made against Ms. Stokes, I would not, on the available evidence, characterise it as a lack of candour.

75. On the appeal, the appellants also pressed their argument that the indemnities in respect of *"damages, costs and expenses arising out of the proceedings"* could not have extended to any liability incurred by the respondents arising out of their non-compliance with

the settlement agreement. In light of the conclusions to which I have come, it is unnecessary to decide that issue.

76. It is clear that the judge was careful to identify the correct principles – and that he did so – but I am persuaded that he erred in his assessment of the asserted prejudice. Even on its face, Mrs. O'Leary's evidence in relation to the PIA amounted to no more than mere assertion. Moreover – as was recognised by the judge in his analysis of the respondents' claim to have lost the benefit of their notice claiming indemnity and contribution – there was no evidence of Ms. Stokes ability to pay or contribute to any award of damages. Still less was there any evidence of any connection between Ms. Stokes' ability to pay and the appellants' delay in progressing the proceedings. The action was set down on 7th March, 2014. By then – although she had solicitors on record for her – Ms. Stokes had suffered judgment to be entered against her in these proceedings in default of defence. Later in the same month she failed to meet a demand by the respondents' solicitors for payment of €189,653.29. Although it was not until 16th July, 2015 that Ms. Stokes obtained her protective certificate, all the evidence points to her having been insolvent before the commencement of the delay complained of. Although the respondents' allegation of prejudice was focussed on the PIA, the substance of their allegation was that by reason of the appellants' delay they had been deprived of the possibility of collecting from Ms. Stokes on foot of the indemnities. On the respondents' own case, Ms. Stokes' contingent or unquantified liability on foot of the indemnities were included in the PIA. If Ms. Stokes was no mark prior to the delay, their prospects of collecting cannot have been affected by the delay. I accept the appellants' submission that the judge could not have safely determined whether the respondents had or had not been prejudiced by the delay without assessing the likely ability of Ms. Stokes to have satisfied an award against her if the action had been progressed as it ought to have been.

77. The judge was obviously attempting to do the best he could with what he had been given but I am persuaded that he ought not to have come to the conclusion he did as to the effect of the PIA without evidence of the PIA. Leaving to one side for a moment what the summary summons showed as to the respondents' participation in the PIA, it was not evident from what Mrs. O'Leary had said whether or not the respondents had been notified of, or had participated in the PIA. If the respondents had been aware of the PIA, they would have been in a position to say what they knew about it. It was to be expected under the scheme of the Personal Insolvency Act, 2012 that the Personal Insolvency Practitioner would have communicated with all of Ms. Stokes' contingent creditors. If – for the sake of argument – the respondents had not been notified of the proposal for a PIA, it is difficult to see how the PIA might have impacted on them. But in fact, as I have said, it was evident from the letter of 18th October, 2023 that the respondents had participated in the PIA and must have been in a position to explain what liabilities to them were captured by the PIA and satisfied by the payment of €212,898.84 which they received.

78. For completeness, I observe that the appellants, also, were among Ms. Stokes' creditors. It was not evident from what Mr. Coughlan said whether the appellants had been notified of, or engaged, in the PIA. At the hearing of the appeal, it was said by counsel that they had not been notified of the PIA but there was no evidence of this. If, in the preparation for the PIA in 2015, Ms. Stokes did not disclose to her Personal Insolvency Practitioner the judgment which had been obtained against her on 9th December, 2013, that would have been a significant – and I cannot forbear to say, surprising – omission. By the same token, I would find it surprising if Mr. Coughlan, when he eventually came to learn if the PIA, did not try to establish what it was all about and where it left the default judgment which he had obtained.

79. In fairness to the judge, it is by no means clear from the papers provided to this Court how strongly the significance of the judgment obtained by the respondents against Ms. Stokes

was pressed in the High Court. It must be recalled that the copy summary summons and High Court order referred to in the respondents' solicitors' letter of 18th October, 2023 was not provided to the appellants' solicitors until after the exchange of written submissions had been completed. The respondents' written submissions in the High Court, which were filed on 6th October, 2023, were largely a re-hash of the affidavit of Mrs. O'Leary. The appellants' written submissions, which were filed on 1st December, 2023, focussed on the absence of any evidence of the prejudice which had been asserted; and contended that, in any event, the indemnities could not alter the respondents' obligations under the settlement agreement. Beyond the figures for the amount of the judgment obtained against Ms. Stokes and the amount recovered on foot of the judgment, the respondents' solicitors' letter of 18th October, 2023 did not tell the appellants' solicitors anything that they could not have established – and probably had established – from an online High Court search. The appellants' High Court written submissions made no reference at all to the letter of 18th October, 2023. Perhaps the appellants' solicitors should have followed up sooner on the missing enclosures, but the copy summons was absolutely key to understanding that the judgment which the respondents had obtained and enforced against Ms. Stokes was on foot of the indemnities, and that if the claim was not grounded on the appellants' specific performance action, that action was certainly referenced in the special indorsement of claim. It was wholly unsatisfactory that this critical document, which was the focus of the appeal, was not referred to in the parties' written submissions in the High Court and was not in the books but was floated into the High Court – as it was into this Court – at the last minute, as a loose document.

80. The respondents, in their written submissions on the appeal, contend that the High Court judge was told that *"they had in fact recovered the sum of €212,898.84 from [Ms. Stokes] on foot of the indemnities"* and that *"it is clear that he considered same in his overall determination."* They point to the judge's finding at para. 41 that *"It is apparent from the*

exchange of correspondence between the parties that, subsequent to the [appellants'] setting these proceedings down for trial, the [respondents] commenced proceedings against [Ms. Stokes] and obtained the benefit of the PIA process." This fails to take account of the fact that when, at para. 10, the judge summarised information given in the letter of 18th October, 2023 concerning the judgment obtained against Ms. Stokes, he added:- *"No other details of those proceedings or that judgment have been provided."* Contrary to the respondents' submission, the judgment does not show that the judge was told that the money recovered by them had been recovered on foot of the indemnities, or that he considered that in his overall determination.

81. I unhesitatingly reject the respondents' argument that this Court should not get involved in a forensic investigation into what was recovered against Ms. Stokes or predict what might have been further recovered if the proceedings had been progressed expeditiously. It was the respondents who raised the issue as to what might have been recovered on foot of the indemnities and the alleged effect on their prospects of recovery of the appellants' delay. They did not raise the issue of *"further"* recovery because they did not disclose that they had already recovered on foot of the indemnities. Until the copy summary summons was made available to the appellants, there was simply no evidence as to what liabilities were encompassed by the judgment against Ms. Stokes. On the respondents' case, Ms. Stokes' liabilities to them were included in the PIA but there was no explanation of how that might have been. For present purposes it is sufficient to say that the judgment on foot of the indemnities entirely undermined the respondents' assertion – and it was no more than that – that as a result of the appellants' delay the respondents would *"be prevented from recovering any and all costs and expenses relating to the [appellants'] claims from the date of the PIA."*

82. As to the suggestion that the judge erred in failing to have sufficient regard to his finding that the respondents had not lost the benefit of their notice claiming indemnity and contribution because of the PIA, he did not so find. What the judge found, at para. 42, was that the respondents had not established that they had lost that benefit. The double negative is not the equivalent of a positive. As previously noted, the notice claiming indemnity and contribution includes a claim for indemnity on foot of the indemnities as well as pursuant to the Civil Liability Act, 1961. In circumstances in which there may very well be an issue between the respondents and Ms. Stokes as to the effect of the PIA, it is better that I should say no more about it.

83. My conclusions in relation to the prejudice claimed by the respondents by reference to the PIA are sufficient by themselves to require that the appeal be allowed but there are two further grounds which I will deal with briefly.

84. The first of these – ground No. 9 – is that the judge erred in determining that the appellants had alternative remedies available to them in the form of claims against Ms. Stokes and Mr. Donegan and the other proceedings against Irish Water, Cork City Council and Foróige. The ground of appeal does not quite reflect the judge's finding which – at para. 47 – was that the respondents were not seeking to deprive the appellants of a remedy or access to justice entirely. The judge noted that the appellants had a variety of other proceedings against other defendants in relation to water damage to their property which, he said, somewhat mitigated against the otherwise draconian impact of an order dismissing the proceedings against the respondents.

85. This point was not really developed in the appellants' written submissions or in oral argument but in principle I think that it is correct. If, as the appellants contend, their property has been and/or continues to be flooded from a number of adjoining or nearby properties by a variety of means, it may be difficult to unravel who is responsible for what damage but – as

the judge found – there was no evidence of what the other actions were all about. In principle, it seems to me that it could be of no consolation to a plaintiff who has lost his remedy in respect of the damage emanating from one source that he continues to have his remedy in respect of other damage emanating from another source. Similarly, it seems to me that it will be no consolation to a plaintiff who has lost his remedy against one concurrent wrongdoer – who may be a mark – that he continues to have his remedy against others – who may not be.

86. The last substantive ground of appeal – ground No. 10 – is that the judge erred in failing to have sufficient regard to the conduct of the respondents in the course of the proceedings; the delays occasioned by the respondents; and the acquiescence of the respondents in the delays subsequent to Ms. Stokes PIA.

87. The first thing I would say about this is that there was no evidence that Ms. Stokes' PIA had anything to do with the delay. The appellants' submissions sought to make much of the fact that it was necessary to bring two motions for judgment against the respondents before they entered their appearance and delivered their defence but it is tolerably clear that there was engagement in the background as to whether the solicitors who had acted for the respondents in the previous proceedings – apparently on the instructions of Ms. Stokes' insurers – would act for them in the new proceedings. Apart from the complaint of general prejudice arising from the passage of time, the respondents did not point to any risk of fair trial prejudice and did not seek to make the case that the appellants' delay after discovery had been completed would, by itself, have justified or required the dismissal of the proceedings.

88. In the appellants' written submissions the respondents' alleged acquiescence was focussed on the period between March, 2014 – when the action was set down – and August, 2017 when the appellants' solicitors first sought voluntary discovery; and the period between November, 2018 – when the discovery was completed – and March, 2022 when the

appellants' current solicitors raised their notice for particulars of the defence and sought to deliver a late reply. As to the first period, it was suggested in the appellants' written submissions that there was an exchange of correspondence between February, 2016 and September, 2016 in relation to a proposed joint inspection but there was no evidence of this. It was also suggested that there was activity in the second period but on the evidence all that happened was that the appellants changed solicitors. Again the appellants' written submissions suggested that there was an exchange of correspondence between June, 2019 and September, 2019 as to the adequacy of the appellants' discovery, but there was no evidence of this. In my view, there was no acquiescence in the delay following the completion of the exchange of discovery but there was in the first period of delay. When the appellants' solicitors wrote on 31st August, 2017 seeking discovery the respondents' solicitors raised no objection and on 11th December, 2017 consented to an order for discovery in the terms which had been sought. Thereafter, on 18th June, 2018 the respondents' solicitor made their own request for voluntary discovery, with which the appellants complied. If prior to or during that engagement the respondents had any mental reservations about the progress of the litigation, it seems to me that the appellants were entitled to take the view that they were content that it was being moved forward.

89. The High Court judgment, at para. 48, identifies that the appellants relied on the acquiescence of the respondents in the discovery process and in the without prejudice discussions between July, 2022 and February, 2023. He quite rightly dismissed the appellants' reliance on the respondents' participation in the without prejudice discussions, which took place on the basis of an express agreement that there would be a standstill.

90. As to the respondents' participation in the discovery process, the High Court judgment conveys to me that the appellants had argued that this acted as a bar to any application to dismiss for delay. For the reasons given by the judge at para. 50, any such

proposition was untenable in light of the decision of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The judge set out the statement of the law by Lord Browne-Wilkinson in *Roebuck v. Mungovin* [1994] 2 A.C. 224, 236, which had been cited with approval by O'Flaherty J. in *Primor*, that:-

> *"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."*

91. In this case, the High Court judge, at para. 51, noted that the respondents had engaged with the discovery process. That, he said, did not debar the appellants from the relief to which they would otherwise be entitled but had the appellants sought to bring the action to trial expeditiously after discovery was exchanged, the interests of justice might have been finely balanced. This conveys clearly that the judge correctly identified the respondents' participation in the discovery process as a relevant factor to be taken into account in the exercise of his discretion and that he properly weighed it in the balance. In circumstances in which I have – respectfully – concluded that the judge was in error in his assessment of the

assertion that the respondents were prejudiced by Ms. Stokes' PIA, the significance of the respondents' alleged acquiescence in the delay after November, 2018 falls away.

Summary

92. The core issue in the High Court and on the appeal to this Court was whether the respondents had established that they had been so prejudiced by the appellants' delay in progressing the proceedings that the balance of justice lay in favour of the action being dismissed.

93. The allegations that the respondents had been prejudiced in their ability to realise the full potential of their investment or from disposing of the property or in obtaining insurance against all risks connected with the property were completely vague and unsupported by any evidence. It could be inferred that the respondents had suffered a degree of general prejudice by reason of the delay, but the respondents did not identify any specific fair trial prejudice and did not engage with the appellants' evidence that the relevant witnesses were all available. In particular, it was not contended by the respondents that the engineer who was engaged by them at the time of the events complained of and later was, by reason of the delay, hampered in his ability to give his evidence in relation to the issues in dispute or that they were otherwise disadvantaged in defending the action.

94. The lynchpin of the respondents' motion to dismiss was their allegation that by reason of the appellants' delay they were prevented from recovering on foot of indemnities they had held in respect of all costs and expenses relating to the appellants' claims in previous proceedings because, in the meantime, Ms. Stokes had entered a PIA which included those liabilities.

95. For the reasons given, I am unconvinced that the significance of the claims against Ms. Stokes subtending the 2014 action and the judgment obtained by the respondents against her were as clearly highlighted as they could and should have been. However, for the reasons

given, I am persuaded that the High Court judge was in error in his assessment of that claimed prejudice and that the acknowledged unavailability to the respondents of the indemnities is entirely unrelated to the delay.

96. I would allow the appeal and set aside the order of the High Court.

97. As to costs, it seems to me that the appellants are presumptively entitled to their costs of the application in the High Court and of the appeal but provisionally I would be inclined to stay execution on foot of any costs order pending the final determination of the proceedings. If either party would contend for any other costs order, I would allow a period of 14 days (excluding the Christmas vacation) for the filing and service of written submissions – not to exceed 1,500 words – in which event the opposing party will have 14 days in which to respond.

98. As this judgment is being delivered electronically Whelan and Faherty JJ. have authorised me to say that they agree with it and with the orders proposed.