THE HIGH COURT

[2020] IEHC 602

[2014 No. 1829 S.]

BETWEEN

PADDY CUNNINGHAM T/A CUNNINGHAM CONSTRUCTION

PLAINTIFF

AND

TOM BRACKEN AND CATHERINE MURPHY

DEFENDANTS

JUDGMENT of Ms. Justice Nuala Butler delivered on the 24th day of November, 2020

1. There are two separate applications before the court arising out of proceedings instituted by the plaintiff against the defendants in July 2014 relating to building works carried out by the plaintiff on behalf of the defendants in 2006 and 2007. The first in time of the two is the plaintiff's application to remit his claim to the Circuit Court which motion was issued on 22nd August, 2019. However, the parties agree that logically the second of the two motions, which is an application by the defendants to strike out the plaintiff's claim for delay, should be heard and determined first as, depending on its outcome, it may not be necessary to proceed further.

Applicable legal principles

2. The defendants' application is made on a dual basis seeking an order striking out the plaintiff's claim for want of prosecution under O. 122 r. 11 of the Rules of the Superior Courts and/or an order pursuant to the court's inherent jurisdiction striking out the claim because of the plaintiff's inordinate and inexcusable delay in prosecuting it. The legal principles applicable to an application of this nature are well settled having been the subject of a number of authoritative Supreme Court judgments. It is long established that where a party seeks to dismiss proceedings for delay in prosecuting them that party bears the onus of proving that the delay complained of is both inordinate and inexcusable. These are discrete elements which have to be addressed in the specific context of the case. The plaintiff contends that the delay in this case is neither inordinate nor inexcusable.

3. However, establishing inordinate and inexcusable delay will not automatically result in proceedings being dismissed. The court must proceed to consider whether the balance of justice, again in light of the facts of the particular case, is in favour of or against allowing the case to proceed and exercise its discretion in light of that consideration.

4. Guidance is offered as to the factors potentially relevant to the court's consideration of the balance of justice by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at p. 475 as follows:

> *"…in considering this latter obligation the court is entitled to take into consideration and have regard to*
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> *(i) the implied constitutional principles of basic fairness of procedures,*

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

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

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

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

It is clear from this passage that the overriding concern remains the interests of justice. The import of the passage was summarised by Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 IR 510 as being that "*the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation*". In particular, the court must ensure that, if the case is permitted to proceed, the delay should not result in the trial court being unable to ensure basic fair procedures for all parties. *Primor* is generally regarded as the leading case on delay in this jurisdiction and was recently reaffirmed as such by Denham J. on behalf of the Supreme Court in *McNamee v. Boyce* [2017] IESC 24.

5. In this case two specific aspects of these features have been put in issue by the parties. The first relates to whether there will be any specific prejudice suffered by the defendants if the case is allowed to proceed and, indeed, whether the defendants are even required to show such specific prejudice. The second concerns whether the defendants have by their conduct acquiesced in the plaintiff's delay.

6. In relation to the first of these issues counsel on behalf of the defendants relies on a passage from the judgment of Fennelly J. in *Anglo Irish Beef Processers* (above) which in turn drew on a statement by Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151. Henchy J. acknowledged that merely establishing that inordinate and inexcusable delay had occurred would not automatically result in proceedings being dismissed. However, he

went on to state that "…*such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant, or inability on the part of an infant plaintiff to control or terminate the delay of his or her agent*". Fennelly J. considered the effects of that statement as follows:

> "*That statement of the law indicates that the author of delay which is found to be both inordinate and inexcusable will not be absolved of fault unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess the third consideration in the cited passage from the judgment of Hamilton C.J. namely whether 'on the facts the balance of justice is in favour of or against the proceeding of the case.' As I have already suggested, the plaintiffs were unable to point to any disadvantage or disability affecting them. Nor was there any delay or acquiescence of the defendants, which might redress the balance of fault.*
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> *In such circumstances, when the court comes to strike that 'balance of justice' in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J., it will need to find something weighty to cancel out the effects of the plaintiffs' behaviour. It will attach weight to the character of the claim and to the character of the plaintiffs. When considering any allegation of delay or acquiescence by the defendants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiffs' claim dismissed."*

This passage of Fennelly J.'s judgment does not reflect the majority view of the Supreme Court in that case. Instead, the judgment of the court is that delivered by Keane C.J. and the separate, concurring, judgment delivered by Fennelly J. is given on the basis that notwithstanding his agreement with the judgment of Keane C.J. "*at least in one respect I would go somewhat further".*

7. Notwithstanding that Fennelly J.'s comments did not form part of the reasoning of the majority of the Supreme Court in *Anglo Irish Beef Processers*, counsel for the defendants points to the fact that these comments have been expressly adopted in three separate judgments by the Court of Appeal. Although all judgments are authored by the same judge, Irvine J., in each case the judges sitting with Irvine J concurred with her judgments which consequently represent the combined view of six members of the Court of Appeal. In each case the statements of Fennelly J. are expressly approved in terms such as "*where delay has been found to be inordinate and inexcusable the author of that delay will not be absolved of fault unless they can point to some countervailing circumstances that may be considered sufficient to cancel out the effect of such behaviour" (Millerick v. Minister for Finance [2016] IECA 206); "when a court comes to consider whether the balance of justice favours allowing the action to proceed in light of its finding of inordinate and inexcusable delay, the author of that delay is not to be absolved of fault, unless they can point to some countervailing circumstances which the court considers sufficient to negate the effect of such behaviour" (Carroll v. Kerrigan*

[2017] IECA 66); "Where a plaintiff is found guilty of inordinate and inexcusable delay there is a weighty obligation on the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim proceed.' (*Flynn v. Minister for Justice* [2017] IECA 178). Thus, the comments of Fennelly J quoted above represents precedent which is binding on this Court.

8. In addition to these authorities from the Supreme Court and Court of Appeal, both parties drew the court's attention to a range of High Court decisions on delay. Some of these authorities were opened to illustrate various periods of time which had been found either to constitute or not to constitute inordinate delay. These authorities were of general assistance in terms of seeing how the principles have been applied by other courts but because they all turn on their individual facts, they do not serve as a precedent to establish that any particular period of delay is necessarily unacceptable or, conversely, that any delay of a lesser amount is necessarily acceptable. As it happens, the cumulative delay in this case is very much towards the longer end of the spectrum although, when broken down, the individual periods of delay equate to periods which have been found to be both unacceptable and acceptable in different contexts

9. More usefully, the High Court decisions addressing the question of acquiescence identify the types of conduct on the part of a defendant which may be relevant to this issue. Of particular note in this regard is a case relied on by the plaintiff namely the decision of Quirke J. in *O'Connor v. John Player Ltd* [2004] 2 ILRM 321. Quirke J. identified that the conduct of the defendant since the commencement of proceedings should be considered for the purposes of establishing, firstly, whether such conduct amounted to acquiescence in the plaintiff's delay and, secondly, whether the defendants were guilty of conduct which induced the plaintiff to incur further expense in pursuing the action.

Factual background

10. Because an application of this nature centres on whether there has been delay and on what the legal effects of that delay should be, it is necessary to set out the history of the interactions between the parties up to the point where the two motions were issued in August and November of 2019 respectively.

11. The plaintiff is a builder based in Headford, County Galway who had prior to 2006 carried out a number of pieces of work for the defendants to a total value of some €750,000 to €800,000. The defendants also reside in Headford and the second defendant is a solicitor in practice in that town. In 2006 the defendants engaged the plaintiff to carry out building works on a small commercial/residential development at Main Street, Headford for which they had been granted planning permission in January 2005. There is some dispute as to whether the agreement was made in January or in October of 2006 but in either event the works commenced in October 2006. The agreement between the parties was purely verbal and was never reduced to writing. Unfortunately, this has resulted in a fundamental disagreement now as to what terms were actually agreed. The plaintiff claims to be entitled to be paid for the value of the works carried out whereas the defendants claim that a fixed price of €250,000 inclusive of VAT was agreed. In addition, the defendants claim that once payments made by them directly to subcontractors are

taken into account, they have paid not just the agreed amount but a sum in excess of that.

12. The works, having commenced in October 2006, ran into difficulty in January 2007. The development involved the demolition of most of an old building save for the retention of the façade and the construction of new commercial and residential units behind the existing façade. Unfortunately, the demolition and preparatory works caused damage to the adjoining properties on both sides and also rendered the façade which was to be retained structurally unstable. As a result, additional works were required both to repair the adjoining properties and to demolish the retained façade. It is evident that there is a significant dispute between the parties as to who was responsible for the decisions which led to these events and who should bear the consequent responsibility for the additional costs which necessarily arose. Of significance in the context of the issues which fall to be considered on this application, the plaintiff claims that there was a difference of opinion between himself and his subcontractor on the one hand, and the defendant's engineer on the other, as to how the foundations for the new development should be constructed. He claims that he was specifically instructed by the defendant's engineer to dig the foundation deeper than he or his subcontractor felt was safe. On the other hand, the defendants claim that the damage was caused by the negligent carrying out of works by the plaintiff and his workmen. The defendants also claim the plaintiff walked off the job and remained uncontactable for a period of eleven days following these events and that ultimately the defendants had to engage and pay other contractors to carry out remedial works. Further, the defendants say they had to engage alternative contractors to carry out elements of the work that properly fell within the scope of the plaintiff's contract.

13. It is notable that the engineer in question, although still in practice and presumably available as a witness, has not been joined to the proceedings. There is no evidence before the court that that engineer is even aware of the existence of these proceedings or his possible involvement in them. The availability of the other contractors who became involved in the works in January 2007 and subsequently has not been canvassed before the court.

14. Despite these difficulties the works were eventually completed. There does not appear to be evidence before the court as to precisely when the works were finally completed.

15. It is undisputed that certain payments were made by the defendants to the plaintiffs in respect of the works. As of 2009, the defendants had paid the plaintiffs some €163,602. This sum together with an additional €90,000 paid to other contractors for work which the defendants claim the plaintiff was contractually obliged to carry out, exceeded the contractual price which the defendants allege had been agreed between the parties. As the plaintiff was claiming that additional monies were owed to him, the defendants sought a detailed breakdown of the sums claimed. Ultimately a meeting was held between the parties in January 2010 at which the defendants, whilst disputing that any additional monies were owed, offered the plaintiff a further payment of €50,000. A handwritten letter from the second defendant dated 15 January 2010 accompanying that payment

made it clear that the defendants were disputing the additional sums claimed by the plaintiff and had suggested that the plaintiffs bill be examined by a quantity surveyor but the plaintiff had rejected this proposal. Payment of the additional €50,000 brought the total sums paid by the defendants directly to the plaintiff to €213,666.

16. There are two statements of account in respect of the works done by the plaintiff exhibited in the proceedings although the correspondence suggests that an account was first furnished by the plaintiff in July 2009. The first exhibited statement is dated 30th March 2010 and comprises a list of works done by the plaintiff with a statement of the total amount alleged to be outstanding. It is unclear if the statement was provided to the defendants although the second exhibited statement dated 18th November 2010 undoubtedly was. The second statement comprises largely the same list with prices indicated for each item but without any detailed breakdown as to how that price was arrived at. Interestingly, the November statement includes an additional item of "Prelims. Insurance, Scaffolding, Health and Safety" priced at €23,315.11. Notwithstanding the inclusion of this additional item, there is no increase in the total sum claimed as between the March and November statements. When allowance is made for the amounts already paid, the plaintiff claimed balance of €97,243 (inclusive of VAT) due to him.

17. The defendants replied to the statement by letter dated 2nd December 2010 disputing the claim largely on the basis that it did not make appropriate allowance for sums which had been paid by them. Again, the defendants sought a detailed breakdown of the sums claimed, indicated that any legal proceedings would be defended by them and that they would bring a counterclaim against the plaintiff for negligence and breach of contract. A further statement of account appears to have been issued by the plaintiff on 1st July 2011 (although it is not included in the papers before the courts) and again, the defendants responded by letter of 27th July 2011 disputing the claim and denying any monies were owed.

18. There matters rested for nearly 3 years until the 11th April 2014 when the plaintiff's solicitor issued a pre-action letter seeking payment of the sum of €97,243 allegedly owing by the defendants. As counsel for the defendants points out, the terms of that letter suggest that the plaintiff had not brought the full history of the exchanges between the parties and the correspondence sent by the defendants to the attention of his solicitor. The defendants replied through a solicitor's letter of 16th April 2014 setting out their position which has not changed substantively since. Firstly, the letter identified that the contract was for the fixed price of €250,000 - although as counsel for the plaintiff points out that this is the first time that either a fixed sum or the sum of €250,000 is mentioned in the written exchanges between the parties. The letter also indicated that no breakdown of the sum claimed had been provided. It outlined the events which occurred during the course of the works and which are set out above, and finally, it set out all of the additional amounts paid by the defendants directly to other contractors. Again, it was clearly stated that any proceedings would be defended and that a counterclaim would be made by the defendants.

19. Following this correspondence on 15th July 2014 the plaintiff issued proceedings by way of summary summons claiming the sum of €97,243 as a liquidated sum due to him by the defendants. A motion seeking liberty to enter final judgment issued on 3rd November 2014 grounded on an affidavit of the plaintiff in which he positively avers to having been advised that the defendants had no defence to his claim either at law or on the merits and that their appearance (entered on 6th August 2014) had been entered solely for the purposes of delay. This averment is surprising, to say the least, given the previous exchanges between the parties and in particular the exchange of solicitors' letters in which the defendants' solicitor set out the basis on which any proceedings would be defended. Unsurprisingly, the motion for judgment was resisted and in a replying affidavit sworn on 26th February 2015 the second defendant pointed out not just that the defendants had a *bona fide* defence, which was evident from the outset, but that it was never appropriate for the plaintiff to have issued summary proceedings without exhibiting the full exchange of correspondence between the parties. The plaintiff swore a replying affidavit engaging with the factual detail of the defendant's response on 15th May 2015. Thereafter, on 19th May 2015, an order was made on consent by the Master of the High Court adjourning the matter for plenary hearing. The plaintiff delivered a statement of claim pursuant to the Master's order on 17th June 2015.

20. The defendants responded by serving a Notice for Particulars on 28th September 2015 under cover of a letter indicating that a defence would be filed when replies to particulars were received. That notice was the last proceeding in this action prior to the issuing of the two motions in late 2019. As the plaintiff relies on the contents of the Notice for Particulars and especially Item 11 to excuse any delay in prosecuting the case, it is necessary to look at it in a little detail. The notice comprises 14 itemised requests set out over two pages. The requests cover a range of different issues arising out of the plaintiff's claim including details of changes the plaintiff alleges the defendants made to the works as originally requested, details in respect of the site meeting at which the plaintiff alleged he received instructions from the defendants' engineer and clarification as to whether the plaintiff's claim includes items of work carried out by contractors whom the defendants claim to have paid directly. Item 11 requested a detailed breakdown of the cost of the building works and specified that it was "essential" that a detailed breakdown be provided "preferably prepared by a quantity surveyor".

21. The plaintiff did not respond to the Notice for Particulars either by replying to all of those queries except item 11, for which a quantity surveyor's report would be required, or by simply advising the defendant's solicitor that a quantity surveyor's report was being procured and replies would be furnished in due course.

22. Six months after receipt of the Notice for Particulars, in March 2016the plaintiff engaged a quantity surveyor. There then followed a lengthy delay of two years before the quantity surveyor's report was provided to the plaintiff in March 2018. Despite what the plaintiff attests to being "numerous letters and phone calls" neither the quantity surveyor's report nor the correspondence relating to that report is before the court and therefore the court can only speculate as to why such a lengthy delay should have occurred in procuring a

report from a professional person. The report itself is significant because, as a result of its contents, the plaintiff reduced the amount he is claiming from the defendants to €63,681.97 and instructed his solicitor to have the matter remitted to Circuit Court. The defendants were informed of this intention in a letter from the plaintiff's solicitor dated 10th October 2018 (seven months after receipt of the quantity surveyor's report) but the relevant motion did not issue for a further ten months on 22nd August 2019 (i.e. 17 months after receipt of the report). Before that motion issued, the defendant's solicitor, in a letter dated 4th April 2019, replied to the effect that in light of the delay and lack of communication the defendants had formed the view that the plaintiff was not proceeding with the action. The defendant sought service of a Notice of Discontinuance or, alternatively, that the plaintiffs should serve a Notice of Intention to Proceed after which the defendants would bring a motion to strike out the proceedings for delay. There is no Notice of Intention to Proceed in the papers before the court and it is unclear whether such notice was ever served. Instead, the plaintiff's motion to remit issued in August 2019 and the defendant's motion to strike out issued in November 2019.

Chronology relating to delay

23. Based on this history, the following chronology is relevant to the question of whether there was delay in issuing and prosecuting these proceedings.

24. A contract was entered into between the parties in 2006 in relation to works which were carried out in 2006 and 2007 and perhaps into 2008. Issues concerning negligence and breach of contract in the carrying out of those works arose in early 2007. Those issues potentially involve a third party who is not currently on notice of the proceedings. Whilst payments were made by the defendants to the plaintiff in respect of works done, a dispute between the parties as to the amounts owing was evident by 2009. This dispute had crystallised by 15th January 2010, which is the date of the last payment by the defendants to the plaintiff. Thereafter, a formal statement of account was served by the plaintiff on 18th November 2010 and litigation threatened in the event of non-payment. The defendants responded disputing liability on 30th November 2010. A further exchange of correspondence in July 2011 did not alter that position. Therefore, it was evident from some point in 2009 and certainly by January 2010 that there was a significant dispute between the parties as to whether the defendants owed the plaintiff additional monies in respect of the works carried out pursuant to the contract. Non – payment of the amount claimed on foot of a formal statement of account was clear from November 2010.

25. Notwithstanding the fact that the parameters of the dispute between the parties had crystallised by November 2010, proceedings were not issued by the plaintiff until 15th July 2014, some three and a half years later. These summary proceedings were predicated on invoices issued within the preceding six years (i.e. presumably the statements of account issued in 2009 and 2010) although the work to which the invoices related had, at that stage, been carried out some seven to eight years earlier. No issue has been raised by the plaintiff under the Statute of Limitations so I accept the claim as one brought within, albeit towards the end of, the limitation period fixed by statute. Nonetheless, the date of the works remains relevant in circumstances where there is

likely to be a significant dispute between the parties as to the events which occurred while the works were ongoing in January and February 2007 in respect of which oral evidence will undoubtedly be required.

26. There is no doubt but that the form of proceedings chosen by the plaintiff was inappropriate given that his claim is effectively one of *quantum meruit* and that the defendants had indicated, strongly, the basis upon which they intended to defend any proceedings such that summary judgment was unlikely to be granted. It took 9 months for this procedural error to be resolved by adjournment to plenary hearing. It is true that the traditional assumption that a plaintiff will not be held responsible for delay on the part of a professional adviser such as a solicitor, no longer carries the weight it once did (per Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290). However, in circumstances such as these where the issue is not delay on the part of a solicitor in giving effect to the plaintiff's instructions but an error in the procedural form chosen, it would be harsh to attribute the resulting delay to the plaintiff who could hardly be expected to appreciate the distinction between a summary summons and a plenary summons.

27. The only period of relative activity in these proceedings occurred between the issuing of the summary summons in July 2014 and the delivery of the Notice for Particulars on 28th September 2015. Apart from this 14-month period, most of which was taken rectifying the procedural error in the form of the proceedings, there has been singularly little progress in the proceedings either before or after their institution.

28. The plaintiff took steps in 2016 to engage a quantity surveyor in order to respond to the Notice for Particulars. That surveyor's report was not received until March 2018 and no real explanation for that delay has been offered save to attribute it to the quantity surveyor. Following receipt of the report, apart from the exchange of solicitors' correspondence no formal step was taken by the plaintiff until the motion to remit the proceedings issued in July 2019, nearly four years after the Notice for Particulars had been raised.

Whether there was inordinate delay?

29. In moving this application counsel for the defendants approached the issue of delay by looking globally at all of the periods of delay both prior to and subsequent to the institution of the proceedings and treating such delay as being self-evidently inordinate. Thus, the defendants rely on a total period of delay of 14 years from the date of the contract in 2006 to the hearing of this application to dismiss the proceedings. Within that 14 years, there is a delay of six or seven years from when the works were done before the proceedings were instituted when, on the defendant's case, it had been clear for at least four and a half years of that period that there was a dispute between the parties. The delay after the institution of the proceedings is treated as comprising nine months rectifying the procedural error and then a period of four years since the statement of claim was served before the plaintiff took a further step. On the other hand, the plaintiff approaches the question of delay on the basis that the period of relevance is the delay in replying to the Notice for Particulars. The plaintiff does not regard the period prior to the institution of proceedings as relevant, presumably because the plaintiff is focused on O.

112, r. 11 or because no issue has been taken under the Statute of Limitations although this is not entirely clear. Further, the plaintiff treats the relevant period as terminating in October 2018 when the plaintiff's solicitor wrote to the defendant's solicitor seeking consent to the intended application to remit the proceedings to the Circuit Court. Thus, on the plaintiff's account, the period of delay is one of three years.

30. Given this difference of approach it is necessary in the first instance for the court to identify the period of delay to which the application relates. In this regard, it is relevant to note the difference between the order sought under O. 122, r. 11 of the RSC and the order sought pursuant to the inherent jurisdiction of the court. O. 122, r. 11 allows for the dismissal of proceedings for want of prosecution where "*there has been no proceeding for two years from the last proceeding had"*. The dismissal of proceedings for want of prosecution necessarily requires that there be proceedings in being. Thus, an application under O. 122, r. 11 focuses on delay subsequent to the institution of proceedings rather than delay in the institution of the proceedings themselves. However, as noted at the outset, the defendants in this case have sought relief under both O. 122, r. 11 and the court's inherent jurisdiction which is not bounded by the procedural requirements of O. 122, r. 11. For the purposes of their application pursuant to the court's inherent jurisdiction the defendants are entitled to ask the court to look at the cumulative delay on the part of the plaintiff including delay in the institution of the proceedings.

31. Pre-action delay is calculated from the date of accrual of the cause of action which is difficult to be exact about in the circumstances of this case. The contract between the parties was an oral one and there is now a fundamental disagreement between them as to the terms of that contract. If the defendants are correct in characterising the plaintiff's cause of action as one in *quantum meruit*, then the cause of action accrued from when the works were carried out. If the cause of action is purely contractual then, in the absence of a contractual term stipulating when payment was to be made, the obligation to pay arose and hence the cause of action accrued when the works were completed. The date of completion of the works is not evident from the papers before the court but presumably must have preceded the earliest statement of account issued in July 2009. If the terms of the contract provided for final payment on foot of a statement of account – or if a term to that effect could be implied because of the prior history of dealings between the parties – then the cause of action accrued in July 2009. As there is no evidence on any of these matters before the court, I will assume for the purposes of this motion that the cause of action accrued on the date most favourable to the plaintiff, i.e. July 2009. On the basis that either s. 11(1)(a) or (b) of the Statute of Limitations applies to these proceedings, that means that the proceedings issued in July 2014 were issued some five years into a six-year limitation period. That is squarely within but decidedly at the later end of the period within which the proceedings could be issued. This does represent a delay on the part of the plaintiff. Further, that delay is potentially significant given that much of the dispute about the amounts owed, if any, depends in turn on events which occurred whilst the works were being carried out in January and February 2007. Nonetheless, were this the only delay it could not be characterised as inordinate of itself. However, the authorities establish that lateness in issuing proceedings (even if

issued within the applicable limitation period) creates an obligation to proceed with expedition thereafter.

32. In this case, that did not happen. For the reasons discussed above, I am not prepared to attribute responsibility to the plaintiff for the fact that the proceedings originally issued were inappropriate and that there was a consequent delay in converting those proceedings to a more appropriate form. In any event, that delay of some nine months is not significant in the context of the overall delay with which the court is dealing. Of course, it goes without saying that no responsibility can attach to the defendants for the fact that summary judgment was incorrectly sought against them and that, following their objection, steps had to be taken to adjourn those proceedings for plenary hearing.

33. The plaintiff is however responsible for the delay which followed service of the Notice for Particulars which has not, to date, been replied to some five years after it was issued.

34. The delay of nearly four years between receipt of the Notice for Particulars by the plaintiff and the service of the motion to remit is well in excess of the two-year period required to ground an application to dismiss proceedings for want of prosecution under O. 112 r. 11. It is also, in my view, inordinate both in itself but especially when taken in conjunction with the delays which had already occurred in instituting the proceedings and the delay necessitated by the steps required to convert the summary proceedings into plenary proceedings. Even though, as I have held, the latter was not a culpable delay on the plaintiff's part, it was still incumbent on the plaintiff to move with expedition in circumstances where it had occurred. Also, I do not accept the plaintiff's characterisation of this period of delay as terminating with his solicitor's correspondence of October 2018. What is required under O. 112, r. 11 is a "proceeding" which necessarily connotes some formal step being taken. Correspondence intimating an intention to take a step which is not in fact taken for a further ten months does not constitute a "proceeding" so as to bring to an end an ongoing period of delay.

35. Therefore, for the purposes of the application under O. 112, r. 11, I find the four-year delay from receipt of the Notice for Particulars to be inordinate. For the purposes of the application under the court's inherent jurisdiction, I also find the delay to be inordinate whether it measured from the date of completion of the works (which is unclear but circa 2008) or from the service of the first statement of account (July, 2009) or from the latest point at which it was clear that the defendants were rejecting any liability to pay the additional sums claimed (December, 2010). This remains the case even when the period of delay resulting from the alteration of the form of the proceedings is excluded.

Whether the delay is excusable?

36. Having held the delay to be inordinate, the next question is to consider whether it is inexcusable. The authorities on the issue of excusability and its interaction with balance of justice are somewhat difficult to apply. *Primo*r makes it clear that a party seeking to dismiss proceedings bears the onus of proving that the delay is both inordinate and inexcusable even though on the face of it this imposes an evidential burden on the moving party to prove a negative – i.e. the lack of a reasonable excuse on the part of the

other party. However, the effect of this is ameliorated by the approach taken by Fennelly J. in *Anglo Irish Beef Processors* to the effect that a party guilty of delay that is both inordinate and inexcusable must be able to point to "countervailing circumstances" in order for the claim to proceed and the recognition that this obligation is a weighty one.

37. In most instances, there will be a significant overlap between any excuse offered by a plaintiff to excuse delay and the subsequent consideration of where the balance of justice lies. However, the logic of *Primor* is that the delay must in principle be regarded as inexcusable before the balance of justice falls to be considered. Given that the central objective is for the court to ensure that the decision to allow a claim to proceed or not is fair and just, it would make little difference in the overall scheme whether the justification offered by the plaintiff is considered as going to excusability or to the balance of justice were it not for the fact that the onus of proof shifts as between the defendant and the plaintiff as you move from one phase of the analysis to the other.

38. In this case, the defendants point to the lengthy delays involved as being self-evidently inordinate and inexcusable and seek to move the argument directly to the balance of justice. However, they also point to the explanations proffered on affidavit by the plaintiff as being unrealistic or simply not an acceptable excuse. *Primor* suggests that delay must be regarded as excusable unless the defendant establishes that it is not which rather begs the question as to whether inexcusability can be established by a defendant refuting the excuses offered by a plaintiff. Had the plaintiff in this case not offered explanation, the defendant's case on excusability would be limited to the length of the delay and the fact that no excuse can be found in the conduct of the proceedings as, for example, might be the case if there were a lengthy discovery process.

39. However, in the particular circumstances of this case where there is significant pre-action delay followed by significant delay in prosecuting the proceedings leading to a very lengthy cumulative delay and no reason for that delay is evident on the face of the proceedings or in the defendant's response to them, I am prepared to accept that the delay is inexcusable. I am fortified in this conclusion by the excuses actually offered by the plaintiff for the delay.

40. In respect of the pre-action delay, the plaintiff says that he was slow to engage in litigation and hoped that matters could be resolved without recourse to the courts. In circumstances where the parties previously had amicable business dealings and they all live in the same small town, there is much to commend such an approach. However, the defendants had made it clear from, at the latest, December, 2010 that they were not accepting liability for the plaintiff's claim and, apart from similar correspondence repeated the following year, no further steps were taken by the plaintiff to resolve the issues between them. Consequently, the plaintiff's belief that it might be possible to resolve matters without recourse to the courts was entirely unrealistic. It is one thing not to be trigger-happy with litigation; it is entirely another to treat a flat refusal to accept liability without any further engagement as providing a basis for amicable resolution.

41. In respect of the delay in the prosecution of the proceedings, the plaintiff attributes this to the time taken to engage and receive a report from a quantity surveyor without which it is said the plaintiff could not reply to the Notice for Particulars. The plaintiff also argues that the engagement of a quantity surveyor was something required of him by the defendants. While much of this argument was directed at the balance of justice, I do not accept the proposition that the time taken by the plaintiff in this regard was in response to a requirement imposed on him by the defendants. The plaintiff is seeking payment of sums allegedly due to him for works done under a contract. The contract was purely verbal and the plaintiff does not contend that it contained any provision relating to how the works were to be costed or how the value of the works was to be measured. The defendants allege the contract was for a fixed price which they have paid. From the outset of the dispute, the defendants sought a detailed breakdown of the plaintiff's claim and suggested that the value of the work in respect of which the plaintiff is seeking payment be measured by a quantity surveyor. When this suggestion was originally made in 2010, the plaintiff rejected it. In reality it is difficult to see how the proceedings could properly be issued without the extent of the claim being supported by a professional opinion and it is notable that once a quantity surveyor's report was obtained, the plaintiff reduced the amount of the claim by approximately one-third. The defendants, by suggesting in the Notice for Particulars, that the detailed breakdown of the plaintiff's claim be "preferably prepared by a quantity surveyor" could not and did not impose any such requirement on the plaintiff. Rather, it must have become evident to the plaintiff that in order to provide the detailed breakdown of his claim to which the defendants were entitled, he needed the assistance of a quantity surveyor. This much is recognised in the plaintiff's affidavit in response to this motion where he states that he engaged the services of a quantity surveyor "to ensure the sum claimed is correct and can be substantiated at the trial of the action".

42. Regardless of whether the plaintiff felt obligated to instruct a quantity surveyor, this does not explain the length of time taken by him to do so. The plaintiff did not instruct a quantity surveyor for six months after receipt of the Notice for Particulars; it took two years for the quantity surveyor to deliver his report and the plaintiff did not act thereon for a further seventeen months. The plaintiff does not explain why it took two years for the quantity surveyor to report. The plaintiff could not rely on such delay as an excuse if, for example, it resulted from incomplete instructions having been provided to the surveyor by the plaintiff. On the other hand, if complete instructions were provided at the outset and the quantity surveyor simply took two years to report, it begs the question as to why the plaintiff and his solicitor did not instruct an alternate quantity surveyor in order to move matters along in circumstances where a lengthy delay had already taken place. There is no information before the court as to the reason for this delay save that there were "numerous letters and phone calls" involved. In summary, given that the need for a quantity surveyor was evident as early as 2010, a four-year delay in procuring the services of a quantity surveyor and acting on his report post-2015 is not excusable.

Balance of Justice – Defendants' Conduct:

43. In considering where the balance of justice lies, the court is necessarily guided by the factors identified by the Supreme Court as being potentially relevant in *Primor* which are set out above. In an overall sense, consideration of these factors is directed towards ensuring that if a case is permitted to proceed it is possible to have a fair trial without serious prejudice being caused to the defendant and in which basic fair procedures can be applied to all parties. More specifically, a consideration of these factors engages not just the plaintiff's conduct, but also the conduct of the defendant. Insofar as there has been delay on the part of the defendant, the defendant could be taken as having acquiesced in the plaintiff's delay or the defendants' conduct might have induced the plaintiff to incur additional expense in pursuing the action. None of these factors necessarily constitute an absolute bar to the defendants being granted a dismissal of the proceedings but are relevant to the balancing exercise which must be conducted by the court.

44. In this case, the plaintiff relied on two matters which it is contended constituted acquiescence or an inducement on the part of the defendants. The first is the failure of the defendants to formally follow up the Notice for Particulars by sending solicitor's correspondence reminding the plaintiff that a response was due and/or issuing a motion to compel replies. In this regard, the plaintiff relies on the judgment of Laffoy J. in *Dunne v. ESB* [1999] IEHC 199in which it was held, *inter alia*, that a period of four and a half years during which the defendant took no action to have the case brought on for trial or, alternatively, dismissed for want of prosecution militated against the dismissal of the proceedings. However, the note of caution already sounded in respect of treating periods of delay as acceptable, or unacceptable, on the basis of other cases is relevant here. In *Dunne*, the dispute between the parties arose from an agreement which had been made with the plaintiff's predecessors-in-title as part of the compulsory acquisition of lands in the 1960s. There had been an ongoing controversy for some 30 years as regards the rights asserted by the plaintiff to moor and berth boats at a pier which had more recently crystallised over the defendant's obligation to maintain the pier. Further, the litigation between the parties was at an advanced stage with pleadings closed, particulars raised and replied to by both parties and discovery exchanged. It was in the context of that longstanding and well-documented dispute and in circumstances where the litigation was effectively trial-ready that the failure of the defendant to take action over a four-and-a-half-year period was considered a relevant factor in determining whether the proceedings should be struck out. In contrast, these proceedings are at a very early stage where the plaintiff has not yet even particularised his claim. The degree to which the onus on a defendant to take steps to bring the plaintiff's claim on for hearing will weight in the balance must surely be linked to the extent to which the proceedings are ready to be heard.

45. Further, even if they are not to be regarded as fact-specific, the observations of Laffoy J. (in the High Court) might be regarded as being superseded by those of Fennelly J. in *Anglo Irish Beef Processors Limited* (p. 519) to the following effect:-

> *"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 plaintiff's claim dismissed."*

The defendants in this case responded promptly to receipt of pleadings from the plaintiffs during the fourteen-month period when the case was being actively progressed. The onus lay on the plaintiff to reply to the defendants' Notice for Particulars and not on the defendants to seek to have the proceedings dismissed for the plaintiff's failure to reply. In the circumstances, I cannot see anything in the defendants' conduct which could be said to amount to acquiescence in the plaintiff's delay.

46. The second matter relied on by the plaintiff as constituting acquiescence is that the defendants did not intervene on receipt of the plaintiff's solicitor's letter in October 2018 and, instead, allowed the plaintiff's motion to remit to be issued before bringing their motion to strike out the proceedings. On the face of it, if there were no more to it than that the defendants could be accused of having allowed the plaintiff to incur further expense in the litigation, albeit not significant expense in relation to the costs of the proceedings as a whole. However, counsel for the defendants rightly brings attention to the defendants' solicitor's letter of 4th April, 2019. This letter concludes as follows:-

> *"To be frank, we were surprised to receive your recent correspondence and had formed the view that the Plaintiffs were not proceeding with this action, in view of the inordinate delay and lack of communication. The Defendants are prepared to let matters lie and will not proceed with their counterclaim on the basis that you now serve a Notice of Discontinuance within the next fourteen days. In default we would respectfully suggest you serve a Notice of Intention to Proceed and thereafter the Defendants will apply by way of motion to strike out the proceedings in view of the Plaintiff's inordinate and inexcusable delay."*

In light of that correspondence, it cannot be said that the defendants induced the plaintiff to incur additional expense in the issuing of the motion or acquiesced in any way with the plaintiff's on-going delay. Instead, the correspondence makes it clear that it is the defendants' intention to bring a motion to strike out the proceedings subject only to the plaintiff serving a Notice of Intention to Proceed without which the proceedings would remain fallow. As previously noted, it is not clear from the papers that a Notice of Intention to Proceed was ever served by the plaintiff and in light of its absence from the papers before the court, I assume that it was not. In any event, at the time the motion to remit was issued on 22nd August, 2019, the plaintiff was clearly on notice of the defendants' intention to seek to strike the proceedings out for reason of delay and could not be said to have been induced or misled by the defendants in any way.

Balance of justice - Prejudice:

47. Even in the absence of culpable conduct on the part of the defendants, it does not necessarily follow that the plaintiff's proceedings should be struck out unless the interests of justice require this. In particular, if the delay is likely to cause serious prejudice to the defendants or otherwise risk a fair trial, it will usually be appropriate to dismiss the

proceedings. The defendants assert, relying on Fennelly J.'s comments in *Anglo Irish Beef Processors Limited*, that in the absence of countervailing circumstances being established by the plaintiff which either explain the delay (as distinct from excusing the delay) or mitigate the plaintiff's culpability, then once inordinate and inexcusable delay has been established, the court should almost automatically proceed to dismiss the claim. In essence, the defendants contend that the court must find something positive in the plaintiff's favour to cancel out the inordinate and inexcusable delay whereas the plaintiff contends there must be serious prejudice to the defendants which render a fair trial impossible.

48. In reality, I do not think the task of the court is as black and white as either party suggests. There is no automatic presumption in favour of the dismissal of proceedings once inordinate and inexcusable delay has been established unless the plaintiff establishes countervailing circumstances although the onus certainly shifts to the plaintiff to show why proceedings should not be dismissed once the delay is accepted as being inordinate and inexcusable. Equally, it is not the case that where inordinate and inexcusable delay has been established, the plaintiff is nonetheless entitled to proceed with the action unless the defendant can also show that it is severely prejudiced.

49. The obligation on the court is to ensure that a fair trial can take place and this may depend on a number of factors which cannot be reduced simply to inordinate and inexcusable delay on the one hand and to serious prejudice on the other. For example, given the general recognition that lengthy delay impairs the ability of witnesses to give complete and accurate evidence, the impact of delay on a case will depend in part on the extent to which the case is dependent on oral as opposed to documentary evidence. This case is one which started life on a summary basis and was adjourned for oral hearing precisely because of the nature and extent of the dispute between the parties made it inevitable that the court would require to hear oral evidence in order to determine the issues. Further, although the proceedings were issued within time (on the assumption that the cause of action accrued circa 2009), the events which are in dispute between the parties and which added to the complexity and cost of the works occurred in January 2007. The proceedings were issued more than seven years after those events occurred and significant delay has occurred since they were issued.

50. The plaintiff contends that as the defendants' engineer is still in practice and available as a witness, the defendants will suffer no prejudice. I do not necessarily agree with this assumption. There is no evidence before the court to indicate that the engineer in question is aware of the proceedings or of the likelihood of his becoming involved in them whether as a witness or a party. From his perspective, the disputed events occurred nearly fourteen years ago and, at this remove, it cannot be expected either that he has a detailed recollection of the events or that he has maintained all of his papers in relation to them. The defendants point out that the plaintiff has not sued the engineer even though he claims to have acted on foot of the engineer's instructions. Equally, of course, the defendants have not joined the engineer as a third party to the proceedings but as they have not yet received replies to the particulars which they have sought, items 6 to 9 of

which request particulars of the plaintiff's alleged on-site interaction with the engineer, this is understandable. In the absence of such particulars, the defendants could not reasonably be expected to initiate what would amount to professional negligence proceedings against their engineer.

51. Although not specifically the subject of argument, I note that the defendants' intended defence is predicated on their having paid alternate contractors directly in respect of works done to remediate the problems which arose in January, 2007 and also in respect of works which the defendants contend the plaintiff was contractually obliged to carry out. The scope and value of those works and the circumstances in which they were carried out may be potentially relevant to the issues between the parties. There is no information before the court as to whether those contactors are still available to give evidence in the proceedings and even if they are, there is no reason to expect at this remove that they will either have a clear recollection of events or will have retained any relevant documentation.

52. As the plaintiff has not yet replied to the Notice for Particulars and the defendants have not yet filed a defence, it is reasonable to expect that it would be at least a year and possibly longer before these proceedings could come to trial. In all of the circumstances and given the magnitude of the delay, I am satisfied that not only is there potential prejudice to the defendants but that it would be difficult for a court to conduct a fair trial of the issues between the parties.

53. Finally, in weighing up these factors, the court had regard to the nature of the claim between the parties. The claim is one for breach of contract in respect of works which were undoubtedly carried out by the plaintiff at the defendants' request. It is important to bear in mind that the defendants have paid the plaintiff a significant sum in respect of those works and have also paid other contractors sums in respect of works carried out on the same project, albeit in circumstances which are disputed by the plaintiff. The court's approach to where the balance of justice lies might have been different if no payment had been made by the defendants and dismissal of the proceedings would result in the plaintiff being at a loss of the total value of the contract. However, in circumstances where the dispute relates only to a claim for final payment after significant payments has been made and where the defendants sought to actively engage with the plaintiff from the point at which that claim was first intimated, I do not consider that the balance of justice would be served by allowing the plaintiff to pursue the claim at this remove.

54. In those circumstances, I will make an order dismissing the plaintiff's claim for want of prosecution and am happy to do so under O. 112, r. 11 or pursuant to the inherent jurisdiction of the court. It follows that the plaintiff's motion to remit the proceedings to the Circuit Court does not fall to be determined.