

THE HIGH COURT

[2022] IEHC 271
2019 342 P

BETWEEN

MICHAEL HERBST

PLAINTIFF

AND

**PATRICK MCGUCKIAN, ALISTAIR MCGUCKIAN
AND GLENFORD CONSTRUCTION WICKLOW LIMITED**

DEFENDANTS

JUDGMENT of Mr. Justice Heslin delivered on the 1st day of April, 2022

Introduction

1. This matter comes to court in circumstances where the first and second named Defendants (hereinafter "the Applicants") issued a motion on 14 October 2020 seeking an order dismissing the claim made by the Plaintiff (hereinafter "the Respondent") for inordinate and inexcusable delay and/or for want of prosecution, pursuant to the inherent jurisdiction of this court; and/or in the alternative, an order pursuant to O. 122, r. 11 of the Rules of the Superior Courts ("RSC") dismissing the Respondent's claim for want of prosecution; and/or dismissing same in the interests of justice.
2. The underlying proceedings relate to an agreement entered into by the Applicants, with the Plaintiff, on or about 24 September, 1999, whereby the Respondent agreed to sell and the Applicants agreed to purchase certain of the Respondent's lands in Arklow, Co. Wicklow (hereinafter "the 1999 Agreement"). It is not in dispute that a special condition of the 1999 Agreement provided that the Applicants would construct a 25 foot-wide roadway of "hardcore" within three years. The relevant deed of transfer was dated 22 October 1999 and it is not in dispute that the three-year time limit expired on 22 October 2022. It is common case that the roadway has never been built and, in the manner more fully explained later in this judgment, planning permission has been refused for such a roadway.
3. The Respondent issued legal proceedings in the form of an equity civil bill dated 9 June 2010 seeking specific performance of the 1999 Agreement, as well as seeking damages for breach of contract in lieu of or in addition to specific performance, limited to the jurisdiction of the Circuit Court. In the manner explained in due course, there were certain periods during which the Respondent agreed to forbear taking any steps against the Applicants and I will presently refer to same, as well as to certain payments made by the Applicants to the Respondent in that context. I will also refer in due course to the co-operation between the Respondent and the Applicants as regards the seeking of planning permission to construct the road, which permission was ultimately refused in August 2017. Before turning to look at certain relevant principles it is appropriate to note that the Respondent obtained an order from the Circuit Court in October 2018 transferring the proceedings to this court.

Relevant principles

4. Order 122, rule 11 of the RSC provides that where there has been no proceeding for two years, a Defendant may apply to the court to dismiss the claim for want of prosecution

and, on the hearing of such an application, this court may order that the matter be dismissed or may make such other order as the court deems just. It is fair to say that there is a wealth of jurisprudence in this area and the relevant principles are well settled. The oft-quoted decision of the Supreme Court in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459 sets out the appropriate approach for this court to take on an application to dismiss proceedings for failure to prosecute same.

Primor principles

5. It is fair to say that *Primor* essentially lays down a three-part test, in that the court must ask (i) is the delay inordinate?; (ii) is the delay inexcusable?; and (iii) if the delay is both inordinate and inexcusable, is the balance of justice in favour of, or against, the case being allowed to proceed? The onus lies on the moving party – in this case the Applicants – to establish that there has been inordinate and inexcusable delay on the part of the Plaintiff. If the court answers the first of the two *Primor* questions in the affirmative, it is fair to say that the onus ‘shifts’, such that there is then an onus on a Plaintiff/Respondent to show that the balance of justice lies in favour of allowing the action to proceed where there has been inordinate and inexcusable delay.

Shifting onus

6. As the Court of Appeal made clear in *Sweeney v Cecil Keating t/a Keating Transport & McDonnell Commercials (Monaghan) Ltd.* [2019] IECA 43: -

“If the delay is found to be both inordinate and inexcusable, the court is then obliged to consider what is frequently described as the third leg of the *Primor v. Stokes* test, whether the balance of justice favours the dismissal of the action. The onus of proof shifts to a Plaintiff to establish the existence of countervailing circumstances which would warrant permitting the proceedings to proceed to trial (see the judgment of Fennelly J. in *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 IR 510). This is because the scales of justice at that point are weighed against the Plaintiff who has been found guilty of inordinate and inexcusable delay. If the position was otherwise, there would be no point in a court engaging in an assessment as to whether the Plaintiff had been guilty of inordinate and inexcusable delay. The court might just as readily commence its analysis of the application by deciding whether the justice of the case would favour permitting the action proceed to trial.”

Scrutiny of reasons

7. It seems uncontroversial to suggest that delays of many months at a time, and delay which can be measured in years, can fairly be called inordinate in the sense of being out of the ordinary, excessive and/or irregular, in the context of the underlying obligation which every Plaintiff has to progress their case with reasonable expedition. Insofar as reasons are proffered to excuse delay, any such reasons must withstand judicial scrutiny and must be evidence-based and sufficient to explain the relevant delay. As Baker J. made clear at para. 11 in *Sweeney*:

“The authorities require that the delay not merely be explained but that the explanation be one that excuses the delay. In *Millerick v. Minister for Finance*

[2016] IECA 206, Irvine J. considered that the explanation must be scrutinised, must be supported by evidence, and must 'legitimately excuse' the delay in pursuing the claim."

Pre-commencement delay

8. It is also clear from the jurisprudence that, in dealing with a motion of the present kind, the court is entitled to have regard to any delay on a Plaintiff's part prior to the commencement of the relevant proceedings and is also entitled to ask whether it could be said of the Plaintiff that their proceedings involved a "late start". The significance of pre-commencement delay was made clear by Irvine J. at para. 36 of the Court of Appeal's decision in *McNamee v Boyce* [2016] IECA 19:

"Yet another principle which has emerged from many recent judgments of the superior courts dealing with the issue of delay is that in considering whether or not the post commencement delay has been inordinate, the court may have regard to any significant delay prior to the issue of the proceedings: (see *Cahalane and Another v. Revenue Commissioners and Others* [2010] IEHC 95 and *McBreathly v. North Western Health Board* [2010] IESC 27). These decisions support the proposition that where a Plaintiff waits until relatively close to the end of the limitation period prior to issuing proceedings that they are then under a special obligation to proceed with expedition once the proceedings have commenced."

The foregoing principle to the effect that a party prosecuting a claim after a lengthy delay is under a particular onus to progress their proceedings with due expedition was also made clear in *Manning v Benson & Hedges* [2004] 3 IR 556.

Primary focus on Plaintiff

9. Although the jurisprudence makes clear that the conduct of *both* sides must be examined on an application of the present kind, the authorities also recognise that, given the material difference in their positions arising out of the fact that it was the Plaintiff who decided to commence litigation, silence or inactivity on the part of a Defendant does not constitute acquiescence on their part and does not excuse a Plaintiff's delay. As Irvine J. (as she then was) stated at paras. 36 – 38 of the Court of Appeal's decision in *Millerick*:

"36. It is clear from the authorities that the conduct of both parties to proceedings has to be examined in considering an application of this kind. Having said that, the judgment of Fennelly J. in *Anglo Irish Beef Processors Limited* makes clear that it is the conduct of the litigation by the Plaintiff, that is the primary focus of attention. A Defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the Defendant that constitutes acquiescence in the delay, his silence or inactivity is not material. It is obviously not a consideration on the first question as to whether the delay is inordinate and inexcusable. The only way it can arise therefore is in the balance of justice. The question at that point is whether the Defendant caused or contributed to the Plaintiff's delay or in some manner gave

the Plaintiff to understand or led him to believe that the Defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the Plaintiff. This understanding of the law is also consistent with the later authorities of the Supreme Court and the High Court.

37. In my view, the Minister in the present case cannot be deemed culpable for mere inactivity. After all, it is the Plaintiff who commences legal proceedings and draws the Defendant into the legal process. No Defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise. In many cases the Plaintiff has no valid claim and they may be no mark for any award of costs that a Defendant may obtain following a successful defence of the proceedings. Often times, a Defendant's personal or professional reputation may be badly scarred regardless of having mounted a successful defence to a claim.

38. Why should a Defendant who believes that there is some chance that the Plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant Plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?"

Countervailing circumstances

10. The importance of a Plaintiff being able to point to "countervailing circumstances" sufficiently weighty to tip the scales in favour of a claim being permitted to proceed in the interests of justice (i.e. after it has been established that the delay has been inordinate and inexcusable) has been emphasised in numerous decisions. Two decades ago Mr. Justice Fennelly, in his judgment in *Anglo Irish Beef Processors Ltd. & Anor v Montgomery & Ors.* [2002] IESC 60, stated (with reference to the decision of Hamilton C.J. in *Primor*):

"One of the authorities cited by Hamilton C.J. was *O'Domhnaill v. Merrick* [1984] I.R. 151, where Henchy J. said at p. 157:-

"Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a case. However, where, as in this case, the delay has been inordinate and inexcusable, *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" (emphasis added).

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.

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. (emphasis added)

Something weighty

11. The foregoing makes clear that, if inordinate and inexcusable delay has been established, it is a matter for the Plaintiff/Respondent to point to "*countervailing circumstances*" which must, of necessity, be "*something weighty*" if they are to cancel out the effects of the Plaintiff/Respondent's behaviour insofar as the inordinate and inexcusable delay established. Thus, when it comes to the third limb of the *Primor* test, the scales are not evenly balanced. Rather, they have tipped decisively in favour of the dismissal of proceedings where inordinate and inexcusable delay have been established and the burden is firmly on a Plaintiff/Respondent to tip the scales in the opposite direction. As Allen J. put it in the recent decision in *South Dublin County Council v CF Structures Limited* [2021] IEHC 5 (having referred, *inter alia*, to the judgment of Fennelly J. in *Anglo Irish Beef Processors Limited*):

"... if the Defendant establishes that there has been inordinate and inexcusable delay in the prosecution of the action, the onus is squarely on the Plaintiff to demonstrate that the balance of justice is in favour of allowing the action to proceed."

Moderate/marginal prejudice

12. Given the onus facing a Plaintiff/Respondent where inordinate and inexcusable delay has been established, and the necessity for such a Plaintiff to demonstrate weighty countervailing circumstances, it is unsurprising that, as the authorities make clear, a court may decide to dismiss proceedings even where only *modest* prejudice has arisen for delay. As Irvine J. (as she then was) made clear at para. 35 of the Court of Appeal's decision in *McNamee v Boyce* [2016] IECA 19:

“Accordingly, where a Plaintiff has not been guilty of inordinate and inexcusable delay, the Defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the Defendant proves culpable delay on the part of the Plaintiff in maintaining the proceedings, the Defendant need only prove moderate prejudice arising from that delay in order to succeed under the *Primor* test.”

13. It seems clear that the phrase “*culpable delay*” referred to inordinate and inexcusable delay having been established. The same principle was referred to in the learned judge’s decision in *Millerick v Minister for Finance*, wherein, (at para. 32), it was stated *inter alia* that: “*It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. (See Cassidy v. The Provincialate [2015] IECA 74).*”
14. The Court of Appeal’s decision in *Sweeney* expresses the same principle, namely, that even marginal or modest prejudice may justify the dismissal of proceedings where inordinate and inexcusable delay has been established. At para. 34, Baker J. stated:

“Finally, the jurisprudence makes clear that, in a case where a Defendant has established inordinate and inexcusable delay, even moderate prejudice can tip the balance in favour of the dismissal of the action (see, for example, *Stephens v. Flynn* [2008] IESC 4, [2008] 4 IR 31).”

General prejudice

15. Examples of specific prejudice which appear in the jurisprudence includes the death of witnesses; but even where it appears that all witnesses are likely to be available to give evidence at a future trial, prejudice can arise as a result of delay. In *Rogers v Michelin Tyre Plc & Anor.* [2005] IEHC 294, Clarke J. (as he then was) made clear that, in an application of the present type, this court may have regard to general prejudice which could reasonably be expected to occur. In the context of analysing the extent to which a relevant witness might be impaired in giving evidence, the learned judge referred to the statement made by Finlay Geoghegan J. in *Manning v Benson & Hedges Limited* to the effect that: “*delays of four to five years as a matter of probability will reduce the potential of such persons to give meaningful assistance or act as a witness.*”
16. Clarke J. (as he then was) refused to criticise the Defendants in the *Rogers* case for failing to put before the court any evidence as to the specific manner in which the relevant witnesses might find themselves impaired in giving evidence, and he went on to say that:

“The Defendant is entitled to rely on what might reasonably be called general prejudice, that is to say the prejudice which could reasonably be expected to occur in any case of the type concerned and having regard to the delay involved. A Defendant will also be entitled, if it wishes, to put before the court any special or additional prejudice.”

O’Domhnaill principles

17. What the Court of Appeal characterised as being an “overlapping” but “separate” stream of jurisprudence derives from the Supreme Court’s decision in *O’Domhnaill v Merrick* [1984] IR 151. It seems to me fair to say that a comparison of the *Primor* and *O’Domhnaill* principles suggests that *Primor* concentrates on the Plaintiff’s conduct, before moving to the Defendant’s position, whereas the *O’Domhnaill* principles concentrate on the Defendant and the question of whether they would suffer a patent injustice or unfair burden if required to meet the delayed claim. At para. 40 of Mr. Justice McKechnie’s judgment in *Comcast International Holdings Ltd v Minister for Public Enterprise* [2012] IESC 50, the learned judge commented as follows on the distinction between the approaches taken under the *Primor* as opposed to the *O’Domhnaill* principles and the “test” to be applied by the court derived from *O’Domhnaill*;

“40. As the motions which issued in these proceedings disclose, the dismissal relief is sought not only for failing to prosecute but also on the basis of the interests of justice. That the courts have such an inherent jurisdiction cannot be doubted. It surfaced in *O’Domhnaill*, was further established in *Toal* (No. 1) and *Toal* (No. 2), and since then, in several cases, has been accepted without question. It has a somewhat distinct basis and separate existence from *Primor*, but many of the matters relevant for its application are common to both. The test to be applied has been described variously such as, by reason of lapse of time or delay:

- (i) is there a real and serious risk of an unfair trial, and/or of an unjust result;
- (ii) is there a clear and patent injustice in asking the Defendant to defend;
or
- (iii) does it place an inexcusable and unfair burden on such Defendant to so defend?

The justification for the existence of this jurisdiction was described by Finlay C J. in *Toal* (No. 2), a case in which the Plaintiff was blameless for the delay involved and where the proceedings were issued within the permitted statutory period, as stemming from the supremacy of the court’s constitutional obligation which transcends any legislative provision to achieve justice inter partes. No specific article of the Constitution was quoted in this regard, but the administration of justice and the personal rights provisions, must have been intended.”

Defendant - focused

18. Later, at para. 2, McKechnie J. commented as follows on the features of the jurisdiction articulated in the *O’Domhnaill* decision:

“42. There are a number of features to this jurisdiction which are worthy of note: Firstly, that it applies even if the proceedings are instituted within the statutory period prescribed for by the Oireachtas; secondly, that a Defendant can succeed in avoiding a merit hearing even where a Plaintiff is entirely blameless for the delay, in either a personal or a vicarious sense; and thirdly,

that the time period looked at, commences from the date of the alleged wrongful acts and continues to the anticipated date of trial. In addition however, it also has the distinct feature of its focus being on the Defendant: As appears from the descriptive nature of the test as given, the criterion essentially is Defendant directed. This is in stark contrast to the *Primor* principles where the positions of both are equally considered. It is therefore clear that this is a wider jurisdiction than *Primor* with a lower threshold to surmount before its successful invocation. That distinction, coupled with the others as identified, makes this jurisdiction one which should be sparsely used and little availed of. I fully agree with the words of Hogan J in *Donnellan v. Westport Textiles (In voluntary liquidation) v. The Minister for Defence, Ireland, and the Attorney General* [2011] IEHC 11 where in this context, the learned judge, having stated that such jurisdiction permits the court in an appropriate case to “strike out proceedings, even though the third limb of the *Primor* test might not have been established”, went on to caution that, “[o]f course, such cases would have to be exceptional”.

19. Thus, the test laid down in *O'Domhnaill* does not require this Court to consider whether the delay on the part of a Plaintiff/Respondent is blameworthy. Rather, the test is focused on whether unfairness would arise if the matter were to proceed to a trial, in the context of the period of time which has elapsed, from the accrual of the cause of action to a likely trial date.

Unfair trial

20. Commenting on the nature and exercise of the foregoing jurisdiction, Irvine J., (as she then was) put matters as follows in paras. 31 and 32 of the Court of Appeal's judgment in *Cassidy v. Proviciale* [2015] IECA 74:

31. In addition to its right to dismiss a claim on the grounds of inordinate and inexcusable delay, the court also retains a jurisdiction to dismiss a claim, in the absence of culpable delay on the part of the Plaintiff, if satisfied that the interests of justice require such an approach, as was explained by Geoghegan J. in *McBrearty v. North Western Health Board* [2010] I.E.S.C. 27. This latter jurisdiction was first considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151 where Henchy J. expressed himself satisfied that a court might dismiss an action if it was satisfied that to ask the Defendant to defend the action would place that Defendant under an inexcusable and unfair burden. He explained the potential consequences for justice in cases which were substantially delayed in the following manner at p. 158 of his judgment:-

"While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons a trial in 1985 of a claim for damages for personal injuries sustained in a road accident in 1961 would be apt to give an unjust or wrong result, in terms of the issue of liability or the

issue of damages, or both. Consequently, in my opinion, the Defendant, who has not in any material or substantial way contributed to the delay, should be freed from the palpable unfairness of such a trial.”

32. While the *Primor* jurisdiction is usually exercised in proceedings where there has been post-commencement delay or a combination of pre- and post-commencement delay, the *O'Domhnaill* jurisdiction is most usually employed where, at the time the application to dismiss is brought, such a significant length of time has elapsed between the events giving rise to the claim and the likely trial date that the Defendant can maintain that, regardless of the absence of blame of the part of the Plaintiff for that delay, it would be unjust to ask to the Defendant to defend the claim. The question most commonly considered by the court when exercising its *O'Domhnaill* jurisdiction is whether, by reason of the passage of time, there is a real or substantial risk of an unfair trial or an unjust result.

21. Thus, the sole focus of the court in the exercise of its jurisdiction in line with the *O'Domhnaill* principles is whether there is a real risk that it is no longer possible to have a fair trial. That question, of course, is also one which the court must pose in the context of considering where the balance of justice lies under the third limb of the *Primor* test and, before turning to the facts in this case, it seems appropriate to return to *Primor* and to quote, verbatim, the test as outlined in detail by Hamilton CJ in *Primor*, as follows: -

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

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
- (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
- (c) even where the delay has been both inordinate and inexcusable the Court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
- (d) in considering this latter obligation the Court is entitled to take into consideration and have regard to
 - (i) the implied constitutional principles of basic fairness of procedures,
 - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the Defendant to allow the action to proceed and to make it just to strike out the Plaintiff's action,
 - (iii) any delay on the part of the Defendant because litigation is a two party operation the conduct of both parties should be looked at,
 - (iv) whether any delay or conduct of the Defendant amounts to acquiescence on the part of the Defendant in the Plaintiff's delay,

- (v) the fact that conduct by the Defendant which induces the Plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the Defendant from obtaining a striking out order but is a relevant 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."
22. It is fair to say that there is no dispute between the parties as to the applicable law and, armed with the foregoing principles, it is appropriate to turn to the evidence before the court.

The evidence

23. I have carefully considered all the evidence which was put before the court and which comprised the following: -
- the affidavit of Patrick McGuckian, sworn 9 October, 2020 and the exhibits ("A" to "K") thereto;
 - the supplemental affidavit of Patrick McGuckian sworn 19 October, 2020 and exhibit "PMcGL" thereto;
 - the affidavit of Michael Herbst sworn 20 January, 2021 and the exhibits ("MH1" to "MH8") thereto;
 - the third affidavit of Patrick McGuckian sworn 17 February, 2021;
 - the supplemental affidavit of Michael Herbst sworn 16 March, 2021 and the exhibits ("MH9" to "MH11") thereto;
 - the fourth affidavit of Patrick McGuckian sworn 1 April, 2021 and exhibit "4PMcG1" thereto;
 - the supplemental replying affidavit of Michael Herbst sworn 22 April, 2021 and exhibited "MH" referred to therein;
 - the fifth affidavit of Patrick McGuckian sworn 6 May, 2021 and exhibit "5PMcG1" referred to therein.
24. It is unnecessary, for the purposes of the present application, to comment on those affidavits on a paragraph by paragraph basis. I will presently set out, in chronological order, certain facts which emerge from a careful analysis of the totality of the affidavit

evidence. Having also carefully considered the pleadings, I will make reference to same in the context of a chronology of dates and events which appears to me to be most relevant.

Submissions

25. I want to express my thanks to Mr. Quirke SC, for the Applicants and to Mr. Gleeson SC, for the Respondents, both of whom provided the court with detailed written submissions which were supplemented by means of oral submissions made with clarity and great skill during the course of the hearing which took place on 9 and 10 December, 2021. I have carefully considered all submissions, written and oral and will refer to the principal submissions during the course of this judgment.

Material facts in chronological order

26. The following comprises a setting – out, in chronological order, of dates and events which appear to me to be the most material insofar as the present application is concerned.

27. On 24 September, 1999 the Applicants (as purchasers) and the Respondent (as vendor) entered into the 1999 Agreement whereby the Applicants purchased certain lands from the Respondent for an agreed sum of €1million, special condition 12 of which Agreement provided: *"12. The roadway on the western boundary of the subject property over which the Vendor is to have a right of way shall be 25 feet wide. The Purchaser shall install this roadway within three years of completion and make same a basic hardcore roadway."* The 1999 Agreement is entirely silent on the question of planning permission. At para. 13 of the third affidavit of Mr. McGuckian, sworn on 17 February 2021, he avers that *"...it was not understood at the time that the land was sold or afterwards that (sic) by the parties that the work would require planning."* The foregoing would appear to be an uncontroverted averment. The deed of transfer in respect of the lands purchased by the Applicants was dated 22 October, 1999. Thus, the three-year period within which the Applicants were required to construct the roadway was due to expire as of 22 October 2002.

28. Regarding the year 2000, there is no evidence before the court of any step taken by the Applicants to construct the relevant road, or of any request made by the Respondent for same.

29. Regarding 2001, there is no evidence before the court of any steps taken by the Applicants to construct the roadway, or of any request made by the Respondent in respect of its construction.

30. Regarding 2002, the deadline specified in the 1999 agreement expired as of 22 October in that year. There is no evidence before the court of any step taken by the Applicants to construct the roadway prior to the foregoing deadline. Nor is there evidence of any request made of them by the Respondent. It is, however, uncontroversial to say that the Respondent's 'cause of action' accrued as of 23 October, 2002, given that the road was not, in fact, built by then. There is no evidence of the Respondent doing anything upon the accrual of his cause of action, either by way of calling on the Applicants to construct the roadway or commencing legal proceedings arising out of their failure to do so.

31. With regard to 2003, there is no evidence of the Respondent taking any step whatsoever. No proceedings were issued and there is no evidence of any letter written by or on behalf of the Respondent to call upon the Applicants to construct the road, notwithstanding the expiry of the relevant deadline as of 22 October 2002.
32. Regarding 2004, there is no evidence of the Respondent taking any step whatsoever during 2004. There is no evidence of the Respondent progressing any claim against the Applicants, nor does he exhibit even a single letter from 2004.
33. Regarding 2005, the Respondent has exhibited 3 letters. The first is a one-line letter dated 21 March 2005, sent by A&L Goodbody solicitors, who were then representing the Applicants. It simply states "*We confirm receipt of your letter of 15 March, 2005 and have passed a copy of same to our clients*". What the letter dated 15 March 2005 may have said is entirely unknown as it appears that a copy cannot be located. The second letter which the Respondent exhibits is a one-line letter from his solicitor to the Applicants' solicitors stating "*Previous correspondence refers. Please let us hear from (sic) you in relation to all matters at your earliest convenience.*" It is entirely fair to say that the foregoing evidences no urgency whatsoever on the part of the Respondent to bring legal proceedings, notwithstanding the passage of six years since the 1999 Agreement had been entered-into, against the backdrop of no roadway having been constructed and the Respondent's cause of action having accrued some three years earlier. The third and final letter exhibited by the Respondent is dated 18 August, 2005. It is a short letter sent by the Respondent's solicitor requesting "*...that your client complies with the outstanding requirements*" going on to state that "*as our clients are neighbours we are not anxious to enforce matters and would appreciate it if you could please request your clients to carry out the necessary works forthwith*". It seems entirely fair to say that this was a letter written on the instructions of the Respondent almost six years after the entering-into of the 1999 Agreement and three years after the accrual of the Respondent's cause of action which, far from indicating any urgency on the part of the Respondent to enforce his rights by way of legal proceedings, suggests the exact opposite. It is a matter of fact that no proceedings were issued in 2005 and no correspondence from that year post-dating the letter of 18 August 2005, has been exhibited by the Respondent.
34. Regarding 2006, the Respondent does not appear to have done anything throughout the entire year, save for the sending of a three-line letter dated 06 December 2006 to which I will refer presently. Before doing so, it is appropriate to note, that by contract dated 25 May 2006, the Applicants (as vendor) sold their interest in the relevant property to the Third Named Defendant (as purchaser). It is not suggested that the Respondent had any entitlement to be put on notice of such a sale, nor was he. It is entirely fair to say that, up to and beyond the point at which the Applicants sold the lands in question to the Third Named Defendant in mid-2006, the Respondent had shown no interest whatsoever in commencing legal proceedings to seek to enforce his rights pursuant to the 1999 Agreement (on the contrary, the letter of 18 August 2005 stated that he was "*not anxious to enforce matters*"). The question of the roadway was addressed in special condition 6 of

the 25 May, 2006 contract between the Applicants and the Third Named Defendant which stated the following: -

"6. The Vendor warrants that the following text was contained in the agreement under which the Vendor purchased the Subject Property from Michael Herbst and that these are the sole terms relating to this matters: -

'The roadway on the western boundary of the Subject Property over which the Purchaser is to have a right-of-way shall be twenty-five feet wide. The Purchaser shall install this roadway within three years of completion and make same a basic hard core roadway.'

It is a condition of the Sale that the Purchaser shall build a basic hard core roadway in compliance with the foregoing obligation within 18 months from the date of completion of the Sale and the Purchaser shall indemnify and keep indemnified the Vendor against all and any expenses, costs, claims, demands, damages, losses and other liabilities whatsoever arising from the failure of the Purchaser to comply with this obligation. If the Purchaser fails to do so within 6 months of the date of completion of the Sale the Vendor shall have the right without prejudice or limitation to any other right or remedy it might have to come onto the Subject Property with or without machinery and workman and carry out the construction of the roadway as aforesaid and the costs and expenses incurred by the Vendor as a result of executing the construction works shall be paid by the Purchaser to the Vendor on demand. The Purchaser shall pay interest to the Vendor on any unpaid amount at the Stipulated Interest Rate from the date of demand and such interest shall accrue from day to day and shall be payable before and after any judgment. Covenants to this effect shall be included in the Assurances."

35. It is not in dispute that a sale on the foregoing terms completed. Thus, from mid-2006, the Applicants had sold the relevant lands and had obtained an indemnity as regards the construction of the relevant roadway from the Third Named Defendant who was legally obliged to construct same. Although nothing would appear to turn on it, the period of "*18 months*" referred to in special condition 6 constituted an amendment to what was stated previously in the typed document, namely, "*six months*". In other words, it seems clear from the copy document exhibited that "*six*" was originally typed, but this was 'crossed out' and "*18*" written instead.
36. It is not in dispute that the Respondent was unaware of the foregoing sale which took place in mid-2006, at that time. The Respondent does not appear to have taken any step whatsoever in 2006, apart from instructing his solicitors to write to the Applicants' solicitors by letter dated 6 December, 2006 which merely stated: -

"Dear Sirs,

We refer to previous correspondence in relation to the above matter. Pursuant to contract, your client is required to comply with certain requirements. We have

written to you on a number of occasions in relation to these. To date same has not been completed. Please arrange to have the relevant works carried out forthwith.

Yours faithfully."

37. The foregoing appears to have been the only step taken by the Respondent in 2006. It is entirely fair to say, that despite the passage of over seven years since the 1999 Agreement was entered into and despite the fact that the Respondent's cause of action accrued over four years earlier, the foregoing letter does not even suggest an intention on the part of the Respondent to issue legal proceedings in respect of his rights, pursuant to the 1999 Agreement. I also take the view that, even if the Respondent had issued proceedings in 2006, those proceedings could fairly have been described as involving a "late start". Of course, the Respondent did not issue any such proceedings. It is also fair to say that no excuse whatsoever has been proffered by the Respondent to explain what was, on any analysis, considerable pre-commencement delay up to 2006. I now turn to look at relevant events in 2007.
38. Insofar as 2007 is concerned, the Respondent does not appear to have done anything until, by letter dated 12 February 2007, his solicitors wrote to the Applicants' solicitors stating: -
- "We refer to the above matter and to our previous correspondence, a further copy which we now attach for your convenience. We would very much appreciate hearing from you further in relation to all matters at your earliest convenience".
39. It is fair to say that this did not signal any intention to institute legal proceedings, despite the fact that the relevant Agreement had been entered into seven and a half years earlier and the Respondent's cause of action had accrued four and a half years beforehand. The Applicants' solicitors replied on 16 February 2007 to confirm that they had passed a copy of the correspondence to their clients and had requested their instructions. On 27 March 2007, a Mr. Declan Stone of Colliers Jackson – Stops, property consultants and chartered surveyors, wrote directly to the Respondent's solicitors in a letter which stated *inter alia*: -
- "Firstly, I have to put my hands up and say sorry in relation to this matter. To be honest, it is one of those things that we 'long-fingered' for a long time quite simply because we were attempting to get planning on the land and have not carried out any physical works on it. We had always hoped to hold off on such works until we received planning. As things transpired, as I mentioned to you, we ultimately disposed of the property and the sale closed about early August 2006".
40. It is not suggested that the reference to getting "*planning on the land*" referred to any planning application in respect of permission to build the road. The letter went on to refer to the sale of the lands to the Third Named Defendant on the basis that the latter had 18 months from the date of the closing of the sale, i.e. to the end of January 2008, to construct the road. The letter enclosed a copy of the contract of sale from the Applicants

to the Third Named Defendant as well as a cheque for €15,000 on the basis that the Respondent would "deal with" the Third Named Defendant, as per the condition which required the latter to construct the road. In a reply sent by the Respondent's solicitor on 22 March 2007, Mr. Stone was informed that:

"There is a hitch and I will hold your letter and cheque until we resolve it. Our client and I have no notice that you were seeking a further 10-month extension. I was of the understanding the work would be done in the next few months and the compensation was for past delay. Our client requires the road to be completed as per the contract as it is affecting the value of his retained lands. With goodwill on all sides, this should be capable of being completed in the next few months. Please let us have your proposals".

41. It is not in dispute that the Respondent accepted the cheque for €15,000.00, nor is it in dispute that the roadway was not constructed by January 2008, as per special condition 6 in the 25 May 2006 contract between the Applicants and the Third Named Defendant, (which contract the Respondent first learned about in March 2007). In light of the foregoing, the Respondent could not be criticised in respect of delay with regard to the commencement of proceedings during the period from March 2007 to January 2008, inclusive.

Delay up to March 2007 – The first period of significant delay

42. However, the evidence demonstrates the fact that, up to March 2007, it was the Respondent's understanding that the Applicants (a) continued to own the land and (b) had not constructed the roadway, despite the obligation to do so pursuant to the 1999 Agreement. Thus, it is entirely fair to criticise the Respondent for his delay up to March 2007. This is the first period of significant delay on the part of the Respondent, being pre-commencement delay. It is now appropriate to look at what occurred in 2008.

First forbearance period (March 2007 to January 2008)

43. In the manner explained above, the period from March 2007 to January 2008 can fairly be called a period of forbearance during which no blame could attach to either party in respect of delay, but that period expired without the Respondent taking any action as of the end of January 2008, being the deadline by which the Respondent knew that the Third Defendant was required to construct the road.
44. Regarding 2008, there is no evidence of the Respondent doing anything at all throughout 2008, despite the expiry of the forbearance period, as of the end of January 2008, which saw no road constructed.
45. With regard to 2009, the Respondent has exhibited a single letter, which is dated 17 February 2009, and was sent by his solicitor to Mr. Stone. It began by referring to correspondence of March 2007 and the letter stated inter alia: -

"As you recall our agreement was that you paid €15,000 to our client in recognition that he was prepared to accept that the purchaser had eighteen months to install the roadway on the western boundary 25 feet wide made up with hardcore. As you

quite rightly recognise in your letter the eighteen months would have expired by the end of January 2008. We have now passed January 2009 and there is no sign of a roadway. Our client has lost an important investment opportunity to sell on this roadway. Clearly he needs a roadway access to develop his property. Please let us have your proposals to resolve this matter within 14 days from the date hereof. Failing so hearing from you with satisfactory remedy, our client will have no alternative but to proceed by way of specific performance”.

In a reply sent by Mr. Stone on 21 May 2009, the latter stated *inter alia* that: -

“As I explained, we have been making efforts with Glenford to get them to comply with that clause of the contract of sale to them, imposing the condition to build the road as originally agreed. Not surprisingly however, I have no doubt that as a house builder in the current economic climate, they are finding things extremely tough”.

The letter went on to state that, having regard to the manner in which the transaction between the Applicants, as vendor, and the Third Defendant, “Glenford”, had been structured: -

“Glenford cannot effect any further sale transaction on the land (or any part of it, again as I’m informed) without the vendor’s signature. It goes without saying that this signature will not be forthcoming until they have completed that condition of building the road, (or paid to have it done). Again, I would stress that we are pursuing them but ultimately we can rely upon the fact that they rely upon us to effect any further land sales, as the guarantee to get this road built”.

46. Other than the foregoing exchange, there is no evidence of the Respondent doing anything in 2009 to progress his claim, notwithstanding the fact that the 10-year anniversary of the entering-into of the 1999 Agreement came and went. It is entirely fair to say that, although the letter from the Respondent’s solicitors, dated 17 February 2009, threatened ‘specific performance’ proceedings within 14 days, no such proceedings were issued within 14 days or, for that matter, within 14 months. I now turn to look at what occurred in 2010.
47. Nothing appears to have been done in 2010 until the Respondent instituted Circuit Court proceedings by means of an Equity Civil Bill, dated 18 June 2010. It will be recalled that the forbearance period (which commenced in March 2007) expired as of January 2008. Thus, it is fair to say that the Respondent appears to have done nothing to progress his claim from the end of January 2008 until proceedings were instituted on 18 June 2010.

Delay from January 2008 to June 2010 – The second period of significant delay

48. The period from the end of January 2008 up to the issuing of a Civil Bill on 18 June 2010 represents a second significant period of pre-commencement delay on the part of the Respondent, for which no explanation has been given. It is a statement of the obvious that the Civil Bill was issued over seven and a half years after the Respondent’s cause of

action accrued and over ten and a half years *after* the 1999 Agreement was entered into. Even giving the Respondent full "credit" for the first forbearance period, it is clear he made a very "late start" to proceedings, so late that the question of his claim being "statute barred" is an issue which would need to be resolved at any future trial.

The Plaintiff's civil bill

49. It is plain that the primary relief sought in the Civil Bill is that of specific performance. Para. 4 of the indorsement of claim refers to the 24 September 1999 Agreement and to special condition 12 in the relevant contract as between the Respondent (as vendor) and the Applicants (as purchaser). Paras. 5 – 7 refer to the Transfer, dated 22 October 1999, and the fact that the roadway was not constructed upon the expiry of three years from that date, despite the Respondent calling on the Applicants to do so. Para. 8 of the indorsement of claim refers to the fact that, in March 2007, the Respondent learned from the Applicants' agent that the land had been sold to the Third Named Defendant and that it was a condition that the latter would construct the roadway within 18 months; and reference was also made to the €15,000 in the context of an extension of time agreed for the construction of same. Para. 9 referred to the failure of "*the Defendants, and each of them*" to construct the roadway and the final plea made as per para. 10 was in the following terms: -

"10. By reason of the matters aforesaid the Plaintiff has been hindered in the development of his land and also has been unable to rent out his land due to the absence of the roadway. Full particulars of which will be provided at the hearing of the actions

AND THE PLAINTIFF CLAIMS:

1. Specific performance of the agreement between the Plaintiff and the first and second named Defendants, whereby the first and second named Defendants agreed to construct a roadway.
 2. Damages for breach of contract, in lieu of or in addition to specific performance limited to the jurisdiction of this honourable court.
 3. Further or other relief.
 4. Interest pursuant to Statute.
 5. Costs".
50. In a manner I will presently come to, the Respondent's claim is now one exclusively focused on *damages* rather than *specific performance*. Although it is not pleaded in the indorsement of claim to the 9 June 2010 Equity Civil Bill, it is plain from the affidavits sworn by the Respondent, in 2021, that a key element of the claim he wishes to advance is that he had a 6 acre site with development potential for which the roadway was essential and, although not particularised, it is clear that the Respondent now wishes to make a substantial damages claim, contending that the Applicants were, at all material

times aware of the 6 acre site and its development potential and that it was the reason why the roadway was so important. Moreover, the Respondent now asserts that this was made known to the Applicants and to their agents, in particular, to Mr. Stone, throughout all negotiations. In any event, an Appearance was entered in July 2010 on behalf of all of the Defendants and an amended Appearance was entered on 30 November 2010, on behalf of the Applicants alone.

51. 'Warning letters', dated 24 July 2010 and 9 August 2010 were sent, following which, a motion, dated 4 November 2010, was issued seeking judgment in default of defence. The said motion was returnable before the County Registrar on 6 December 2010 and was adjourned to the Judge's List. I now turn to what occurred in 2011.
52. By letter dated 9 May 2011, Messrs Matheson, Ormsby, Prentice Solicitors ('Matheson'), acting for the Receiver of the Third Defendant, wrote to the Respondent's solicitor requesting an adjournment of the aforementioned motion in order to facilitate settlement talks between the parties, and the motion was adjourned to 6 September 2011. By letter dated 21 July 2011, Matheson wrote to the Respondent's solicitor stating *inter alia*, that: "the Company is insolvent and we are satisfied that your client's claim against the Company will rank as unsecured. The Receiver is not obliged to deal with unsecured claims, which are a matter for the directors of the company...notwithstanding this, it appears to us that the Company should not have been named as Defendant in the Proceedings in circumstances where there is no contractual relationship between the Company and your client. It appears from the reliefs set out in the equity civil bill that you accept this as your client has sought an order for specific performance against the first and second Defendants only". By letter dated 04 August, 2011 the Respondent's solicitor wrote to Matheson stating *inter alia*: "Lest there be any misunderstanding at a later stage, please note that the Plaintiffs [sic] have issued an equity civil bill in this matter seeking specific performance or [sic] agreement whereby Glenford Construction (Wicklow) Limited agreed to construct a roadway. The proceedings were adjourned to September 2011 to see if an arrangement could be reached between the parties on a without prejudice basis with a view to hopefully avoiding the need for further Court action. This is recited in your letter of 9th May, 2011 to me. In that letter it was agreed that the Receiver agreed not to dispose of the Company's interest in the property at issue in these proceedings without reference to us. We intend to rely upon this agreement by the Receiver."
53. It will be recalled that the Applicants sold their interest in the relevant property to the Third Defendant several years *before* the Third Named Defendant company went into receivership. It does not seem unfair to observe that, had the Respondent moved more quickly with regard to asserting his rights and instituting proceedings against the Applicants, there was a period of years during which the Applicants could have relied upon the contractual obligations which the Third Defendant owed them, as regards the roadway and an indemnity in respect of the cost of same. However, a receiver was appointed on or about 24 September 2010, which was just three and a half months after the Respondent issued his Equity Civil Bill. In light of the foregoing, it seems

uncontroversial to say that the receivership and subsequent winding-up of the Third Named Defendant company caused prejudice to the Applicants insofar as an ability to rely on the contractual obligations which that company took on, by means of the 25 May 2006 contract with the Applicants. It will also be recalled that the Respondent was informed of the sale and the obligations assumed by the Third Defendant with regard to the roadway, in March 2007. Indeed, the Respondent agreed to an extension of time so as to allow for the Third Defendant to construct the roadway by January 2008. When no roadway was built the Respondent did not commence any proceedings at the start of February 2008 (which was over two and a half years *before* a receiver was appointed to the Third Defendant). The company was still trading as of February 2008 and no receiver had been appointed. Thus, had the Respondent issued proceedings at that juncture, it seems fair to say that there was at least some prospect of the Applicants being able to rely on the Third Named Defendant company's obligations to them. In any event, the opportunity for the Applicants to do so would appear to have disappeared with the appointment of a receiver, in September 2010. The position, as of September 2011, was that Matheson (solicitors for the receiver) were refusing to accept liability, whereas the Respondent's solicitor stated in a 17 September 2011 email to Matheson: -

- "(i) It is disappointing that you refuse to engage in mediation or indeed these proceedings;
- (ii) Our claim for equitable relief is not only against the first and second named Defendants, it is for specific performance of the agreement between the Plaintiff and the first and second named Defendants, whereby the first and second named Defendants agree to construct a roadway. As you know well this land and obligation was sold to the Third Named Defendant. The Plaintiff together with the first and second named Defendants, will seek an order over and against the Third Named Defendant, directly binding all three Defendants and any purchaser on notice of these proceedings;
- (iii) In this regard you must not only inform us and the Defendants of any sale of the land by you, you must also put the purchaser on notice...".

54. The Respondent's motion had a hearing date of 31 January 2012 and, by agreement, the motion was adjourned to 14 February 2012 to facilitate discussions. On or about 13 February 2012, an interim settlement was reached between the Respondent and the Applicants, whereby, in consideration of the latter paying certain monies, the Respondent agreed to forebear taking any further steps as against the Applicants ("the February 2012 agreement"). It was on the foregoing basis that the Respondent's motion was struck out, on or about 16 February 2012, with no further order.

The period between June 2010 and February 2012

55. At this juncture it seems entirely fair to say that, between June 2010 and February 2012, steps were taken to progress the proceedings and the Respondent could not fairly be criticised for delay. I now proceed to look at what occurred thereafter.

56. Pursuant to the February 2012 agreement, the Applicants were required to pay the Respondent the sum of €15,000 within fourteen days, together with a further payment of €5,000 plus VAT in relation to the Respondent's legal costs; and a further payment of €15,000 was required within twelve months of the signing of the agreement. An unsigned and undated copy of the February 2012 agreement comprises exhibit "F" to the first named Applicant's 9 October 2020 affidavit, but it is not in dispute that the Applicants made all the foregoing payments.

The second period of forbearance – Feb 2012 to July 2014

57. As clause number 1 of the February 2012 agreement makes clear "the Plaintiff agrees to forbear from taking any further steps in the above entitled proceedings, as against the first and second named Defendants, for a period of 2 years 6 months (to 21 July 2014)...". Clause 2 detailed the payments which the Applicants were required to, and did, make. Clause 3 made clear that during the forbearance period, the Applicants would take steps to try and procure the construction, by the Third Defendant, of the roadway in accordance with special condition 6 of the 25 May 2006 contract between the Applicants and the Third Defendant and, alternatively, would seek to procure payment by the latter of the costs of constructing the roadway. Clause 4 went on to provide that, in the event of the Applicants not being able to procure the construction of the roadway within the period of forbearance, they would construct same in accordance with special condition 12 of the 1999 Agreement "...or, at the Plaintiff's absolute discretion, enter into a further agreement with the Plaintiff to further extend the period of forbearance". Having regard to the foregoing, it could not fairly be said that the Respondent was guilty of delay during the period from February 2012 up to and including July 2014. I now turn to what occurred afterwards.

July 2014 onwards

58. It is not in dispute that no roadway was constructed as of the end of the second forbearance period. It is fair to say that, as this date approached, the Respondent will have been well aware that no works whatsoever had been done. The Respondent will also have been very well aware that no further forbearance agreement had been entered-into. Thus, one might expect the Respondent to immediately take steps to 're-animate' his legal claim, particularly in circumstances where the proceedings had been issued in June 2010 and sought an order for specific performance in respect of an agreement entered-into in 1999. The Respondent however, did not do so.
59. It appears that the Respondent did nothing to progress his legal proceedings in 2014, other than to cause a 'Notice of intention to proceed', dated 15 September 2014, to be served. Once the 1-month period referred to in the Plaintiff's Notice of intention to proceed had expired, the Plaintiff did nothing to progress his claim during the remainder of 2014. Nothing in the affidavits delivered by the Respondent explains or excuses his failure to progress his claim in the latter half of 2014, i.e. after the forbearance period expired on 31 July of that year. I now turn to 2015.

60. With regard to 2015, the Respondent appears to have taken no step to progress his claim until a notice of motion seeking judgment in default of defence was issued on 18 November 2015.

Delay from July 2014 to November 2015 – the third period of significant delay

61. It will be recalled that the then most recent period of forbearance expired on 31 July 2014. Thus, a period of fifteen months expired (i.e. August 2014 to October 2015, inclusive) during which the Respondent did not take any formal step to progress his legal proceedings against the Applicants. A Notice of intention to proceed is not a pleading, nor is a notice of change of solicitor. The latter was served on behalf of the Respondent on 08 September 2015. It is fair to say that the Respondent's inaction is further evidenced by the service, on 16 October 2015, of another Notice of intention to proceed. It was not until November 2015 that a motion seeking judgment in default of defence was issued. Nothing in the Respondent's affidavits constitutes an adequate explanation or excuse in respect of this fifteen months' delay which arose against the backdrop of very significant pre-commencement delay.

November 2015 onwards

62. The Plaintiff's November 2015 motion was initially returnable for 14 December 2015. As and from November 2015, the Respondent appears to have taken steps to try to progress the proceedings. Correspondence was also exchanged between the solicitors for the Applicants and the Respondent's solicitor.
63. Regarding 2016, it is fair to say that communication took place between the Respondent's solicitors and those representing the Applicants and the Respondent's motion was adjourned from time to time to see if a satisfactory agreement could be reached. Furthermore, the Respondent retained a Mr. Leslie Luskin, Quantity Surveyor, who was employed to 'cost' the roadway; and a 'without prejudice' meeting was set up for 1 April 2016, with the Respondent's motion adjourned again. On 20 April, 2016, the Respondent's solicitor sent an email to *inter alia*, Mr. Declan Stone, the Applicant's agent, which email stated:

"I met Leslie Luskin QS for McGuckian. He met with them and they were prepared to install the 25-foot basic hard core roadway, but feared that the consequences of digging the roadway back to rock or even through rock could leave any added hard core open to movement and being down onto the public road because of the very steep gradient and the upset to the current natural stone support structure that will be lost by widening the roadway to 25 feet. The McGuckians are concerned about (1) the Plaintiff never being satisfied with the specification and works and (2) possibility of public liability. The solution may be that the McGuckians seek engineering advice and Leslie price it out and send it to Mr. Herbst for approval and then engage a contractor and pay the contractor to install the 25-foot basic hard core roadway and have it signed off by a suitable roads engineer that it complies with the agreed specification and then vest the roadway in Mr. Herbst. Does this bring us any closer to resolution? I am anxious to progress this case to order for specific performance cert in default of agreement."

The Applicants Defence of 12 May 2016

64. On 12 May 2016, the Applicants delivered their Defence. The said Defence contains the following by way of preliminary pleas: -

“Insofar as the Plaintiff’s claim seeks equitable relief the Plaintiff is guilty of both laches and acquiescence and the Court should exercise its discretion not to allow the Plaintiff’s claim to proceed.

The prejudice arising to the first and second named Defendants in defence of this claim which should motivate the Court to exercise discretion to halt the Plaintiff’s claim in equity, is the fact that the Third Named Defendant, who took up the obligations under the original contract of 24 September 1999, to build the roadway across the Plaintiff’s right of way, in favour and to the benefit of the Plaintiff, has gone into receivership and ultimately has been struck off and/or liquidated as insolvent. In such circumstances the indemnity that the first and second named Defendants hold in their favour as against the Third Named Defendant is worthless, whereas had the Plaintiff acted with due expedition, the first and second named Defendants could have enforced their indemnity successfully.”

65. The foregoing seems to me to speak to prejudice which was, in fact, caused to the Applicants as a result of the delay on the part of the Respondent in commencing legal proceedings. Even taking account of the agreement reached in March 2007 whereby, in the context of a payment by the Applicants to the Respondent of €15,000.00, the Respondent extended the period of time to allow for the construction of the roadway, to January 2008, the Respondent failed to issue proceedings in February 2008, despite knowing that the roadway had not been constructed by the extended deadline. Indeed, it was not until July of the *following* year that the Respondent issued the Civil Bill in question.

66. Paragraph 1 of the Defence pleads that the Third Named Defendant company is dissolved, the receivership having taken effect on 29 September 2010. Paragraph 2 refers to the 25 May 2006 contract as between the Applicants and the Third Named Defendant company. It is appropriate to quote *verbatim* paras. 3 and 4 of the Defence, as follows: -

“3. Despite knowing of the transfer of the lands between the first and second named Defendants and the Third Named Defendant as early as March 2007, the Plaintiff did not pursue the breach of contract within six years from the perceived breach in September 2002.

4. It is denied that the Plaintiff has been hindered in the development of his land and also has been unable to rent out his land due to the absence of the roadway and the Plaintiff is put on strict proof in respect hereof.”

67. A Circuit Court ‘Notice of Trial’ and ‘Notice to Produce’, dated 18 July 2016, were delivered by the Plaintiff and the case was listed for hearing in October 2016. By agreement between the parties, the case was adjourned, so as to allow the Applicants to

apply for planning permission in respect of the roadway. At the request of the Applicants, via their agent, Mr. Stone, advice was sought from, and provided by, Mr. Padraig Smith, Architect. Furthermore, the Applicants made an offer to the Respondent to build a roadway of 1.5m in width. This offer was made in circumstances where the advice from the Applicants' architect and planning consultant was that planning permission would not be required for a roadway of that size. It is fair to characterise this offer as an offer to build such roadway as could be built without planning, but this proposal was rejected by the Respondent.

68. It is not in dispute that the Applicants afforded the Respondent the opportunity to examine and to comment on the planning application. Amongst the correspondence exhibited by the Respondent in his 19 June 2018 affidavit (grounding the application to transfer the proceedings from the Circuit Court, to this Court) is a letter, dated 25 October 2016, sent by the Applicants' solicitors to the Respondent's solicitor which states *inter alia*, that:

"Mr. Stone also advises that before preparing the planning application that he personally went to see your client to check if he would prefer a cheque rather than the widened road, as the architects had expressed doubt that such a wide agricultural road would be granted planning permission. Your client reaffirmed that the application for planning permission should be lodged. As you are aware, Mr. Stone is liaising with your client directly in relation to the planning application and requires your client's confirmation that the application is acceptable to him before it can be lodged with the planning authorities."

69. In an email sent on 14 November 2016, the Respondent stated the following to the Applicants' agent, Mr. Declan Stone:

"Declan,

I spoke to Michael Herbst today and he is happy that you proceed with such planning application as your architect deems necessary to construct the agreed roadway.

Gus".

70. It is not in dispute that an application for planning permission in respect of the roadway was prepared and submitted and it is common case that the proceedings were adjourned, initially to 17 April 2017, to facilitate the seeking of planning permission. I now turn to look at what occurred in 2017.
71. In 2017, correspondence was exchanged between the parties with regard to the planning application, which was lodged on 17 January 2017. By letters dated 6 March 2017 and 4 May 2017, Wicklow County Council made requests for further information/clarification in respect of the planning application. The queries raised by Wicklow County Council were furnished to the Respondent who was requested for his input and who gave same.

Agricultural use

72. With regard to question 1(a) as raised by Wicklow County Council, the Respondent's solicitor sent an email, on 9 April 2017, to Mr. Stone and to the Applicants' solicitors stating *inter alia*: "In relation to question 1(a) we are instructed the use will continue to be agricultural use and our client Michael Herbst and Tom Delahoyd who has the right of way, required the road widened and upgraded so as they can access their land with larger agricultural machinery. Our client also points out in relation to 1(b) that the road will not be tarred so there will not be a runoff of water onto the public road. Best wishes". The foregoing related to the Respondent's input in respect of the queries raised by Wicklow County Council in March 2017.

Agricultural laneway

73. The following relates to the Respondent's input in relation to Wicklow County Council's queries raised in May 2017, as can be seen from the contents of an email sent, on 21 May 2017, by the Respondent's solicitor to Mr. Stone, which was cc'd, at the time, to the Respondent and to the Applicants' solicitor: -

"Dear Sirs,

We are instructed to reply to the Council query as follows: -

1. There are 3 farmers who need this access agricultural laneway.
2. Most of farm machines for the big fields are circa 8 feet wide plus. As an example we attach below a picture of a tractor with trailer. The combine harvester and tedders etc. are in excess of this width. As the road is about 900m long with many bends each farmer and their contractors need the facility to pass a [sic] up and down safely.
3. The road will be blocked behind a gate on the suggestion of the Council with a block of concrete which the tractors using the road can remove but hinders other traffic to freely abuse the laneway and hillside for access to illegal tipping.
4. Please see email from Tom Delahoyd below confirming that the concrete block is formed and drying, just waiting to get the frame welded on to it and to do some trials with it. He further states two tractors will need to be able to pass (20ft) and with all the pedestrians using it they need to be safe as well so extra 5ft. With the steep gradient involved extra width is required for the safe movement of machinery, for purpose of compliance with health and safety and also recent legislation on motorists giving width berth to cyclists. Mr. Delahoyd reminds Mr. Herbst that this was the level of safety and convenience of agricultural vehicles being able to pass agreed at the time of purchase so that it is inappropriate at this stage to look to alter the specifications.

We trust this addresses the issue, and we have no objection to Pdraig Smith inserting technical specifications and facts in support of the application and this response.

Best Wishes.”

74. Before proceeding further, it is appropriate to note that the input provided by the Respondent in respect to both sets of queries raised by Wicklow County Council in March and May 2017 was to say, in essence, that there are three farmers who need to access this agricultural laneway with large agricultural machinery. No reference was made to the Respondent having a 6-acre site for which the roadway was required in order to ‘unlock’ its development potential. Rather, very specific detail was given, including with regard to the dimensions of farm machinery and the blocking of the roadway, whereby tractors using the road could remove the block, but other traffic would be hindered in using the roadway.
75. The input provided by the Respondent was, in fact, included in the submission made to Wicklow County Council. Moreover, on 20 July 2017, Mr. Stone wrote to the Respondent’s solicitor stating the following: “Hi Gus, see attached from Pdraig Smith Architects. They have amended the wording of the additional information from Micky Herbst, to make it in their opinion more ‘planner friendly’. Can you please confirm that you are in agreement with their editing so that this can be submitted to WCC?”. In an email sent by the Respondent’s solicitor to Mr. Stone on 26 July 2017, the former stated: “Declan, Mr. Herbst approves the issue of submission by Pdraig Smith to WCC planning”.
76. Having regard to the foregoing, it appears that there was a significant amount of co-operation as between the Respondent and the Applicants with regard to the seeking of planning permission; and the correspondence before the court in the current motion indicates that the Respondent approved both (a) the application for planning permission and (b) the responses furnished to queries raised by Wicklow County Council in respect of the planning sought.

The third forbearance period – Nov 2015 to August 2017

77. It is not in dispute that Wicklow County Council confirmed *refusal* of the planning application on 17 August 2017. Given that the Plaintiff’s November 2015 motion gave rise to discussions which resulted in an agreement that planning permission would be sought and given the steps taken to try and obtain same, it would not be fair to consider the period, from November 2015 to 17 August 2017, as one characterised by delay on the Respondent’s part as regards progressing his claim. Rather, this period seems more appropriate to describe as a third forbearance period.

August 2017 refusal of planning permission

78. Among the documents exhibited by the Respondent as part of exhibit “NH11” referred to in his supplemental affidavit, sworn on 16 March 2021, is an email sent by Mr. Stone to the Respondent’s solicitor, dated 25 August 2017, which states as follows: -

“Morning Gus,

Please see attached decision to refuse from Wicklow County Council plus advices thereon from Pdraig Smith Architects (“PSP”).

PSP are pessimistic about the chances of success with an Appeal to An Bord Pleanála, and make the point that should an appeal fail then it would close the door quite firmly on any form of improvement/upgrading to the existing access in the long term.

Can you advise ASAP if you wish an appeal to be lodged. The latest date for lodging an appeal is September 13th so PSP would need to know by next Friday September 1st, so as to facilitate adequate time to prepare the Appeal.

Kind Regards,

Declan".

Whether the Plaintiff wished to appeal

79. It is not in dispute that the Respondent provided no response to the foregoing. Thus, it is fair to say that the Respondent was asked if he wished to lodge an appeal to An Bord Pleanála but did not reply to that queries and, in these circumstances, no such appeal was ever lodged.

Sub-standard planning application / replies to queries

80. It is also fair to say that at no stage in 2016 or 2017 did the Respondent or anyone acting for the Respondent, suggest that either (a) the application for planning permission and/or (b) the replies furnished to the queries raised by Wicklow County Council, were in any way sub-standard. The evidence before this court is also that the Respondent raised no issue with the planning application, as submitted, and actively provided input into the replies to the queries raised by the Local Authority. It seems important to emphasise the foregoing at this juncture when looking at the evidence from the relevant period because, in affidavits sworn 5 years later, in 2021, the Respondent suggests, in effect, that there was a *deliberate* attempt by the Applicants and by their Architect to make a *sub-standard* application for planning and to deal with the queries raised by Wicklow County Council in a *sub-standard* manner. In the manner I will presently come to, the evidence before this court does not provide any basis to support such allegations. Furthermore, they do not appear to have been raised *before* 2021. In addition, that aspect of the Respondent's claim would need to be pleaded in order for any future trial judge to properly determine such issues. As to what the Respondent now asserts, it is appropriate to set out certain averments made by him, as follows.

Averments made by the Respondent in 2021 regarding 'planning'

81. The Respondent has made the following averments in his 2021 affidavits on the topic of planning, including the queries raised by Wicklow County Council and the refusal of permission (my emphasis):

- " I now believe unfortunately that the Defendants only made a *half-hearted effort* to obtain the planning for the laneway resulting in its refusal by Wicklow County Council..." (para. 6 of the Respondent's 20 January 2021 affidavit);

- "...It is true that Wicklow County Council requested further information and a reply given but further Wicklow County Council request on 10th May 2017. Further information given by us on 21st May 2017. Final submission by Pdraig Smith on the 26th July 2017. It is therefore the case that the Defendants *failed to diligently respond* with sufficient detail for planning to be granted." (para. 11(xxii) of the Respondent's 20 January 2021 affidavit);
- "There *could have been more enquiries made by the Defendants* with a reasonable chance of success or appeal to An Bord Pleanála. I was dismayed with the *lack of effort on the Defendants' part* in relation to planning". (paras. 11(xxiii) and (xxiv) of the Respondent's 20 January 2021 affidavit);
- "Indeed, is (sic) an unfortunate fact when one looks at the planning, long after pleadings closed, that the Defendants *failed to diligently respond with sufficient detail for planning to be granted...* the Defendants *did not push nor develop my response* in the planning that two agricultural vehicles were able to pass or that a more sizeable lane was required for modern and larger agricultural machinery and the fact is that *I am dismayed with the lack of effort* on the Defendant's part in relation to planning." (para. 14 of the Respondent's 16 March 2021 affidavit);
- "... *no pre-planning meeting took place* prior to the Defendant's application for planning permission". (para. 16 of the Respondent's 16 March 2021 affidavit);
- "On receipt of the decision to refuse permission *there was no post-planning meeting* to review/address... Furthermore, *a revised application was neither explored nor submitted* by the Defendants..." (para. 17 of the Respondent's 16 March 2021 affidavit);
- "... my Solicitor responded in detail to Council Planning Query for further information in a helpful, detailed and forthright manner... Declan Stone informs my Solicitor on 25 August 2017 that the application of Pdraig Smith Architect for the Defendants had been refused with no realistic prospect of appeal. I was surprised and disappointed with this news and *I believed and still believe that reasonable efforts were not made* by the First or Second Named Defendant, their servants or agents, to honour their contractual obligations to construct the road so that I could develop my retained road and 6 acres. I believe *that planning could have been obtained if the Council's questions had been properly addressed by the Defendants and their architects.*" (para. 18 of the Respondent's 16 March 2021 affidavit.)

(emphasis added).

Averments by the Respondent in 2018 concerning planning

82. Although the foregoing is what the Respondent says on the topic of planning in affidavits which he swore in 2021, this can be contrasted with what he averred three years earlier. In his affidavit sworn on 19 June 2018 (to ground the application to transfer these proceedings from the Circuit Court) the Respondent made the following averment at para. 9:

"Unfortunately, planning was not granted, and I beg to refer to copy planning application and correspondence with the Council including clarification of further information along with refusal of planning permission dated 17th August 2017 upon which pinned together and marked with 'MH 5' I have signed my name prior to the swearing hereof." (emphasis added)

83. In 2018, the Respondent made no reference to the very allegations which he now makes in relation to the manner in which planning was sought. He merely stated that *"Unfortunately, planning was not granted"*. This appears curious, to say the least, given his averments in 2021 that he believed at the time (i.e. 2017) and still believes that reasonable efforts were not made to obtain planning permission. Leaving that issue aside, and viewed objectively, the averments in the Respondent's 2021 affidavits comprise allegations to the effect that the Applicants and their Architect *deliberately* failed make a genuine effort to secure planning for the laneway. On any analysis, these are very serious allegations to make, particularly against a professional Architect (whom the Plaintiff has never sought to join as a Defendant). It is uncontroversial to say that, if the present proceedings were to progress to a future trial, these assertions would need to be particularised and the Applicants would be entitled to interrogate the pleas by way of, for example, a notice for particulars, and the seeking of discovery of relevant documentation touching on these allegations.

1999 negotiations

84. It is also notable that, among the criticisms made by the Respondent of the manner in which planning permission for the roadway was sought, is a specific assertion that the contractual obligation which the Applicants assumed with regard to constructing the roadway was (as the Respondent avers at para. 18 of his 16 March 2021 affidavit) *"so that I could develop my retained road and 6 acres"*. It is also fair to say that in his 2021 affidavits the Respondent asserts in the clearest terms that the Applicants and their agent, Mr. Stone, have been aware, since negotiations in 1999, that the Respondent retained a 6-acre site with significant development potential and that the reason for the roadway was to 'unlock' this development potential.

85. Thus, at any future trial, a court would be required to make findings of fact regarding (a) what was, or was not, known in 1999 concerning the 6-acre site and its development potential and (b) whether the Applicants and their architect were aware of same, including, when planning was sought in 2017, which permission, (according to the Respondent), was not sought diligently enough. Later in this judgment I will return to what the Respondent says in respect of the 6-acre site and its development potential in

the context of what is now a damages claim. For present purposes, it is appropriate to look at what occurred after August 2017 when the decision to refuse planning permission issued from Wicklow County Council.

86. Before looking at events from August 2017, onwards, it is appropriate to repeat that it would be unfair to hold that the Respondent was guilty of delay with regard to the prosecution of his proceedings from November 2015 (when the Plaintiff issued a motion seeking judgment in default of Defence) until the adverse planning decision issued (on 17 August 2017). It will be recalled that the said motion gave rise to discussions between the parties, resulting in an agreement that planning permission for the roadway would be sought and planning was, in fact, sought.
87. It is no function of this court in the present application to make any findings touching on the underlying issues. It is, however, fair to say that the documentary evidence exhibited in the present motion strongly suggests that there was co-operation between all relevant parties with regard to trying to secure planning and, at the time planning was sought and at the time queries raised by Wicklow County Council were responded to, no criticism appears to have been made by the Respondent as to the *manner* in which the Applicants or their architect sought to secure planning permission.

The position as of 17 August 2017

88. It is not in doubt that the Respondent was invited to indicate whether he wished an appeal to An Board Pleanála to be submitted and it is common case that he did not reply to this invitation. Thus, as of August 2017, all parties, including the Respondent, knew that planning permission was required for the relevant roadway and that planning permission had been refused. Moreover, the understandable willingness on the part of the Respondent not to progress his legal proceedings for so long as planning permission was being sought, no longer pertained from 17 August 2017 onwards.
89. Against the foregoing backdrop, one might reasonably expect the Respondent to press ahead immediately with his legal action, particularly given the fact that the Respondent's cause of action accrued almost 15 years earlier and the proceedings related to an agreement entered into almost 18 years before the receipt of the adverse planning decision. Furthermore, it must have been very clear to the Respondent, as of 17 August 2017, that, insofar as he intended to maintain any claim, his was now a claim for damages, but one which, on any analysis had had a "late start" and the progress of which had included both periods of agreed forbearance as well as post-commencement delay.

What the Plaintiff did from August 2017 onwards

90. Against the foregoing backdrop, it is reasonable to ask what the Respondent did in late August or early September 2017. The answer appears to be nothing. In other words, no formal step whatsoever was taken by the Respondent in respect of his proceedings for the remainder of 2017, despite having been informed of the adverse planning decision and having failed to reply to a request sent by Mr. Stone, on behalf of the Applicants, as to whether the Respondent wished to appeal the decision to An Bord Pleanála. I now turn to look at events of 2018.

91. Regarding 2018, nothing appears to have been done until a letter was sent on 5 March 2018 by the Respondent's solicitors which, in addition to referring to a proposed notice of trial, sought consent to enlarge jurisdiction, which letter indicated that if a reply was not received, an application would be made to transfer proceedings to the High Court. In a reply sent on 6 March 2018, the Applicants' solicitors indicated that, as a result of the decision to refuse planning permission, the 1999 Agreement was unenforceable, and the Respondent was called upon to discontinue the proceedings. By means of a further letter dated 9 March 2018, the Applicants' solicitors stated that the contract was now frustrated and invited the Respondent to strike out the proceedings, stating that the Applicants would bear their own costs. No response was received to that letter. Nothing further occurred until, by letter dated 29 June 2018, the Respondent's solicitor served a motion returnable for October 2018 seeking to have the proceedings transferred to the jurisdiction of this court.

Invitation to discontinue the proceedings

92. In a letter dated 12 October 2018, the Applicants' solicitors wrote to the Respondent in relation to the application to transfer the proceedings, stating inter alia the following:

"Our clients have already spent considerable time and resources seeking to resolve the issues in this case and have dealt with matters at all times in an honourable manner, doing everything in their power to resolve the issue of the construction of the basic hard-core roadway.

Put simply, it has become apparent that the road cannot lawfully be constructed, as it is not possible to obtain planning permission. Your client therefore has no valid claim against the Defendants.

Despite this, our clients paid your client the sum of €45,000 and €5,000 plus VAT in costs in an effort to resolve matters and sought further time in good faith while they endeavoured to do so. They have spent considerable time and effort (regrettably to no avail) seeking to coerce Glenford Builders Limited ("Glenford") and its liquidators to honour its contractual obligations to build the road. Your client has been apprised of these extensive efforts.

As Mr. Herbst has no doubt been advised, Paddy and Alistair McGuckian could simply have defended the case, inter alia, on the grounds that the claim is time barred and the Plaintiff was guilty of laches. As a matter of honour they chose not to take this course.

Ultimately (and in circumstances where it became clear that there could be no recourse to Glenford (in liquidation) it was resolved that our clients would arrange for the construction of the roadway at their own expense, despite the fact that they had sold the lands to Glenford in 2006 (with a special condition that Glenford build the road, and an express indemnity should they fail to do so).

When it became apparent that the party with the lawful obligation to use best endeavours to construct the road were unwilling and insolvent, our clients agreed to take such steps as they could to carry out the construction. Planning permission was sought and ultimately on the 17th August 2017 was declined by the Local Authority. Our clients were advised that an appeal to An Bord Pleanála had no realistic prospect. Your client clearly accepts this, as evidenced by the fact that correspondence offering to appeal the decision was not replied to. There remains no prospect of obtaining planning permission to widen an agricultural lane by the construction of a 7.6 metre wide roadway at this location.

Given that the case has been dormant for so long and having regard to the fact that it is patently not possible to lawfully construct a basic hard core road on the course of the existing agricultural laneway, our clients are surprised that you seek to reactivate proceedings. They are even more surprised that your client should seek to transfer the matter to the jurisdiction of the High Court.

It is an implied term of any contract to construct, that the obligation, is subject to planning permission being obtained. Otherwise the contract would be void for illegality. Alternatively the contract is frustrated in that respect. There is no question of your client being entitled to damages in lieu. There is no provision for that in the plain and ordinary words used in the contract. It would have been a simple matter to insert such clause.

Given that your client has not stateable case we believe the application to transfer to the High Court is an abuse of process. This view is bolstered by the fact that the claim now being advanced is grossly exaggerated. Your client has sworn an affidavit in which he claims €100,000 for construction costs, in addition to €90,000 for alleged diminution of agricultural lands. There could be no basis to claim both. The road could never have been lawfully built. There is no diminution in the value of the land. The suggestion that this land is devalued to such an extraordinary extent is in itself extraordinary ...”

93. The said letter called on the Respondent to withdraw the proceedings and *inter alia* requested that the court be informed that the Applicants did not consent to the transferral application. In these circumstances, the Applicants did not appear at the transfer application, which was granted. It seems that this court formally adopted these proceedings in December 2018.
94. Having regard to the foregoing, it is fair to say that, with the exception of a single letter sent on 05 March 2018 (prior to which nothing at all was done for over six and a half months) the only action taken by the Respondent from August 2017 until October 2018 was to bring the motion to transfer. I now turn to look at what steps the Respondent took in 2019.

95. As regards 2019, the Respondent took no formal steps whatsoever to progress his proceedings. In other words, the Respondent did not even deliver a 'Notice of Intention to proceed'. In my view, this is extraordinary. By December 2019, two years and four months had elapsed since Wicklow County Council refused to grant planning permission in respect of the roadway. During that period, the only step taken by the Respondent was to move a motion to transfer the proceedings from the Circuit to the High Court. The affidavit sworn by the Respondent to ground the said transfer motion averred that the increased market value of the Respondent's lands, with the benefit of a 7.6 metre wide road, was in excess of €90,000; and a further €100,000 was estimated in relation to the cost of a basic hard core roadway. Despite obtaining an order from the Circuit Court transferring the proceedings to this jurisdiction, 2019 came and went without the Respondent even serving particulars of the sums he was now claiming.
96. It will also be recalled that the Applicants had made their position very clear, namely, they regarded the 1999 Agreement as frustrated in circumstances where the relevant roadway could not lawfully be built, given that planning permission was not available. They also regarded the Respondent's damages claim as something not validly derived from the 1999 Agreement, as well as exaggerated, and they had previously invited the Respondent to discontinue proceedings, indicating that they would bear their own costs.
97. By December 2019, the Applicants could be forgiven for interpreting the absolute *silence* on the part of the Respondent with regard to his proceedings as an indication that, two decades after the 1999 Agreement was entered into, matters would be going no further. I now turn to look as what steps were taken in 2020.
98. In 2020, the Respondent took no formal step to progress his claim. The then most recent period of utter inaction on the part of the Respondent is evidenced by the fact that it was necessary for him to file yet another 'Notice of Intention to Proceed', which was only done on 22 September 2020. The present motion was issued by the Applicants on 14 October 2020.

Delay from August 2017 to October 2020

99. From 17 August 2017 (when planning permission was refused) to 14 October 2020 (when the Applicants' issued the present motion) is a period of three years and two months. It is entirely fair to say that during this period, the only meaningful step taken by the Respondent to progress his claim was to issue a single motion, namely, to transfer the proceedings from the Circuit Court to this court, which motion was dealt with in October 2018, (the Applicants not having appeared in the Circuit Court for the reasons they had made clear in correspondence which called upon the Plaintiff to withdraw his proceedings). Moreover, the Respondent permitted a further two years to elapse *after* this motion was dealt with. Having looked closely at the facts, in chronological order, it is appropriate to refer to the principal submissions made in opposition to the relief sought.

Submissions by the Respondent

100. Among the submissions made on behalf of the Respondent is that a forensic analysis of the facts demonstrates that the Respondent is not guilty of any delay and, to the extent

that the court may consider him to have delayed, such delay is excusable, in particular, having regard to the periods of agreed forbearance. It is asserted that there has been no pre-commencement delay by the Respondent. Without prejudice to that submission, it is asserted that the Applicants have pleaded the Statute of Limitations, so there can be no prejudice, submits the Respondent. Counsel for the Respondent also submits that his client gave the Applicants "*considerable latitude*" and trusted them to honour their agreement with the Respondent. It was submitted on behalf of the Respondent that, in the present application, the Applicants are "deploying against the Respondent", in an impermissible attempt to have the proceedings dismissed, the "very latitude, courtesy, civility and assistance" which the Respondent showed to the Applicants to enable them to honour the 1999 Agreement and/or to obtain planning permission. It is denied that the Respondent's affidavits canvas any new claim and particular emphasis is laid on the words in para. 10 of the endorsement of claim in the equity civil bill wherein the Respondent pleads that he "...has been hindered in the development of his land and also has been unable to rent out his land due to the absence of the roadway". It is submitted that any prejudice arising from the loss by the Applicants of an ability to pursue a claim against the Third Named Defendant is met by whatever purchase price was paid by the Third Named Defendant for the lands which the Applicants sold to them.

101. On behalf of the Respondent, it was also submitted that witness "recollections aren't that important" in the present case. The submission was made that the claim was whether or not the contract is frustrated and whether the Respondent has an entitlement to damages. It is fair to say at this juncture that no submission was made as to how the quantum of such damages might be assessed without proof of, *inter alia*, what the Respondent asserts insofar as the Applicant's knowledge, as and from 1999 onwards, of the supposed development potential of the 6-acre site retained by him.
102. The submission was also made that the majority of blame for delay should be laid at the feet of the Applicants. It was submitted that the balance of justice favours this matter going to a hearing. The submission was made that, whilst the parties may be elderly, "the Plaintiff/Respondent is very familiar with the claim and the history of the negotiations as would the agent for the Applicants/First and Second Named Defendant, Mr. Declan Stone" (para. 32 of the written submissions). It is further submitted that the parties are available to give evidence as witnesses, as is Mr. Stone, a valuer and a quantity surveyor.
103. The Respondent's written submissions also emphasised "...why the 6-acre site was always the reason why the road was so important and this was made known to the Applicants, their agents, and in particular to Declan Stone, in negotiation throughout" (para. 35 of the Respondent's written submissions).
104. It was submitted that the Respondent "...in this case has not been guilty of inordinate delay and inexcusable delay, therefore the Applicants must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed" (para. 36 of the Respondent's written submissions).

105. The submission was also made that “Whilst the period involved is significant it is neither inexcusable as it involves culpable delays on the Applicants’ part” (para. 39 of the Respondent’s written submissions). It was also submitted that “The delay does not require the dismissal of the proceedings and there is no prejudice on the part of the Applicants...” (para. 39 of the Respondent’s written submissions).

106. Particular reliance was placed by the Respondent on the following passage from the decision of Quirke J. in *O’Connor v. John Player & Sons Ltd* [2004] 2 ILRM 321, wherein the learned judge indicated that the following issues are to be considered in assessing where the balance of justice lies:-

- “1. the conduct of the Defendants since the commencement of the proceedings for the purpose of establishing, (a) whether any delay or conduct on the part of the Defendant amounted to acquiescence in the Plaintiff’s delay and (b) whether the Defendants were guilty of any conduct which induced the Plaintiff to incur further expense in pursuing the action;
2. whether the delay was likely to cause, or has caused, serious prejudice to the Defendants, (a) of a kind that made the provision of a fair trial impossible or, (b) of a kind that made it unfair to the Defendant to allow the action to proceed and made it just to strike out the action, and
3. whether, having regard to the implied constitutional principle of basic fairness of procedures, the Plaintiff’s claim against the Defendants should be allowed to proceed or should be dismissed.”

October 1999 to October 2020 – a summary

107. Having looked closely at the chronology of relevant events and the principal submissions made on the Respondent’s behalf, it is useful to summarise matters, as follows:

- 22 October 1999 – Agreement entered into, requiring the roadway to be constructed within 3 years (i.e. by 22 October 2022);
- 22 October 2002 – the Plaintiff’s cause of action accrues;
- October 2002 to March 2007 – pre-commencement delay by Plaintiff;
- March 2007 to January 2008 – first forbearance period;
- January 2008 to June 2010 – further pre-commencement delay by Plaintiff;
- June 2010 to February 2012 – steps taken by Plaintiff to progress claim;
- February 2012 to July 2014 – second forbearance period;
- July 2014 to November 2015- further post-commencement delay by Plaintiff;

- November 2015 to August 2017 – third forbearance period;
- August 2017 to October 2020 – further post-commencement delay by Plaintiff (the single step taken by the Plaintiff being to transfer the proceedings from the Circuit Court in October 2018).

Decision in relation to inordinate delay

108. In light of the facts which emerge from a careful examination of the evidence, I have no hesitation in holding that the Respondent's delay has been *inordinate*. Even if one were to look *only* at the period from October 2018 onwards (when the Circuit Court transferred these proceedings to this Court), the Respondent's delay of 2 years is inordinate. That, however, is most certainly not the *only* period of post-commencement delay on the part of the Respondent. He took no steps to progress his claim between July 2014 and November 2015. Furthermore, these delays need to be seen in the context of what on any analysis was extreme pre-commencement delay. As has been seen, the Respondent did not issue proceedings until June 2010. This was over a decade *after* the entering-into of the 1999 Agreement and over seven and a half years after the accrual of his cause of action. Thus, there has been very significant pre-commencement delay, compounded by inordinate post-commencement delay. Despite these facts, the Respondent asserts that there has been no delay whatsoever on his part. Averments made by him include the following:

- "... there has been no delay or want of prosecution on the part of the Plaintiff" (para. 4 of the Respondent's 20 January 2021 affidavit);
- "... all delays were caused by all three Defendants and not otherwise..." (para. 11(xi) of the Respondent's 20 January 2021 Affidavit);
- "... there can be no question of delay on the part of the Plaintiff herein" (para. 12 of the Respondent's 20 January 2021 affidavit);
- "The claim by the Defendants in relation to alleged inordinate and inexcusable delay which is not accepted to have been on the Plaintiff's part but rather on the Defendant's part is not backed up by the sequence of events..." (para. 23 of the Respondent's 16 March 2021 affidavit).

109. The facts which emerge from a careful analysis of the evidence wholly undermine the foregoing averments. The Respondent's delay is, without doubt, inordinate.

Decision in respect of inexcusable delay

110. In circumstances where the Plaintiff/Respondent has repeatedly averred that there has been no delay on his part, it is perhaps unsurprising that he has offered little by way of an explanation for delay. The position adopted by the Respondent insofar as *excusing* delay, can be seen from the following averments which appear at para. 12 of the Respondent's 20 January 2021 affidavit:

"... any delay is on the part of the Defendants herein and at all material times I have prosecuted my case and at all times taken steps to do so and signalled my intention to do so. Given the periods of forbearance as agreed with the Defendants there can be no question of delay on the part of the Plaintiff herein. In any event any delay is excusable in the circumstances of those periods of forbearance."

111. Earlier in this judgment, I looked closely at the chronology of relevant events. I pointed out the relevant periods where it would be unfair to criticise the Plaintiff/Respondent for delay, having regard to forbearance agreements reached at various points. This court cannot, however, ignore those periods which were *not* covered by forbearance agreements and it is incontrovertible that the Respondent is guilty of inordinate delay even after being given full 'credit' for all three periods of forbearance. In the present motion, the Applicants' counsel made clear that his clients are not accusing the Respondent of delay during the periods of forbearance (a) from March 2007 to January 2008, which I have called the first forbearance period; and (b) from February 2012 to July 2014, which I have called the second forbearance period. In the manner I have already explained, there is no question of the Plaintiff/Respondent being criticised for delay during (c) the third forbearance period (i.e. from November 2015 to August 2017). In the manner described earlier in this judgment, I have taken full account of those periods when the Respondent did take steps to progress his claim, in particular June 2010 to February 2012.
112. Despite the foregoing and leaving aside, for the moment, extreme periods of pre-commencement delay, the Respondent undoubtedly allowed long periods of time to elapse which were *not* covered by forbearance agreements, during which the Respondent did not progress his claim and for which no explanation or excuse whatsoever has been proffered. The clearest example of this can be seen if one examines what the Respondent did (and did not do) once Wicklow County Council refused the application for planning permission on 17 August 2017. It is unnecessary to repeat the detailed analysis again, but the following few comments appear relevant.
113. To allow a period of three years and two months to elapse, from 17 August 2017 onwards, during which the only step taken was the bringing of a single Circuit Court motion to transfer the proceedings, constitutes inordinate and inexcusable delay on the part of the Respondent in the present proceedings. The Respondent has not explained why it took until October 2018 before the motion to transfer was brought. Nor has the Respondent explained why he did absolutely nothing whatsoever to plead what was - by then and according to him - a High Court claim during the period of two years from October 2018 to October 2020. There is no question, on the facts in the present case, of the "ball" being in the Applicants' "court" from August 2017 onwards. Their Defence to the equity civil bill was delivered on 12 May 2016. Moreover, their position in respect of the Applicants' claim had been made crystal clear in correspondence in the wake of Wicklow County Council refusing planning permission in 2017, i.e. they regarded the Plaintiff's claim as being (i) statute barred; (ii) tainted by *laches*; (iii) in respect of an unenforceable

agreement; (iv) being a damages claim which did not derive from the relevant contract; and (v) one which was grossly exaggerated.

114. Despite being on notice of the foregoing, the Respondent essentially did nothing to progress his claim, other than to transfer it to this Court in October 2018 and, thereafter, he did absolutely nothing. Having carefully considered all that the Respondent has said, I am entirely satisfied that his inordinate delay is inexcusable. I now turn to the question of the balance of justice.

The balance of justice in this case

115. In the manner explained earlier in this judgment, there were certainly periods of time involving acquiescence or forbearance. The Respondent received payment in respect of certain of these. I have taken full account of the conduct of *both* sides, very conscious that litigation is a 'two-party operation'. Despite the foregoing, the Respondent has been guilty of inordinate and inexcusable delay which did not flow from any acquiescence on the part of the Applicants. Two stark examples suffice. The first relates to the Respondent's pre-commencement delay up to March 2007, being the point at which the Respondent was informed by Mr. Stone, the Applicant's agent, that the relevant land had been sold to the Third Named Defendant. Other than sending a very small number of very short letters (the first of which was not sent until March 2005 and none of which even as much as threatened legal proceedings) by March 2007, the Respondent allowed some seven and a half years to elapse between the 1999 Agreement and the issuing of his Civil Bill (i.e. four and a half years had elapsed since the Respondent's cause of action accrued). None of the foregoing delay can fairly be laid at the door of the Applicants. None of it has been excused or explained.
116. Similarly, the Respondent's delay from August 2017 onwards had nothing to do with any acquiescence on the part of the Applicants, nor was there any question of the Respondent having been induced by the Applicants to incur any further expense in pursuing the action from August 2017 onwards. On the contrary, the Applicants called upon the Respondent, in 2017 and in the clearest of terms, to discontinue proceedings which they regarded as fundamentally flawed for a number of reasons set out in open correspondence.

Prejudice

117. Careful consideration of the evidence entitles this Court to hold that prejudice to the Applicants been established under a number of headings. The Applicants were men in their sixties when the 1999 Agreement was entered into. The first named Applicant is now a gentleman aged 82, and the second named Applicant is now aged 85. It is very clear from the averments made by the Respondent in affidavits sworn by him in 2021 that, in the event of a trial in the future (a trial which could not conceivably take place until the latter half of 2022 at the very earliest), a trial judge would have to make findings of fact in respect of disputed issues for which findings the court would have to place reliance on oral testimony as to what was or was not negotiated, understood or agreed 23 years earlier in 1999.

Disputed matters going back to 1999

118. To see why this is so, one need only look at the following averments made by the Respondent with regard to the significance of what he says is a 6 - acre site, with major development potential, retained by him and for which the construction of the roadway was essential: -

- “. . . at the time that I sold the adjoining lands to the first and second named Defendants I went to great lengths to preserve access to a 6 acre wooded site I had retained above the site I sold to those Defendants. This site had a housing development potential there being a previous building thereon and with magnificent views. There was an expired planning permission for a fine house on that 6 acre site and my hope has always been to assist in future development that the 25 foot laneway access from the road up to that site”.

(para. 5 of the Respondent’s 20 January 2021 affidavit)

- “The reason why I only sold the surrounding lands to the Defendants and why I kept the 6 acres . . . was precisely because of their development potential given the exceptional panoramic views of the Eastern coast as well as the other reasons given to maintain the road with proper access”. (para. 4 of the Respondent’s 16 March 2021 affidavit)
- “furthermore, in relation to development potential of this area which is well known, the neighbouring lands have been granted planning for intense housing development . . .” (para. 5 of the Respondent’s 16 March 2021 affidavit)
- “I distinctly recall discussions with the first and second named Defendants from early on in our negotiations which led to our agreement that the roadway was to be widened and my ownership of such a valuable site was well known by them in such discussions” (para. 6 of the Respondent’s 16 March 2021 affidavit);
- [With reference to a file of documents from the Respondent’s solicitors commencing with a handwritten note dated 30th April 1999 and said to be instructions given by the Respondent to his solicitor] “This demonstrates once more the importance of negotiation of these express terms to develop the lane leading from the public road to my retained 6 acres for its development. The date of the executed contract is 24 September 1999. There were also negotiations with Declan Stone auctioneer acting for the first and second named Defendants as purchasers . . .” (para. 7 of the Respondent’s 16 March 2021 affidavit);
- “For the first and second named Defendants to now allege that this is new news is astonishing and can only be seen, given the above, as a

strategy by them which, in hindsight, I have tolerated for far too long". (para. 10 of the Respondent's 16 March 2021 affidavit);

- ". . . . I believed and still believe that reasonable efforts were not made by the first or second named Defendants, their servants or agents, to honour their contractual obligations to construct the road so that I could develop my retained road and 6 acres". (para. 18 of the Respondent's 16 March 2021 affidavit);

Discussions and negotiations

119. The foregoing averments refer to alleged discussions and negotiations, in 1999, and what the Respondent maintains was the significance of his 6-acre site in the context of same. It is uncontroversial to say that there is no reference in the 1999 Agreement to the 6-acre site retained by the Respondent, or to its development potential. Nor does special condition 12 in the 1999 Agreement specify the *reason* why the purchaser named therein is obliged to construct the roadway within the relevant three-year period. Thus, oral evidence at any future trial would be required in respect of what was, or was not, discussed or negotiated in 1999. It is very clear from the aforesaid averments made by the Respondent in 2021 that he maintains that the *reason* for the road was to unlock the development potential of his 6-acre site. He also asserts that this was *known* to the Applicants in 1999 and that it was the subject of *discussions* and *negotiations*. He also asserts that the development potential of his land was common *knowledge* locally. It is equally clear that the Applicants dispute the foregoing.

Witness memories

120. Thus, were this case permitted to proceed, a trial judge, in reaching findings of fact would have to rely to a material extent on the memories of witnesses as to what was or was not said, know, understood or negotiated 23 years earlier. This is not a case where all issues can be determined with reference to, for example, the interpretation of a clause, or clauses, in a written Agreement which all parties acknowledge as encompassing their entire legal relations. On the contrary, the averments made by the Respondent make plain that there are issues in dispute which cannot be determined by reference to documentation alone, and require oral evidence.

23-year gap

121. I am entitled to take it that witness memories fade over time. In the present case, there would be at least a 23-year gap between (i) the relevant "*discussions*" and "*negotiations*", leading to the 1999 Agreement, and (ii) a trial at which the content of those negotiations was of fundamental relevance to disputed issues of fact. The likely degrading of the memories of all relevant parties constitutes a very real prejudice in the present case, in my view. This would be true even if all relevant parties were in the first flush of youth. It is all the more so given that the Applicants are approaching their mid-eighties. Mr. Stone's age is not known to the Court but to recall discussions or negotiations at the remove of almost a quarter of a century is likely to pose difficulties for any witness, regardless of age.

122. In my view, the foregoing amounts to prejudice which is, of itself, sufficient to 'tip the balance' decidedly in favour of a dismissal of the present proceedings, having regard to the *Primor* principles. I say this in circumstances where, in the present case, the Respondent has not put forward anything which this Court could fairly regard as "countervailing circumstances" within the meaning of the jurisprudence. Despite the undoubted skill and sophistication with which the Respondent's counsel made submissions, the facts before this Court disclose no "weighty" considerations or circumstances which might even 'restore equilibrium', given the reality that the Respondent's inordinate and inexcusable delay has tipped the balance in favour of dismissal *before* this Court comes to consider the third 'limb' of the *Primor* test. Having embarked on that consideration, things get only worse for the Respondent, in light of the facts.

Unreliable memory

123. To see a practical example of how, at the remove of such a long time, witness memory may be wholly unreliable, I need only refer to the following averments made by the Respondent:

"I knew the first named Defendant, Patrick McGuckian, well and would have counted upon him as a friend having played polo with him".

(para. 10 of the Respondent's 16 March 2021 affidavit);

Despite the foregoing, the Respondent made the following averment in his affidavit sworn the following month:

"In relation to the denial of the polo connection by the first named Defendant I have reviewed it and I accept that the Patrick McGuckian whom I befriended and gave my horses for a polo tournament in Dublin All Ireland Polo Club. Having (sic) is not the first named Defendant and I accept and apologise for my mistake as to identity in relation to this other McGuckian family member. The point of this is that I believed that the family were of good stock and would do the right thing and honour their obligations by surfacing and widening the road as promised. The Mr. McGuckian I befriended also told me he had a 1000-acre farm in Africa growing yellow flowers to add to chicken feed to strengthen the yellows in the eggs. I also knew a Brendan McGuckian as a close friend who then farmed in Ballykeane Stud, Red Cross who is a cousin of the second named Defendant. Negotiations of the sale happened later and were with the Auctioneers and with Mr. Stone".

(para. 7 of the Respondent's 22 April 2021 affidavit)

Sincere but sincerely wrong

124. No doubt the Respondent was absolutely sincere when he swore his 16 March 2021 affidavit, but it appears that he was sincerely wrong in what he initially believed, and averred to. That this is so, could hardly be surprising at the remove of over two decades but, in my view, it illustrates the risks of injustice where witnesses swear to what they

genuinely believe to be true but which, as a result of the passage of time, may be wholly incorrect. To borrow the phrase used by the Supreme Court in *O'Domhnaill*, this “*puts justice to the hazard*”. In my view it creates a real risk that an unfair trial or unjust result might ensue.

Distinct recollection of 1999 negotiations

125. Whilst looking at this topic, it is also useful to contrast certain averments made by the Respondent, in his 16 March 2021 affidavit, with those made in his supplemental affidavit sworn on 22 April 2021 (my emphasis): -

- “*I distinctly recall discussions with the first and second named Defendants from early on in our negotiations which led to our agreement that the roadway was to be widened and my ownership of such a valuable site was well known by them in such discussions*” (para 6 of the Respondent’s 15 March 2021 affidavit);

By contrast, the Respondent made the following averment the next month:-

- “*Negotiations of the sale . . . were with the auctioneers and with Mr. Stone*” (para 7 of the Respondent’s 22 April 2021 affidavit);

126. It seems from the foregoing that the Respondent continues to maintain (i) that there were *negotiations* in the lead up to the 1999 Agreement; and (ii) that the Applicants were at all material times aware that he retained a 6-acre site with development potential; and (iii) that the roadway was required in the context of the site which the Respondent retained. However, having averred (in March 2021) that the Respondent could distinctly recall discussions with the first and second named Defendants/Applicants, he averred (in April 2021) that the negotiations were conducted with the relevant Auctioneers and with Mr. Declan Stone, the Applicant’s agent (as opposed to negotiations having been directly with the Applicants/Defendants). There is a material difference between the two propositions. Yet again, this illustrates the very real danger of unreliable testimony being given in respect of disputed issues decades after the “*discussions*” and “*negotiations*” were said to have occurred.

127. Having regard to the foregoing, I am entirely satisfied that a proper application of the *Primor* principles justifies the dismissal of the present proceedings, I am also satisfied that, viewed through the lens of the *O'Domhnaill* principles, this is a case which, due to a real risk of an unfair trial or unjust result, must be dismissed.

Further prejudice

128. Quite apart from the foregoing, (and, in my view, fundamental), prejudice both to the Applicants and to the Court’s ability to properly administer justice, other prejudice of relevance to the third limb of the *Primor* test emerges. Firstly, it seems clear from averments made by the Respondent that, at any future trial, the Applicants would be faced with having to meet ‘fresh’ allegations, in particular, that they and their architect, in effect conspired so as to *deliberately* make only a *half-hearted* attempt to obtain planning permission. It is fair to say that there is no documentation exhibited from late 2016 or up

to August 2017 in which any such allegation is made, by or on behalf of the Respondent. It is very clear, however, from the averments made by the Respondent, in 2021, that these serious allegations comprise part of the claim he makes against the Applicants (and their architect, despite the latter not being a Defendant). Having to meet such 'fresh' claims articulated by the Respondent for the first time in 2021, but relating to events of 2016 and 2017, and made after inordinate and inexcusable delay on the part of the Respondent, seems to me to give rise to at least moderate prejudice to the Applicants. On the topic of moderate prejudice, and quite apart from the fact that these proceedings have been "hanging over" the Applicants for many years, the 'fresh' allegations made by the Respondent that the Applicants deliberately made sub-standard efforts to secure planning permission are allegations which plainly touch on their personal integrity and reputations. That the Applicants should be facing such claims in proceedings commenced over a decade ago seems to me to amount to at least moderate prejudice to them, insofar as their reputations are concerned.

The Applicants' 'window of opportunity' to pursue the Third Defendant company

129. Furthermore, and as I made reference to earlier in this judgment, the Applicants sold their interest in the relevant land to the Third Named Defendant, pursuant to a contract of May 2006. This was almost seven years *after* the 1999 Agreement and approaching four years *after* the Respondent's cause of action accrued. Notwithstanding the foregoing, the Respondent had not instituted legal proceedings. Had he done so by, or shortly after May 2006, it seems to follow that there was at least a prospect of the Respondents being able to pursue the Third Named Defendant company, if not in respect of the *construction* of a roadway (assuming that planning permission, had it been applied for by the company, would have been refused), for an *indemnity* in respect of the cost of same. On the facts of this case, the 'window of opportunity' in respect of the Applicants' practical ability to rely on the contractual commitments made to them by the Third Defendant in respect of the roadway/indemnity 'opened' in May 2006 (with the entering into of the relevant contract which contained a special condition requiring the Third Defendant to construct the road as the special condition in the 1999 Agreement envisaged) and 'closed' in September 2010 (with the appointment of a Receiver to the Third Named Defendant).

130. It will be recalled that the Respondent was responsible for very lengthy pre-commencement delay and, had the Respondent moved quicker, it is conceivable that the Respondents could have found themselves in a far better position, *vis-a-vis* relying on the Third Named Defendant's obligations to them. As matters transpired, the Respondent only issued the Equity Civil Bill some *three months* before a Receiver was appointed to the Third Named Defendant, thereby denying the Applicants any realistic prospect of compelling the Third Named Defendant to make good on the indemnity provided by same to the Applicants. This, it seems to me, constitutes actual prejudice to the Applicants flowing from the Plaintiff/Respondent's delay.

131. Even if I am wrong, the authorities make clear that only moderate prejudice need be demonstrated for an Applicant to succeed under the *Primor* principles where both inordinate and inexcusable delay have been established, (as they have in the present

case). I am entirely satisfied that at least moderate prejudice has been demonstrated. The likely degrading of witness memories certainly comprises prejudice of at least that degree. Raising, as it does, the spectre of an unfair trial or unjust result, it goes well beyond moderate prejudice in my view.

132. Despite the great skill employed by the Respondent's counsel in submissions, it is the *facts* which emerge from an analysis of the evidence which require that the Respondent's case be dismissed. Having assessed the evidence in line with the *Primor* principles, the result is not one which came down to fine margins. In my view, the balance of justice favours, overwhelmingly, the dismissal of these proceedings under the *Primor* approach. Furthermore, such is the lapse of time between relevant events (i.e. *discussions* and *negotiations* in 1999) and any likely trial (the end of 2022 at the earliest) there is a substantial risk, in my view, of an unjust result were this Court to permit the proceedings to continue to a trial.
133. For the reasons set out in this judgment, I am granting the reliefs sought in the Applicant's 14 October 2020 motion.
134. On 24 March 2020, the following statement issued in respect of the delivery of judgments electronically: "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate." My preliminary view, insofar as the question of costs is concerned, is that there are no circumstances which would justify a departure from the 'normal' or 'general' rule that costs should 'follow the event'. The parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs, which should be made. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days from the date of this judgment.