THE HIGH COURT

[2021] IEHC 408

[2017 No. 5599 P]

BETWEEN

DIAMREM LIMITED

PLAINTIFF

AND

CLARE COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 16th day of June, 2021

INTRODUCTION

1. This is a case in which this Court considers the effect of the call by the Supreme Court in *Comcast International Holdings Incorporated & Ors. v. Minister for Public Enterprise & Ors.* [2012] IESC 50 ("Comcast") for a sea-change in the indulgent attitude of the courts to litigants who are guilty of delay in the prosecution of their proceedings.

2. The context is a delay of 22 months from the date when the plenary summons was issued by the plaintiff to the date when the motion to dismiss was issued by the defendant.

3. For the reasons set out below, and despite the fact that the plaintiff can point to cases in the past where longer delays were tolerated by the Irish courts, this Court finds, in reliance on Comcast, that the proceedings should be dismissed for delay.

SUMMARY

4. In the substantive proceedings, the plaintiff ("Diamrem") claims that the operation by the defendant (the "County Council") of a car park located adjacent to the Cliffs of Moher Visitor Centre in Co. Clare has prevented Diamrem from implementing a park and ride facility for visitors to the Cliffs of Moher.

5. In essence, it is Diamrem's case that the car park the subject of these proceedings, on the eastern side of the Cliffs of Moher (the "Eastern Car Park"), was only to be used on a temporary basis during the construction of the Visitor Centre at the Cliffs of Moher and that the continued use by the County Council of that car park is unlawful. Diamrem claims that the use of the Eastern Car Park was to cease as soon as the construction period ended and that the County Council was then obliged to facilitate the implementation of the park and ride service, with a view to having visitors access the Visitor Centre using that service.

6. In brief terms, Diamrem seeks the following reliefs in the plenary summons it issued in this case on 20th June, 2017:

   - damages for misfeasance of public office,
   - a declaration that the County Council deliberately and consciously continued to use the Eastern Car Park despite knowing that the continued use was unlawful,
   - an order prohibiting the County Council from continuing to use the Eastern Car Park, and,

- a declaration that the County Council has interfered with Diamrem's constitutional rights.

The amended plenary summons which Diamrem is seeking permission from this Court to file seeks in addition to the foregoing, damages for breach of legitimate expectations.

7. The kernel of the dispute centres on the opposing views of the parties in relation to the continued use of the Eastern Car Park. That car park is located to the east of the R478 – the road which runs north to south alongside the Cliffs of Moher. The Visitor Centre is located next to the Cliffs and to the west of the R478.

8. In particular, Diamrem claims that the grant of planning permission for the Visitor Centre provided for a permanent car park on the western side of the R478 and on the site of the Visitor Centre (the "Western Car Park") and also provided for the Eastern Car Park on the eastern side of the R478 to be used only during the period of construction. In effect, it is Diamrem's case that certain representations were made to it that the County Council no longer planned to build the Western Cark Park and that instead, a mobility strategy would be put in place, with a view to access being provided to the Visitor Centre through park and ride facilities. Diamrem says that representations were made by the County Council that the use of the Eastern Car Park would cease once the necessary permissions were obtained for the park and ride facilities.

9. For its part, the County Council says that a decision was made by it not to build the Western Car Park on the site of the Visitor Centre and that modifications were made to the design proposals following certain consultations pursuant to Part 8 of the Planning and Development Regulations, 2001. As a result of those modifications, the County Council says that it is entitled to continue to use the Eastern Cark Park, with the effect that this temporary car park would become the permanent car park.

10. The County Council now seeks to have the proceedings dismissed on the grounds of inordinate and inexcusable delay. Dismissal is further sought on the grounds that Diamrem has failed to deliver a Statement of Claim within the time permitted by O. 27, r. 1 of the Rules of the Superior Courts. In response to this motion, Diamrem has put forward a number of reasons for the delay in progressing the proceedings. These reasons are considered in detail in this judgment.

11. The motion to dismiss was issued by the County Council on 15th May, 2019. Some six months later, Diamrem issued a motion to amend their plenary summons and to extend the time in which to deliver a Statement of Claim.

12. Having considered the submissions made by the respective parties, and for the reasons set out herein, this Court is of the view that the delay by Diamrem in prosecuting the proceedings is inordinate and inexcusable and that the balance of justice is in favour of the dismissal of the proceedings. This Court will therefore grant the order sought by the County Council. It follows therefore that the motion brought by Diamrem to amend the

plenary summons and extend the time for delivery of the Statement of Claim necessarily becomes moot.

BACKGROUND

13. There is a somewhat protracted history to the case.

14. Planning permission was granted by An Bord Pleanála for the Cliffs of Moher Visitor Centre on 17th December, 2002 (An Bord Pleanála ref. 03/128695). It is not necessary at this stage to detail what was contained in that grant of planning permission, although it is relevant to point out that it included permission for the development of a permanent car park on the site of the Visitor Centre – the Western Cark Park. It should be noted however, that the contents of that planning permission have been the subject of significant dispute between the parties over a number of years, the core issue being the provision in that planning permission for a temporary car park – the Eastern Car Park - which is the subject of these proceedings.

15. Following the grant of planning permission, construction of the Visitor Centre took place. It is common case however that the permanent car park, the Western Car Park, permitted in the planning permission was never built on the site of the Visitor Centre. Instead, the temporary car park, the Eastern Car Park, has continued to be used as a car park for the Visitor Centre.

16. Planning permission was subsequently granted to Atlantis Limited for the park and ride facilities. Mr. John Flanagan is a director of Atlantis Limited and Diamrem and he has sworn affidavits on behalf of Diamrem. There are two park and ride facilities currently in existence, located in Liscannor and Coogyulla, Doolin, respectively, and both are owned and operated by Diamrem and an associated company (Diamrem Equity Holdings Limited).

17. Reference is made below to separate proceedings taken by Diamrem against the County Council in relation to the Eastern Car Park. Those proceedings were taken under s. 160 of the Planning and Development Act, 2000 (as amended) with claims made therein that the Eastern Car Park was an unauthorised structure which ought to be removed (the "s. 160 proceedings"). For ease of reference, the within plenary proceedings will be called the "*misfeasance proceedings*" throughout the course of this judgment. It is relevant to note there was a period of some seventeen months where both the s. 160 proceedings and the misfeasance proceedings were live in the High Court. It is part of the County Council's case in the present application that Diamrem failed to progress the misfeasance proceedings during that time, and in particular when they were awaiting judgment in the s. 160 proceedings (bearing in mind that the plenary summons in the misfeasance proceedings issued in June 2017 while the judgment in the s. 160 proceedings was delivered in November 2018, ten months after the hearing finished).

The section 160 proceedings

18. On 21st July, 2016, as a result of the ongoing dispute between the parties in relation to the continued use of the Eastern Car Park, Diamrem issued proceedings under s. 160 of the Planning and Development Act, 2000 (as amended) in which it claimed that the

Eastern Car Park was an unauthorised structure. The respondents in those proceedings were the County Council, as well as Cliffs of Moher Centre Limited – a company set up by the County Council for the purposes of operating the Visitor Centre. The reliefs sought in those proceedings included, *inter alia*, an order prohibiting the continued use of the Eastern Car Park and an order compelling the removal of the Eastern Car Park.

19. The respondents in the s. 160 proceedings issued a motion for security for costs on 17th November, 2016. That motion was heard in March 2017 with judgment delivered by Noonan J. on 27th March, 2017 refusing security for costs.

20. The s. 160 proceedings were heard over the 19th, 20th and 21st December, 2017 and subsequently concluded on 11th January, 2018. Of some relevance is the fact that the proceedings had originally been listed on 11th July, 2017, but not having been reached, no hearing proceeded on that date. Judgment in the s. 160 proceedings was delivered by Faherty J. on 20th November, 2018 (see *Diamrem Limited v. Cliffs of Moher Centre Limited and Clare County Council* [2018] IEHC 654). By that judgment, Faherty J. made an order refusing the reliefs sought by Diamrem, that order being perfected on 24th January, 2019. One of the findings made by Faherty J. in her judgment was that the County Council had made a decision under file references LA 03/25 and/or LA 04/08 pursuant to s. 179 of the 2001 Act to relocate the car park for which permission was granted to the site of the temporary car park. At para. 102, Faherty J. stated:

> "Insofar as the applicant relies on the park and ride planning processes in aid of its case, I am not overly persuaded that these planning processes can assist the Court in construing the Board's December, 2002 permission for the purpose of determining whether there has been compliance with the Conditions attached thereto. With regard to the applicant's reliance on the December, 2004 map, while it is the case that that document envisages a green space at the site of the temporary car park, *the existence of that document, to my mind, cannot gainsay the decision made in 2003/2004 to relocate the car park for which planning permission was granted in December, 2002 to the site of the temporary car park.*"(Emphasis added)

21. After judgment was delivered, Diamrem served a Notice of Change of Solicitor on 31st January, 2019, thereby dispensing with the services of the legal team that had up to that point been advising it in the s. 160 proceedings.

22. Three weeks later, on 18th February, 2019, a Notice of Appeal was served by Diamrem in the s. 160 proceedings.

23. Over the following year or so, a number of relevant events took place in respect of the s. 160 proceedings. First, in March 2019, the respondents in the s. 160 proceedings wrote to Diamrem seeking security for the costs for the appeal of the judgment in the s. 160 proceedings. Diamrem refused to provide security (placing reliance on the costs' provisions contained in the Environment (Miscellaneous Provisions) Act 2011 and Aarhus Convention). Subsequent correspondence was exchanged between the parties on the

issue of security for costs, however no motion was issued by the respondents in this regard.

24. Secondly, Diamrem brought a motion in the Court of Appeal pursuant to O. 84A, r. 4(c) seeking to admit new evidence for the purposes of its appeal. That application was refused in a judgment delivered by Costello J. (Haughton and Binchy JJ. concurring) on 9th March, 2021 (see *Diamrem Limited v. Cliffs of Moher Visitor Centre and Clare County Council* [2021] IECA 63).

25. The appeal in the s. 160 proceedings was heard by the Court of Appeal over the course of two days on 14th and 15th April, 2021, with judgment reserved on that date. At the date of delivery of the within judgment therefore, no decision has been made in respect of that appeal.

The misfeasance proceedings

26. The misfeasance proceedings herein were issued by way of plenary summons on 20th June, 2017 some eleven months after the s. 160 proceedings were issued.

27. The County Council entered an appearance on 17th July, 2017. Separately, on the same date, the County Council wrote to Diamrem seeking clarification as to whether Diamrem intended to deliver a Statement of Claim in circumstances where the County Council considered that the plenary summons '*would appear to include a statement of claim in its general indorsement of claim*'. The County Council requested in that letter to Diamrem that if a Statement of Claim was to be delivered by Diamrem, that it would do so '*within the required time'.*

28. By letter dated 28th July, 2017, Diamrem responded to the above request and stated that:

> "Pursuant to the Court Rules the *Statement of Claim* will be filed in the matter which *will be delivered in the short term*." (Emphasis added)

29. Of note is that the aforementioned response sent by Diamrem in relation to the Statement of Claim was sent on its behalf by its former solicitors, who were replaced (in June 2019) by the same firm which had, in January 2019, taken over the s. 160 proceedings.

30. No Statement of Claim having been delivered, on 25th August, 2017 the County Council sent a 28-day warning letter threatening to issue a motion to strike out the proceedings. However, despite this, no Statement of Claim was delivered between then and the 15th May, 2019, when the County Council issued its motion seeking to have the proceedings dismissed.

31. After that motion was filed, on 25th June, 2019, Diamrem served a Notice of Change of Solicitor in the misfeasance proceedings, appointing the same firm as it had appointed to take over its s. 160 proceedings. On the same date, Diamrem served a Notice of Intention

to Proceed – the first step taken by Diamrem since the misfeasance proceedings issued in June 2017.

32. On 9th August, 2019, the solicitors who came on record in the s. 160 proceedings for Diamrem on 25th June, 2019 sent to the County Council a proposed amended plenary summons and a draft Statement of Claim. That letter noted that the amended plenary summons envisaged joining both a plaintiff (Diamrem Equity Holdings Limited) and a defendant (Cliffs of Moher Centre Limited) to the proceedings. The letter sought confirmation from the County Council as to whether it would be consenting to the proposed amendments to the plenary summons, including the addition of further parties to the proceedings.

33. On 13th September, 2019, the County Council responded in the following terms:

> "Given the nature of [the County Council's] motion which is pending, [the County Council] is not in a position to consent to either the proposed application to amend the Plenary Summons or to the addition of the proposed parties. At the moment [Diamrem] is unable to proceed with its claims until [the County Council's] motion has been determined."

34. By letter dated 1st October, 2019, Diamrem responded to the County Council's position as set out above and stated that the amendments to the plenary summons were sought as a result of '*the manner in which [the s. 160 proceedings] were conducted by [the County Council]'*. Furthermore, Diamrem stated that the addition of a plaintiff, Diamrem Equity Holdings Limited (the owner of the park and ride facilities in Liscannor and Doolin), was '*necessary to determine the real questions involved in these proceedings'* due to the claim made by Diamrem that there had been interference with Diamrem's constitutional property rights. The addition of a defendant, Cliffs of Moher Centre Limited, was sought, it was said, on the basis that during the relevant period, that company and the County Council '*operated as one and the same entity'*.

35. Of note is that, at the hearing of the within motions, Diamrem indicated that it no longer sought to have Diamrem Equity Holdings Limited joined as a plaintiff, despite having indicated in its letter of October 2019 that the joining of that party was '*necessary'* to determine the issues in dispute.

36. Following this somewhat protracted exchange of correspondence, on 22nd November, 2019, Diamrem issued its motion to amend the plenary summons and to extend time to deliver the Statement of Claim.

37. In summary therefore, the key dates insofar as the legal dispute (both the s. 160 and misfeasance proceedings) between the parties is concerned are as follows:

- 21st July, 2016 – s. 160 proceedings issued
- 20th June, 2017 – misfeasance proceedings issued

- 11th July, 2017 – s. 160 proceedings fixed for hearing, but case not reached
- 17th July, 2017 – County Council enter appearance to misfeasance proceedings
- 19th, 20th, 21st December/11th January 2018 – hearing of s. 160 proceedings takes place
- 20th November, 2018 – judgment delivered in s. 160 proceedings
- 31st January, 2019 – Diamrem change solicitors in s. 160 proceedings
- 18th February, 2019 – appeal lodged in s. 160 proceedings
- 15th May, 2019 – County Council issues motion to dismiss misfeasance proceedings
- 25th June, 2019 – Diamrem change solicitors in misfeasance proceedings and serve Notice of Intention to Proceed
- 9th August, 2019 – 1st October, 2019 – correspondence exchanged regarding proposed amendments to plenary summons
- 22nd November, 2019 – Diamrem issue motion to amend plenary summons in misfeasance proceedings
- 14th – 15th April, 2021 – s. 160 appeal is heard
- 28th – 30th April 2021 – hearing of motions in misfeasance proceedings before this Court takes place

APPLICABLE LAW FOR DISMISSAL ON ACCOUNT OF DELAY

38. It is common case that the law applicable to these proceedings, namely dismissal on the grounds of inordinate and inexcusable delay, is as stated in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. This law is well settled and does not require to be restated in any detail. In summary, it is clear from *Primor* that there is a three-step test in any application to dismiss, first whether the plaintiff's delay is inordinate, if so, whether that inordinate delay is excusable and if not, whether the balance of justice favours the dismissal of the action in all the circumstances. Each of these parts will now be considered in turn.

The length of the delay

39. Before considering the three-part test, it is important to establish the length of the delay in this case. In this regard, it is clear from the judgment of MacMenamin J. in the Supreme Court case of *Lismore Builders Ltd (in Receivership) v. Bank of Ireland Finance Ltd & Ors* [2013] IESC 6, that the period of delay in cases such as this is calculated from the date of the defendant entering an appearance, which in this case was on 17th July, 2017, to the date on which the defendant issued the motion to dismiss the proceedings on account of delay, which in this case was 15th May, 2019. This is a period of one year, nine months and 28 days.

WAS THE DELAY INORDINATE?

40. The first question therefore is whether this period, approximating to one year and 10 months or 22 months, amounts to an inordinate delay. Examples were opened to the court of periods of delay, which were less than 22 months and which were in excess of 22 months, which periods of time were found to constitute inordinate delay. For example, in *The Governor and Company of Bank of Ireland v. Wilson & Anor* [2020] IEHC 646 a delay of 18 months from the date of issuing a plenary summons was regarded as inordinate. Similarly, a period of 26 months in *Kenny v. Motor Network Ltd & Anor* [2020] IECA 114 was regarded by the Court of Appeal as inordinate in relation to a reply to particulars.

41. In considering whether the delay of 22 months in this case to deliver the statement of claim is inordinate or not, it is necessary to first have regard to the time period during which the plaintiff is expected under the Rules of the Superior Courts to deliver its statement of claim. Under Order 20, rule 2 it is stated:

> "Where the procedure is by plenary summons, the plaintiff may deliver a statement of claim with the plenary summons or notice in lieu thereof, or at any time within twenty-one days from the service thereof."

42. As previously noted, Diamrem issued the plenary summons on 20th June, 2017. In its written submissions (in its own motion for liberty to amend the plenary summons), Diamrem notes that:

> "[…] the Plenary Summons as originally issued contained a level of detail that is ordinarily reserved for a Statement of Claim."

43. It is perhaps not surprising therefore that upon receipt of this detailed General Indorsement of Claim on the Plenary Summons, solicitors for the County Council in a letter dated 17th July, 2017 to the solicitors for Diamrem stated:

> "The plenary summons would appear to include a statement of claim in its general endorsement of claim. If that is so, we will raise particulars on the general endorsement of claim but otherwise please let us have statement of claim within the required time."

44. The '*required time'* would appear to be a reference to O. 20, r. 2 of the RSC and so this amounts to a request from the County Council to Diamrem for confirmation that the general endorsement of claim was to be treated as the Statement of Claim or, if not, a request for the Statement of Claim to be delivered within 21 days.

45. By letter dated 28th July, 2017, the solicitors for Diamrem replied to this request as follows:

> "Pursuant to the Court Rules the Statement of Claim will be filed in the matter which will be delivered in the short term."

Since the Court Rules set down a period of 21 days for delivery of the Statement of Claim Diamrem appear to be committing to deliver the Statement of Claim within 21 days.

46. After 21 days pass without the delivery of the Statement of Claim, the solicitor for the County Council, by letter dated 25th August, 2017, wrote to Diamrem's solicitor stating that no Statement of Claim had been received and that unless it was received within 28 days from the date of that letter a notice of motion would issue to strike out the proceedings for want of prosecution.

47. Nothing further was heard from Diamrem's solicitor and the next development was on 15th May 2019, which was over 600 days later when the defendant carried through with its threat to issue its motion to strike out the proceedings for delay.

48. The delay of 22 months in delivering the Statement of Claim in this case is many multiples of the 21 day period allowed under the Rules of the Superior Courts. It appears to this Court that on any analysis of the term 'inordinate delay', this period of 22 months is an inordinate delay. It is difficult for this Court to see how this could not be an inordinate delay. The only basis upon which the plaintiff appears to argue that it is not inordinate is that the County Council, in its submission referencing examples of inordinate delay, gave four examples and only three of the four examples were of periods of delay in excess of 22 months, with just one being less than 22 months. However, it is this Court's view that this illustrates the indulgence which heretofore was granted to litigants in relation to their compliance with time limits (which indulgence, the Supreme Court has indicated in *Comcast* at para. 3.3 *et seq*., needs to stop). It is this Court's view therefore, that these examples do not support the proposition that failure to deliver a Statement of Claim within 22 months of a 21 day deadline is not an inordinate delay.

49. More generally, it seems to this Court that there is little point in having time limits in Court Rules unless those time limits are going to be complied with (since otherwise the law falls into disrepute) and while an argument can always be made that a delay is excusable (for example if a plaintiff was in hospital), there is in this Court's view no basis for arguing that a delay of 22 months, when the time limit is 21 days, is not inordinate.

50. Despite Diamrem's submissions therefore that this period of delay is not inordinate, this Court is of the view that it would be stretching the English language to suggest that this delay is not inordinate.

51. This Court is also conscious of its obligation to have regard to judgments of the Supreme Court and in particular to take on board the exhortation by that Court in Comcast for judges to '*tighten u*p' on non-compliance with time limits in litigation, for the very good reason that if they do not do so, it will continue:

> "*If parties feel they can get away with it*, and if that feeling is justified by the response of the courts, then *there is likely to be more delay*." (per Clarke J. (as he then was) at para. 3.8 of Comcast wherein he quotes from his own judgment in

Rodenhuis and Verloop B.V. v. HDS Energy Ltd [2011] 1 I.R. 611, at pp. 616 and 617) (Emphasis added)

52. This Court is obliged by *dicta* such as this from the Supreme Court to ensure that laws do not fall into disrepute by 'indulging' litigants in their claims that a delay is not inordinate, just because there may have been indulgences in the past of such delays, where by everyday norms or indeed by any standard, the delay would be regarded as inordinate.

53. Accordingly, this Court has little hesitation in concluding that a delay, which is over 30 multiples of the prescribed time-period, is inordinate. However, before the proceedings could be struck out on the basis of such a delay, that delay must also be inexcusable.

WAS THE DELAY EXCUSABLE?

54. Diamrem claims that the delay of 22 months is excusable for a number of reasons which can be summarised as follows:

- Freedom of information requests
- Devotion of resources to s. 160 proceedings
- Change of legal team
- Receipt of legal advice to amend plenary summons following delivery of judgment in the s. 160 proceedings

These reasons will be considered sequentially.

Freedom of information requests

55. Reference is made in Diamrem's submissions to the delay being excusable by virtue of its need for information for the Statement of Claim, which was sought pursuant to freedom of information requests from the County Council (which requests were refused by the County Council but reversed by the Senior Investigator of the Office of the Information Commissioner). These freedom of information requests related primarily to the days the car park was operated by the County Council and the amount of money generated by its operation.

56. However, it was clear from Diamrem's oral submissions that it does not place any significant reliance on the delay thereby caused, since the information sought relates to issues of damages and quantum. Since the issue of the quantum of damages allegedly suffered by Diamrem arising from this claim, does not justify a plaintiff in delaying delivery of the basis for that claim, as distinct from the quantum of any loss, this Court is of the view that the freedom of information requests do not provide a good excuse for a delay in the delivery of the Statement of Claim.

Devotion of resources to the s. 160 proceedings

57. Considerable reliance however is placed by Diamrem on the claim that the delay is excusable because it had to devote considerable resources to the s. 160 proceedings and so was prevented from delivering the Statement of Claim within a reasonable timeframe.

58. In this regard it is relevant to note that the s. 160 proceedings were due to be heard on 11th July, 2017 but were then adjourned due to the unavailability of a judge to hear the case until 19th December, 2017. Since the Plenary Summons in these misfeasance proceedings was filed on the 20th June, 2017, it is relevant therefore to note, in considering Diamrem's excuse for the delay in delivering a Statement of Claim in the misfeasance proceedings, that Diamrem chose, and was not obliged, to institute the misfeasance proceedings on the 20th June, 2017 just a few weeks prior to the date when the hearing in the s. 160 proceedings was due to commence.

59. In this regard, it is also relevant to note that there was no statute of limitations reason for the issue of the proceedings on this date (since in its oral submissions Diamrem confirmed that it was operating on the basis of a six year limitation period from April 2016). Thus it was a matter of free choice that Diamrem decided to issue the plenary summons in June 2017, although it was just about to commence the hearing of the s. 160 proceedings, and then by letter dated 28th July, 2017 Diamrem gave the County Council the commitment that it would deliver a statement of claim within 21 days. It is also important to note that this commitment was given in order to prevent the County Council from finding out the basis for the claim against it, by raising particulars on the general endorsement of claim contained in the plenary summons.

60. The hearing in the s. 160 proceedings commenced on 19th December, 2017 and finished on 11th January, 2018. Judgment was delivered on 20th November, 2018. The order in the s. 160 proceedings was perfected on 24th January, 2019 and within a month a Notice of Appeal in the s. 160 proceedings was filed on behalf of Diamrem by its new solicitors, who had issued a Notice of Change of Solicitor in the s. 160 proceedings on 31st January, 2019.

61. It is in this context that one must consider Diamrem's claim that a valid excuse for the delay of 22 months in delivering a Statement of Claim was the fact that it was concentrating its resources on the s. 160 proceedings.

62. However, this Court does not accept that this is a valid excuse for the delay. This is because first the s. 160 proceedings were ready for hearing on 11th July, 2017 and therefore when they were adjourned due to the unavailability of a judge until 19th December, 2017, there was an opportunity during this five month period for the plaintiff to comply with its commitment to deliver the Statement of Claim '*in short-term'* to the County Council.

63. It is true that there was an exchange of affidavits in the s. 160 proceedings during this period of time, yet as the case was ready for hearing in July 2017, this seems not to be a particularly strong excuse, even taking account of the affidavit exchange, for the failure to deliver a Statement of Claim in the misfeasance proceedings. This is particularly so when one considers that it was Diamrem who chose to institute the misfeasance proceedings just weeks before the initial hearing date for the s. 160 proceedings and so chose to bring upon itself the obligation to deliver a Statement of Claim in accordance with the rules, even though it knew that it had the s. 160 hearing just about to commence. It is now

however choosing to use as an excuse, this set of circumstances (of having two sets of proceedings on the go, but, it claims, limited resources) even though it was Diamrem itself which intentionally brought this about. In particular, Diamrem was not forced to impose upon itself the obligation to deliver a Statement of Claim within 21 days, this was an obligation which it willingly assumed once it decided to issue the plenary summons in the misfeasance proceedings on 20th June, 2017.

64. In considering whether the fact that it had to devote resources to the s. 160 proceedings is a good excuse, it is of particular significance that there is a period after the hearing in the s. 160 proceedings finished on the 11th January, 2018 of 10 months until the date of the delivery of the judgment on 20th November, 2018. During this time it could not be said that Diamrem was devoting any of its resources to the s. 160 proceedings – and so this does not provide an excuse for the delay. Yet during this time there was no honouring by Diamrem of its obligations under the rules of court to deliver the Statement of Claim within 21 days (or within a reasonable period thereafter), nor was there any discharge of its commitment to the County Council to deliver a Statement of Claim in '*short-term'.*

65. It is true that between 20th November, 2018 and the filing of the appeal on 18th February 2019, Diamrem would have been concentrating its resources to the preparation of its grounds of appeal in the s. 160 proceedings. However, this would not prevent some work being done on the Statement of Claim. More significantly, in the period of time between the delivery by Diamrem's legal team of the Notice of Appeal on 18th February, 2019 and the date of the issue of the motion to dismiss on 15th May, 2019, there is a period of a further three months when Diamrem's resources are not required to be concentrated on the s. 160 proceedings at all, yet the Statement of Claim is once again not delivered during this period.

66. For the foregoing reasons, this Court concludes that the failure by Diamrem to deliver a Statement of Claim because its resources were devoted to the s. 160 proceedings is not sufficient to make that delay excusable.

Excuse of a change of legal team?

67. Diamrem claims that the fact that it changed legal team makes the 22 month delay in delivering the Statement of Claim, excusable.

68. As noted earlier, Diamrem changed its legal team, in the s. 160 proceedings, to the firm which represents it in the misfeasance proceedings on 31st January, 2019, after the judgment was handed down in the s. 160 proceedings and for the purposes of its appeal. Diamrem made the same change of solicitor in the misfeasance proceedings on 25th June, 2019, which was six weeks after the motion to dismiss was filed in this case (15th May, 2019).

69. Thus, the period of 22 months of delay, which Diamrem is now seeking to excuse, all occurred while Diamrem was represented by a legal team and there was no disruption to the legal advice received during this period on the misfeasance proceedings, since there

was no change of legal term during this 22 month period. Yet Diamrem failed to deliver the Statement of Claim that it was obliged by the rules of court to deliver within 21 days and also failed to deliver it, in compliance with its commitment to the County Council to do so '*in the short term'*.

70. As a general proposition, this Court does not see how a litigant can seek to excuse her non-compliance with the law and/or commitments given by her when advised by one set of lawyers, by virtue simply of the fact that she has changed legal team. If, as a matter of general principle, a change of legal team gave a litigant a justifiable excuse for non-compliance with time limits, then it would be an easy matter for a litigant to avoid the consequences of non-compliance by simply changing legal team. Thus, as a general principle, this court does not believe that the excuse of the change of legal team is a particularly compelling one when dealing with non-compliance. Furthermore, in the particular circumstances of this case, it is clear that the former legal team was advising the plaintiff throughout the entire period of 22 months and therefore the change in legal team, which was advising on the misfeasance proceedings, took place *after* the 22 month period expired and it is therefore difficult to see how that change could convert that inordinate delay into an excusable inordinate delay.

Excuse of legal advice to amend plenary summons on account of s. 160 proceedings

71. Diamrem in its written submissions claims that:

> "Subsequent to the filing of the Notice of Appeal on 18 February 2019, on 6 March 2020, the Plaintiff sought advice regarding the plenary proceedings from the new legal team engaged in the section 160 proceedings, *including advice in relation to the amendment of the Plenary Summons to address the matters relating to the conduct of the section 160 proceedings* and the other matters subsequent to the issue of the plenary proceedings." (Emphasis added)

Diamrem relies on this legal advice regarding the steps which it should take in the misfeasance proceedings, arising from various factors, including, *inter alia*, the delivery of the judgment in the s. 160 proceedings to excuse the 22 month delay in the delivery of the Statement of Claim. In particular, it is averred on behalf of Diamrem that:

> "It became clear following the Court's judgment and the Plaintiff receiving advice thereon from his new legal team that it would be necessary to amend the Plenary Summons and to prepare a Statement of Claim which would address these matters relating to the conduct of the proceedings…".

72. Diamrem submitted that the manner in which the County Council defended the s. 160 proceedings was such as to justify detailed claims in the Statement of Claim and thus the delay which has occurred in its delivery thereof.

73. In this regard, it is relevant to note that the essence of Diamrem's claim for misfeasance of public office is that when relying on Part 8 of the Planning and Development Regulations, 2001 in the s. 160 proceedings, officers of the County Council knew that the

Part 8 approval did not authorise the relocation of the permitted car park on the western side of the visitor centre to the site of the temporary car park on the eastern side of the Visitor Centre.

74. The plenary summons in the misfeasance proceedings reflects this claim by seeking a Declaration that:

> "the [County Council] and/or certain officers employed by the [County Council] deliberately and consciously continued to use a carpark at the Cliffs of Moher Visitors Centre when they knew that this continued use was unlawful."

75. Thus, while the s. 160 proceedings dealt with Diamrem's application for an injunction to prevent the use of the Eastern Car Park, the misfeasance proceedings were concerned with a claim for damages arising from the alleged use of the Eastern Car Park in an unlawful manner.

76. While in the s. 160 proceedings the High Court has rejected Diamrem's claim that the County Council should be prohibited from using the Eastern Car Park, Diamrem claims that the misfeasance proceedings are stand-alone proceedings and so continue, irrespective of the judgment of the High Court in the s. 160 proceedings, or indeed of the judgment of the Court of Appeal, when judgment is delivered.

77. In the context of whether the delay in delivering the Statement of Claim was excusable, Diamrem claims that it was necessary to await the judgment in the s. 160 proceedings in order for it to be in a position to finalise the Statement of Claim, once it became clear that the County Council was (in Diamrem's view) intentionally or recklessly claiming that the continued use of the Eastern Car Park was lawful when it allegedly knew that this was not the case.

78. However, it seems to this Court that this does not justify the 22 month delay since first, the affidavits which set out the basis for the County Council's defence of the s. 160 proceedings had been completed in May 2017 and therefore the manner in which the County Council was defending the s. 160 proceedings was clear even before the plenary summons was issued.

79. Even if this Court was to conclude that it was excusable for Diamrem to wait until the end of the s. 160 hearing before reaching a final position regarding the manner in which the County Council defended the proceedings, this occurred in January 2018. Therefore, at this stage Diamrem was in a position to set out in the Statement of Claim the precise basis for its allegations regarding the manner in which the County Council had conducted the s. 160 proceedings. It had all the facts at that stage to support any claims that it wished to make and did not require the judgment in the s. 160 proceedings to set out its claims in this regard.

80. Accordingly, it was not reasonable for Diamrem to wait a further 10 months after the hearing finished, until the judgment was delivered, before it felt that it was in a position to deliver its Statement of Claim.

81. In any event, even if this Court had accepted this excuse, Diamrem did not deliver the Statement of Claim in the six months after the judgment was delivered (in November 2018) up until 15th May, 2019 when the motion to dismiss was filed, and clearly this excuse about waiting for the judgment does not provide any basis for this further delay.

The appropriate time to issue the plenary summons?

82. More generally, it is clear that by May 2017, Diamrem was aware of the manner in which the County Council was going to defend the s. 160 proceedings and if this was going to be the basis for its misfeasance of public office proceedings, then the logical approach would have been to await the completion of the hearing and then issue the plenary summons and deliver, shortly thereafter, the Statement of Claim with the particularised claims set out therein.

83. Instead what Diamrem did was to issue the plenary summons back in June 2017 just a few weeks prior to the confirmed start date of the hearing in the s. 160 proceedings, even though in the hearing before this Court, Diamrem now claims that the delay in delivery a Statement of Claim is excusable because it required confirmation from the High Court (in Faherty J.'s judgment) of various factual matters that will form the basis of its claim. In addition, counsel on behalf of Diamrem accepted that since that High Court judgment is now under appeal, Diamrem also requires confirmation from the Court of Appeal of those factual matters. Furthermore, if the Court of Appeal judgment were to be appealed to the Supreme Court, Diamrem accepted in its submissions that it would then require confirmation from that court of those factual matters, before being able to finalise the Statement of Claim (although, counsel did, at the same time, submit that Diamrem was in a position to deliver a Statement of Claim now, *albeit* that it might need to be amended subsequently, if this Court extended the time for delivery thereof).

84. In this regard, Diamrem suggested in its oral submissions before this Court that perhaps the misfeasance proceedings had been commenced too promptly, since in June 2017 there was no indication of the findings of the High Court regarding certain factual matters upon which the claim depends.

85. It is difficult, in these circumstances, for this Court not to agree that this is a case where the proceedings were issued prematurely with a claim based on facts which Diamrem hoped that the High Court (or failing that the Court of Appeal, and failing that the Supreme Court) would provide for its claim. The result however is that the County Council and its employees have had 'hanging over' it and them very serious allegations for the past four years.

86. Diamrem argues that its delay in delivering the Statement of Claim is excusable because it does not want its Statement of Claim to bear no relationship to the findings of fact made by the High Court or by the Court of Appeal (or indeed by the Supreme Court).

However, if this is correct, it makes a mockery of the rules of court since it suggests that plaintiffs should not wait until they have the established facts for the claim which they are making but should issue proceedings (and it is important to note that these proceedings were not required to be issued for statute of limitations reasons) and make claims based on facts which they hope will turn out to be accepted by a court, at first instance or on appeal.

87. As if to provide support for this perception of what might have occurred in this case, it is relevant to note that in both the draft amended plenary summons and the draft Statement of Claim sent to the County Council by Diamrem on 9th August, 2019, Diamrem claimed that the County Council was guilty of malicious falsehood. However with the passage of time it now appears that the facts do not support this contention and therefore by letter from Diamrem to the County Council, enclosing a new amended plenary summons and amended statement of claim, on the 16th March, 2020 Diamrem indicated that it would not be pursuing this claim.

Legal advice to amend statement of claim as a good excuse?

88. More generally, as with the excuse of a change in legal team, this Court does not regard the reason for delay, being the receipt of certain legal advice regarding what should be in the Statement of Claim, as being one which is particularly compelling.

89. This is because it is a very easy matter for a plaintiff who is guilty of non-compliance to allege that she received legal advice X or Y which justified the delay. While it is not being suggested that the legal advice in this case was in any way Machiavellian or other than *bona fide,* this case does neatly illustrate the ease with which a litigant could obtain legal advice (which may suit a litigant's circumstances at that time) yet subsequently that legal advice may be dropped or changed. So, for example in this case, one of the reasons that Diamrem gives for the delay is that Diamrem had to deal with legal advice to the effect that the pleadings needed to be amended. Yet this legal advice was set out letter in the from Diamrem's solicitors to the solicitors acting for the County Council dated 1st October, 2019. This stated that the legal advice at that stage was that plenary summons needed to be amended by the addition of Diamrem Equity Holdings Limited as a co-plaintiff as this was '*necessary to determine the real questions involved'* . This was on the basis that it was the owner of the park and ride facilities and thus a necessary party to pursue the breach of property rights claim. Yet the ease with which legal advice can be changed (and why the obtaining of legal advice to do X or Y is not always the strongest excuse for delay) is illustrated by the fact that by letter from Diamrem to the County Council on 23rd April, 2021 Diamrem indicated that it was no longer pursuing this change. Similarly, the initial legal advice to claim malicious falsehood is not being pursued as oral submissions were made on behalf of Diamrem to this Court that the legal advice now is that this claim is not sustainable.

90. While it is, of course, not being suggested in this case that the legal advice which was proffered was done for ulterior motives in order to justify the delay, it is worth noting, as a general comment, the ease with which legal advice could be obtained to amend pleadings (which might for example excuse a delay in delivering a statement of claim)

and the ease with which that very same legal advice (to justify a delay) can be withdrawn at a later date. This illustrates that while certain factors which might excuse a delay are particularly strong and objective (e.g. hospitalisation of the plaintiff) it seems to this Court that the receipt of legal advice that pleadings should be amended is not as objective, and is considerably more variable, and therefore not as strong, an excuse, as other objectively verifiable excuses for delay (such as hospitalisation).

91. For the foregoing reasons, this Court does not believe that Diamrem's excuse for the delay, that it obtained legal advice which required changes to the plenary summons and the statement of claim (which it was obliged to deliver), is particularly compelling.

92. Further support for the conclusion that awaiting the outcome of the s 160 proceedings is not a good excuse for Diamrem's delay is to be found in the decision in *Comcast*. That case considered whether proceedings should be dismissed for want of prosecution where the plaintiffs were awaiting the outcome of a tribunal of inquiry into corruption allegations involving the defendants or whether the delay was excusable for this reason. At paras. 5.8 and 5.9 Clarke J. noted that:

> "[…] it seems to me that *a party, who wishes to adopt what might, in ordinary circumstances, be considered to be an unorthodox approach to litigation (such as by putting the proceedings on hold pending some event), is required to, at a minimum, place on record with all other parties to the litigation, that that course of action is being adopted. It does not seem to me that it is legitimate for a party to adopt an unorthodox approach to litigation on a unilateral basis.* Indeed, it was the failure of the plaintiff in *Desmond v. M.G.N.* to inform the defendant that it was intended to await developments at the Moriarty Tribunal that led this court to view the explanation given as not being sufficient to excuse the delay in question. While *Desmond v. M.G.N.* and this case involved a party who was in the unusual circumstances of electing to await developments at a public tribunal of inquiry, it seems to me that the overall principle is more far-reaching. A party who is likely to have to spend a much longer period than might ordinarily and reasonably be expected in preparing court documents or in preparing to take an important step in proceedings (such as serving a notice of trial or certifying the case as being ready) because of delays being encountered in, for example, procuring expert reports, has, in my view, an obligation to bring those difficulties to the attention of all other parties.
>
> In different contexts it has often been said that litigation is a two-way process. However, it seems to me that all parties are entitled contemporaneously to reasonable disclosure of an intention to adopt an unorthodox approach which is likely to lead to a delay of a significant variety in the progress of litigation. *It seems to me that much greater weight ought legitimately be placed on explanations which are tendered contemporaneously* thus affording other parties a reasonable opportunity to take whatever steps may be considered appropriate in the event that it is considered that the proposed unorthodox course of action is not justifiable.

> Unorthodox action signalled contemporaneously and not contested at the time is likely to be more readily accepted by the court as providing an excuse than the same action taken unilaterally and only referred to after the event as retrospectively providing an explanation." (Emphasis added)

93. While Diamrem submitted that awaiting the outcome of a tribunal of inquiry into corruption (in the *Comcast* case) is very different from awaiting the outcome of s. 160 proceedings, it seems to this Court clear from the judgment of Clarke J. that he was referring to any reason why proceedings might not be progressed because of some outside event not directly related to those proceedings, and not just a reason relating to awaiting the outcome of a tribunal of inquiry. In essence, Diamrem is claiming that it was entitled (i.e. any delay thereby occurring was excusable) to put the misfeasance proceedings against the County Council on hold because of the stand-alone s. 160 proceedings it was taking against the same defendant. However, it is also clear from Clarke J.'s judgment that this is not something which a plaintiff is entitled to unilaterally do, particularly when it means that the defendant will have the proceedings alleging a very serious offence hanging over them for as long as it takes for the outside event to end. Rather a defendant, if she is to be subject to having the serious proceedings against her 'parked' but still live, is entitled to full disclosure from the plaintiff, particularly, as noted hereunder, because of the constitutional right of a defendant to a good name and the right under Art. 6.1 of the ECHR to a fair and public hearing within a reasonable time.

94. In this instance, despite the unorthodox approach to the litigation (of awaiting the outcome of the s. 160 proceedings), which Diamrem is now providing as an excuse for its delay in delivering a Statement of Claim, it is clear that this was not brought to the attention of the County Council. On the contrary, the County Council was explicitly told that the plenary summons did not contain the details of the plaintiff's claim but that the Statement of Claim would be delivered within 21 days. As noted by Clarke J., the fact that this excuse was not provided contemporaneously by Diamrem, at the time of the 'parking' of the litigation also lessens the weight which this Court attaches to that excuse. In reliance, *inter alia*, on *Comcast*, this Court therefore concludes that the unorthodox parking by Diamrem of the misfeasance proceedings, in the absence of a contemporaneous disclosure by them to the County Council of the purported reason for this approach (i.e. legal advice that there was a need to await the conduct and outcome of the s. 160 proceedings), does not provide a justifiable excuse for a delay in the prosecution of a claim.

95. For all of these reasons, this Court does not accept that the fact that Diamrem obtained legal advice regarding insertions in the Statement of Claim arising from the judgment in the s. 160 proceedings is a sufficient excuse for the County Council and its officers to have serious allegations of misfeasance of public office hanging over them, without the details of those claims being provided to them, for a period of 22 months.

DOES BALANCE OF JUSTICE FAVOUR DISMISSAL OF PROCEEDINGS?

96. It is clear from *Primor* that, once it has been established that the delay is inordinate and that the inordinate delay is inexcusable, the next question is whether the balance of justice favours the dismissal of the action on account of that delay.

97. It is clear from the judgment of Irvine J. (as she then was) in Lee*ch v. Independent Newspapers (Ireland) Limited* [2017] IECA 8 at para. 45 that:

> "even modest prejudice may tip the scales of justice in favour of a defendant when it comes to a consideration of the balance of justice."

98. It is important to remember that if somebody is unfortunate enough to be subject to High Court litigation, quite apart from the considerable expense involved, there is also the possible damage to a person's reputation and the fact that the subject or subjects of the litigation will usually have a hugely involved process, particularly in the High Court, which is public (often with a considerable personal toll), hanging over them from the moment those proceedings are instituted. All of this is not to be underestimated and therefore when proceedings are subject to inordinate delay, which is also inexcusable, and which is no-fault of the defendant, it is not surprising that very little is required for the scales of justice to be tipped in favour of the defendant resulting in those proceedings being dismissed.

Prejudice to the defendant caused by the delay?

99. In this case, the draft Statement of Claim provided to the Court by Diamrem in connection with its motion to extend the time for its delivery, alleges that in November 2004 Mr. Gerard Dollard ("Mr. Dollard"), Director of Services in Clare County Council represented to Mr. John Flanagan ("Mr. Flanagan", now a director of Diamrem) that the County Council would welcome a private developer to come on board to develop park and ride facilities required for the Visitor Centre.

100. Similarly, the draft Statement of Claim alleges that in or around April 2006 Mr. Dollard called to the office of Mr. Flanagan to progress an application for planning permission to be submitted to the County Council for park and ride facilities at Liscannor and Doolin.

101. The draft Statement of Claim also alleges that in February 2010 a meeting took place between Mr. Dollard on behalf of the County Council, Ms. Katherine Webster (general manager of the Cliffs of Moher Visitor Experience), Ms. Patricia Thornton (of planning consultants, Tom Phillips & Associates) and Mr. Flanagan at which Mr. Dollard represented to Mr. Flanagan that a contract for the operation of the park and ride services would be entered into once the park and ride sites were developed in accordance with the park and ride planning permissions.

102. A key part of Diamrem's claim in these proceedings for damages for misfeasance of public office, is the claim that in 2014 in reliance on these representations and various letters and other documents, an associated company of Diamrem (Diamrem Equity Holdings Limited) acquired park and ride lands at Liscannor and Doolin for the purpose of operating park and ride facilities.

103. The draft Statement of Claim also alleges that during 2015 Diamrem entered into discussions with a representative of Cliffs of Moher Centre Limited (which company Diamrem is seeking to join as a co-defendant to these proceedings) concerning the operation of the park and ride buses that were to be used at Liscannor and Doolin.

104. Diamrem in their written submissions acknowledge that this is not a '*documents only'* case and it is clear from the foregoing that a certain degree of reliance is placed by Diamrem on representations which were made on behalf of the County Council in 2004, 2006, 2010 and 2015, i.e. 17 years ago, 15 years ago, 11 years ago and 7 years ago.

105. This Court does not require specific evidence from witnesses for it to conclude that the memory of witnesses in relation to events which occurred years ago will dim and therefore that any delay (and in particular an inordinate and inexcusable delay) will constitute a prejudice, and thus at least the modest prejudice to which Irvine J. refers to in *Leech* as being sufficient for the dismissal of the proceedings.

106. However, there are also other instances of prejudice to the defendant caused by the delay in this case. It is clear from the draft Statement of Claim that Mr. Dollard is a key witness for the defence. However, Mr. Dollard ceased to be an employee of the County Council on 10th September, 2017 as he has taken up another position. Thus, the delivery of a Statement of Claim now would involve the County Council incurring expense to arrange for Mr. Dollard to deal with these proceedings as a former employee of the County Council. If Diamrem had consented on 28th July, 2017 to the County Council raising particulars on the general endorsement of claim in the plenary summons or if it had provided the Statement of Claim within 21 days under the rules of court, then the County Council would have been in a position to have Mr. Dollard deal with, at least some of, the proceedings, while an employee of the County Council. Diamrem in its legal submissions accept that there will be anticipated costs for the County Council of engaging Mr. Dollard to assist in the preparation of the defence, but it suggests that the '*anticipated cost of engaging Mr. Dollard to assist in preparing the [County Council's] defence'* is not '*irredeemable'*. It is however to be noted that Diamrem does not suggest that it will be providing the remedy for this cost. In this context, it is clear that the County Council has concerns about the recovery of its costs should it win its litigation against Diamrem, as evidenced by its court application for security for costs in the s. 160 proceedings in the High Court and its request for security for costs in relation to the appeal of that judgment.

107. In addition, the draft Statement of Claim provides at paragraph 36 that '*certain officers employed'* by Clare County Council and Cliffs of Moher Centre Limited, including but not limited to Mr. Dollard, continue to use the Eastern Car Park, despite knowing that the continued operation of that car park was in breach of the Visitor Centre planning permission. This allegation is the basis of the claim that there has been misfeasance of public office by certain persons, which is a very serious allegation to have hanging over, not only Mr. Dollard but also '*certain officers'* of the County Council, who are not named. This must mean that there are a number of employees of the County Council, who for a

number of years are not sure whether or not they are the subject of the very serious allegation that they have abused public trust, i.e. misfeasance of public office.

108. Yet, the delay in this case means that whoever those officers are, they are prejudiced by the delay in having their identifies clarified (and by the consequent delay in the County Council raising particulars) in order to enable them, at the earliest opportunity, deal with the serious allegations that effect hovering over them, but which have not been crystallised by the delivery of the Statement of Claim and the raising of particulars.

Public interest in the proceedings being allowed to proceed?

109. Diamrem claims that there is a public interest in determining a serious claim of misfeasance of public office and accordingly it claims that this is a factor which weighs in the balance in favour of the proceedings continuing.

110. The misfeasance of public office allegedly arises because Diamrem claims that the County Council knew that the Part 8 approval did not authorise the relocation of the permitted car park from the western side of the Visitor Centre to the site of the car park on the eastern side of the visitor centre which was described in the grant of planning permission as a temporary car park for the duration of the construction work on the Visitor Centre.

111. While this Court has no role in determining the merits of Diamrem's claim, this Court can however consider how strong the alleged public interest is, in permitting this claim to be made. In particular, Diamrem rely on this public interest to argue for it to be permitted to proceed with its action for misfeasance of public office relating to the use of the Eastern Car Park, which Diamrem claims was temporary and which was to be used only for the duration of the construction works on the Visitor Centre.

112. First it is important to note that the alleged misfeasance of public office does not relate to persons allegedly making private profits out of their public office. Rather it relates to the allegation that Clare County Council knew that the Part 8 approval did not authorise the use of the 'temporary car park' as a permanent one and as a result Clare County Council (and presumably the residents of Co. Clare, who would be expected to see investment in public services arising from the revenue generated from this car park) have benefited financially therefrom. While this may end up being classified as misfeasance of public office and so a form of abuse of the public's trust, it does seem to this Court, as claims of misfeasance of public office go, there are other claims which are more serious and therefore raise greater issues of public interest (such as the claim of misfeasance of public office made in the Comcast case in relation to, *inter alia*, the alleged corruption by a government minister in connection with the award of a national mobile telephone licence).

113. Secondly, it is relevant to note that while Diamrem relies on this alleged public interest to pursue its claim, Diamrem is not a Non-Governmental Organisation or other not for profit organisation with a history of public interest litigation. Rather it seems clear that the primary motivation for these proceedings by Diamrem is money, i.e. it seeks damages for misfeasance of public office (as well as damages for breach of legitimate expectation in its

amended plenary summons) arising from the amount of money it has lost arising from its inability to operate a park and ride facility to and from the Cliffs of Moher.

114. Thirdly, when considering how strong the public interest is in the claim of misfeasance of public office (because the County Council allegedly knew that the Part 8 approval did not authorise permanent car parking on the 'temporary car park' beyond the duration of the construction of the Visitor Centre), it is relevant to note that the High Court has already rejected a similar, but not identical, claim, so this is not a case where Diamrem has not had an opportunity to air some, at least, of its grievances regarding the Western Cark Park, *albeit* unsuccessfully, in court.

115. This is because in the s. 160 proceedings, Diamrem sought to injunct the County Council from using this very same 'temporary car park' of the eastern side of the Visitor Centre (the Eastern Cark Park). It is relevant to note that in relation to the claims made by Diamrem in those s. 160 proceedings regarding the Part 8 resolutions, Faherty J. concluded at para. 110 *et seq*. that:

> "While the language used in the 30th September, 2004 (and indeed the 31st March Compliance document) cannot by any means be described as elegant, and indeed gives rise to some ambiguity, at the end of the day, *I accept Mr. Dollard's evidence that the 2004 Part VIII resolution permitted the continued function of the car park at the Cliffs of Moher beyond the period of construction of the Visitor Centre*.
>
> I am also satisfied that the import of the reference in the 30th September, 2004 document to the car park being re-located "outside of the Visitor Centre Site" *was that it was being re-located to the east of the R 478*, and not to any site remote from the Cliffs of Moher/Visitor Centre[….]
>
> In all the circumstances of the present case, and for the reasons set out above and in particular *taking into account the various Part VIII processes with regard to the car park in question, I am not satisfied that the applicant has discharged the onus on it to show that the use of the present car park is unauthorised use* for the purpose of s. 160 of the 2000 Act." (Emphasis added)

116. In making this point about the strength of the public interest in these misfeasance proceedings, it is important to note that this Court is not commenting on the merits of the claim in the misfeasance proceedings, but rather this Court in making the foregoing points is commenting solely on the level of the public interest in the misfeasance proceedings, since the plaintiff in the proceedings before this Court has claimed that there is a public interest in those proceedings being allowed to continue. To put the matter another way, if the High Court had determined in the s. 160 proceedings that the Part 8 resolutions did *not* permit the use of the Eastern Car Park, then it seems clear that the public interest in allowing the misfeasance proceedings to continue, notwithstanding the inordinate and inexcusable delay, would be stronger than if this was not the case (which was what occurred). However, this is not to say that the public interest in the proceedings, in such a case, would be sufficient to excuse the delay (or that if the Court of Appeal were to

reverse the High Court that this would be the case). Rather, this fact further weakens Diamrem's, already weak, public interest justification for permitting the proceedings.

117. For the reasons set out above, this Court does not believe that the alleged public interest in these proceedings is sufficient to override the prejudice to the County Council in allowing them to proceed.

Right of access to the courts?

118. Diamrem also claims that its right of access to the courts should take precedence over what it regards as any minor prejudice suffered by the County Council as a result of the delay in delivering a Statement of Claim.

119. While this Court recognises that there is a constitutional right of access to the courts, it is clear from the judgment of Irvine J. in the Court of Appeal (Peart and Hogan JJ. concurring) decision in *Collins v. The Minister for Justice & Ors*. [2015] IECA 27 at para. 38 *et se*q. that this right is not an unqualified right. Just as important is the constitutional right of a defendant to her good name and the constitutional obligation on the courts to administer justice in a timely fashion, particularly in light of the right to a '*fair and public hearing within a reasonable time'* pursuant to Article 6.1 of the ECHR.

120. In this case we are dealing with very serious allegations and this Court does not believe that Diamrem's constitutional right of access to the courts is such that it takes precedence over the right of Mr. Dollard and certain other officers of the County Council and indeed Clare County Council as a whole to have their, and its, reputation under a cloud since 20th June, 2017. It was on that date that Diamrem issued proceedings claiming, *inter alia*, misfeasance of public office, but in effect leaving that very public allegation of wrong doing out there hanging over the institution and its employees, without backing it up with details of the claims to enable them be investigated or rebutted.

121. Accordingly, this Court rejects the claim that Diamrem's right of access to the courts is such as to override the prejudice suffered by the County Council and enable the proceedings to continue.

CONCLUSION

122. In conclusion, it seems to this Court that not only is it obliged to follow decisions of the Supreme Court, but it is also obliged to have regard to observations and seek to follow recommendations issued by the Supreme Court, in particular regarding the need for a '*tightening up'* in the application of the *Primor* test.

123. In *Comcast*, Clarke J. (as he then was) made it clear that the time had come for the previous practice to come to an end whereby indulgence was granted to litigants who institute, but then sit on, proceedings. The importance and urgency which the Supreme Court attaches to a change in practice by the courts is best illustrated by taking just a few truncated excerpts from para. 3.3 *et seq*. of the judgment:

- "the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, *the length of time which might be considered* to

give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may *need to be significantly re-assessed and adjusted in the light of the conditions now prevailing*."

- "To the extent that it becomes clear that parties will be significantly indulged even though they engage in delay, then that fact is only likely to encourage delay*. If parties feel they can get away with it*, and if that feeling is justified by the response of the courts, *then there is likely to be more delay*."

- "the courts [need] to make clear that there will not be an excessive indulgence of delay, because *if the courts do not make that clear, it follows that the courts' actions will encourage delay"*

- "As I pointed out it is correct to say that there is no jurisprudence of the [ECtHR] dealing with the circumstances in which proceedings must be dismissed for delay. However, it does seem to me that *if the courts […] "endlessly indulge" delay then that fact is only likely to increase delay and* increase a failure to comply with Ireland's Convention obligations."

- "*the tightening up* to which I referred in *Stephens* is an *appropriate course of action for the courts to adopt.* "

- "the factors first identified by Hardiman J. in Gilroy do require that the application of that test be approached on a *significantly less indulgent basis than heretofore."* (Emphasis added)

124. It seems to this Court that the message from the Supreme Court could not be clearer, namely that there needs to be, not just a tightening up of the indulgence granted to litigants who delay their litigation, but that there needed to a sea-change in attitude by the courts, including the High Court, to delay (i.e. for it to become '*significantly less indulgent*').

125. In conclusion therefore, while Diamrem might complain that of the four cases relied upon by the County Council, three of them had longer periods of delay than Diamrem's in this case, it should be clear from the judgment in *Comcast*, which it must be remembered was handed down almost a decade ago, that what was permitted in the past is no longer determinative in delay cases '*in light of the conditions now prevailing'*. Rather courts must ask themselves in light of these new conditions, whether the delay was inordinate and inexcusable in light of the call by the Supreme Court for a tightening up on previous indulgence and thereby discourage any future delay.

126. In this regard, Clarke J. made the understandable observation that if parties feel that they will get away with delay, this will inevitably lead to delay. Support for this proposition is to be found in this case since Diamrem had no issue acting promptly, within a very tight deadline where the consequences for missing the deadline are significant and are generally enforced by the courts without indulgence, i.e. Diamrem filed the Notice of

Appeal (on 18th February, 2019) which was comfortably within the 28 day limit after the Order in the High Court was perfected (on 24th January, 2019). This was presumably because Diamrem realised that any failure was likely to have consequences (i.e. the loss of its right of appeal).

127. Yet at the very same time it failed to deliver its Statement of Claim within over 600 days of the 21 day limit, presumably because it felt that this delay would be without any negative consequences. If this was its assumption it flies in the face, not just of the Supreme Court's exhortation on the courts to tighten up on the observation of time limits in litigation, but it also flies in the face of numerous other judicial calls for the days of indulging late litigants to be over, e.g. Hogan J.'s statement in Qui*nn v. Faulkner t/a Faulkner's Garage & Anor* [2011] IEHC 103 at para. 29 that:

> "[…] it must also be acknowledged that experience has also shown that *the courts must also become more pro-active in terms of undue delay*, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common" (Emphasis added)

and Hardiman J.'s statement in *Gilroy v. Flynn* [2004] IESC 98 at para. 13 that:

> "[…] comfortable assumptions on the part of a minority of litigants *of almost endless indulgence must end*. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. *The principles they enunciate may themselves be revisited in an appropriate case*." (Emphasis added)

128. For this reason and the other reasons stated, this Court has little hesitation in concluding that the delay of 22 months was inordinate, that it was inexcusable and that the balance of justice favours the dismissal of the plaintiff's proceedings.

129. It is clear, as this Court has acceded to the defendant's motion to dismiss the proceedings, that the plaintiff's motion, for the amendment of the plenary summons and for the late delivery of the Statement of Claim, is moot.

130. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be put in for mention one week from the date of delivery of judgment, at 10.30 am.