THE HIGH COURT

[2022] IEHC 701

[2012 11346 P]

BETWEEN

DAVID DALY AND MARY DALY

PLAINTIFFS

AND

THE MINISTER FOR FINANCE, THE MINISTER FOR EDUCATION AND SKILLS, THE MINISTER FOR THE ENVIRONMENT COMMUNITY AND LOCAL GOVERNMENT, THE GOVERNMENT OF IRELAND, IRELAND, THE ATTORNEY GENERAL AND THE REVENUE COMMISSIONERS

DEFENDANTS

JUDGMENT of Ms. Justice Emily Egan delivered on the 14th day of December, 2022

Introduction

1. This is an application to dismiss the plaintiffs' claim against the defendants pursuant to the inherent jurisdiction of the court on the grounds of inordinate and inexcusable delay on the part of the plaintiffs in the commencement and prosecution of these proceedings, which delay has prejudiced the defendants such that the balance of justice requires that the claim be dismissed. For reasons I will explain, I am not prepared to grant the relief sought.

The plaintiffs' case

2. The plaintiffs, a married couple, are assessed jointly for the purposes of income tax. The first named plaintiff (the first plaintiff) has carried on business as a property developer for many years.

3. Prior to the enactment of the Finance Act, 1999, there was a shortage of student accommodation in the locality of third level institutions within the State. For the purposes of increasing supply of such accommodation the first to fifth named defendants enacted s. 50 of the Finance Act, 1999 and s. 24 of the Finance Act, 2002 as contained in Part 10, Chapter 11 of the Taxes Consolidation Act, 1997 ("TCA 1997"), ss. 372 AK to 372 AV (collectively referred to as the "student accommodation tax relief"). The student accommodation tax relief entitled investors *inter alia* to offset 100% of qualifying expenditure as a year on year deduction against all Irish rental income with the excess being available as a rental loss carried forward against future Irish rental income.

4. The defendants issued statements and guidelines in respect of the student accommodation tax relief. These guidelines provided for qualifying criteria necessary for accommodation to meet the requirements for relief including the issue of a certificate of reasonable cost confirming that the cost of providing the student accommodation was reasonable and that the accommodation was within the specified floor limits and complied with the standards set out in the guidelines ("certification").

5. The plaintiffs plead that by enacting the student accommodation tax relief and by issuing the said statements and guidelines which were then acted upon by the plaintiffs, a valid and binding public private agreement or joint venture enterprise came into existence. Further, the plaintiffs maintain that the defendants represented expressly or impliedly to the plaintiffs that if they invested in student accommodation in accordance with the guidelines they would

enjoy the student accommodation tax relief which would not be withdrawn, limited or restricted in an arbitrary manner.

6. The plaintiffs plead that on the basis of the said representations, they invested in student accommodation in accordance with the guidelines and obtained certification in respect thereof. Specifically, the plaintiffs made two investments financed by way of loan in student accommodation. These involved the construction of the Foster residence in University College Dublin and of the Proby residence on Carysfort Avenue, Blackrock respectively. In each case the accommodation in question was designed and constructed in compliance with the statutory scheme and the applicable guidelines. The plaintiffs plead that the sole reason for which they invested in the provision of this student accommodation was to avail of the student accommodation tax relief.

7. Following this, the legislation was amended by s. 17 of the Finance Act, 2006 which limited the use of student accommodation tax relief by certain high income earners including the plaintiffs with effect from 1st January, 2007. In addition, s. 23 of the Finance Act, 2002 further restricted the right to claim such relief with effect from 1st January, 2010. The plaintiffs plead that as a result of these provisions (which are now contained in Part 15, Chapter 2A of the TCA 1997) they suffered significant loss and damage from the financial year ended 31st December, 2009 onwards and particularly in the year ended 31st December, 2010.

8. As a consequence of the foregoing, in filing their 2010 income tax returns, the plaintiffs submitted an expression of doubt pursuant to s. 955 (4) of the TCA 1997. The Revenue Commissioners responded by letter dated 28th November, 2011 taking issue with the expression of doubt and seeking an amended income tax return. Following correspondence between the plaintiffs' accountants and the Revenue Commissioners during 2011 and 2012, the plaintiffs took independent tax advice regarding their tax liability and their entitlement to claim relief.

These proceedings were initiated shortly thereafter by way of plenary summons dated 9th November, 2012.

9. The plaintiffs plead that the enactment and/or administration of Part 15, Chapter 2A of the TCA 1997 provisions are in breach of contract, and/or joint venture agreement and are in a breach of the plaintiffs' legitimate expectations; that the actions of the defendants in enacting the student accommodation tax relief and issuing the guidelines thereunder amount to representations made to the plaintiffs on which they relied by investing their funds; that the defendants are estopped or precluded from withdrawing the student accommodation tax relief; that it would be unjust, unconscionable and inequitable for the defendants to be permitted to rely upon the amended provisions; that the actions of the defendants constitute an unjust attack upon the plaintiffs' constitutional property rights, their rights under the European Convention on Human Rights and their rights under the Charter of Fundamental Freedoms. The plaintiffs seek *inter alia* specific performance of the alleged public private agreement and/or joint venture agreement together with declaratory reliefs and damages for *inter alia* breach of contract, misrepresentation, breach of legitimate expectation, breach of Constitutional, Convention and Charter rights and other associated reliefs.

Chronology of the proceedings

10. The chronology of the proceedings is as follows:

(a) These proceedings were instituted by plenary summons dated 9 November 2012;

(b) The defendants entered Appearances on 19 November 2012 and on 26 November 2012;

(c) The plaintiffs delivered a Statement of Claim on 22 February 2013;

(d) On 19 April 2013, the plaintiffs issued a 21 day warning letter, calling upon the defendants to deliver their Defence. On the same date, the defendants' solicitors signified their intention to raise a Notice for Particulars;

(e) The defendants raised a Notice for Particulars on 7 June 2013;

(f) The plaintiffs replied to this Notice for Particulars on 23 December 2013;

(g) The defendants delivered their Defence on 17 February 2014;

(h) On 24 March 2015, the plaintiffs made a request for voluntary discovery, seeking discovery of five categories of documents;

(i) On 25 May 2015, the defendants replied to this request, offering to make discovery of one category of documents;

(j) On 1 October 2015, the plaintiffs issued a notice of motion, seeking to compel the defendants to make discovery of categories of documents.

(k) On 9 November 2015, the defendants were directed to make discovery on oath within 12 weeks thereafter.

(l) By letter dated 2 February 2016, the defendants requested an extension of time to make discovery, to which the plaintiffs agreed on 4 February 2016;

(m) On 10 February 2016, Seamus Milne swore an Affidavit as to documents on behalf of the first defendant;

(n) On 17 February 2016, Eugene Creighton swore an Affidavit as to documents on behalf of the seventh defendant;

(o) On 2 March 2016, Belinda Treacy swore an Affidavit as to documents on behalf of the third defendant;

(p) On 21 July 2016, Gary O'Doherty swore an Affidavit as to documents on behalf of the second defendant;

(q) On 9 September 2016, Seamus Milne swore an Affidavit as to documents on behalf of the first defendant;

(r) On 14 October 2016, Eugene Creighton swore an Affidavit as to documents on behalf of the seventh defendant;

(s) On 13 April 2017, the plaintiffs' solicitors wrote to the defendants' solicitors to express concern about redactions in the second Affidavit as to documents of Mr Milne and the second Affidavit as to documents sworn by Mr Creighton;

(t) On 28 April 2017, the defendants' solicitors requested a period of 21 days to respond to these queries;

(u) On 24 May 2017, the defendants' solicitors explained the basis upon which redactions had been made to the documents referred to in the second Affidavit of Mr. Creighton;

(v) On 13 June 2017, the defendants' solicitors explained the basis upon which redactions had been made to the documents referred to in the second Affidavit of Mr. Milne;

(w) During the Summer of 2017, there was a meeting between the parties to discuss the proceedings. That meeting did not, however, bear fruit;

(x) The plaintiffs instructed their solicitors to ask senior counsel to advise on proofs in 2018. Senior counsel did so on 11 May 2018, and identified a number of steps which had to be taken before the matter could be set down for trial.

11. In addition to these proceedings, the plaintiffs have appealed the amended assessments issued by the Revenue Commissioners for the years 2010, 2011 and 2012 to the Tax Appeal Commissioner. Those appeals have been stayed pending the outcome of the within High Court proceedings.

Legal principles

12. The principles of law applicable to applications to strike out proceedings on grounds of delay are well known. Accordingly, I propose to set out only a brief summary thereof.

13. The classic statement of the relevant principles was given by Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459 *("Primor"):*

> "*(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."

14. As has been frequently observed by the High Court, subsequent developments in jurisprudence demonstrate a hardening of judicial attitudes to delay resulting in a recalibration of the weight to be attached to the various factors relevant to determining whether delay has been inordinate and/or inexcusable and, if so, whether the balance of justice between the parties favours an order dismissing the proceedings. This recalibrated approach places emphasis on the constitutional imperative to protect the public interest by ensuring the timely and effective administration of justice.

15. Thus, in *Comcast International Corporation & Ors v. Minister for Public Enterprise* [2012] IESC 50 ("*Comcast*"), whilst noting that the overall test remained the same, Clarke J. (as he then was) observed that the factors first identified by Hardiman J. in *Gilroy v Flynn* [2004] IESC 98 require the application of the test to be approached *"on a significantly less indulgent basis than heretofore."*. Clarke J. stated:

"I do, remain of the view that tightening up is required. While the court will, understandably, be concerned to balance the interests of justice arising in the case before it, and, in that regard, to consider all relevant facts, nonetheless the overall approach of the courts, if unduly lax, has the potential to create injustice by delay

across a whole range of cases whose facts may never come to be considered by a judge, but whose progress is adversely affected by a culture of delay."

16. Despite this recalibration, the pre-eminence of the *Primor* principles was recently affirmed by the Supreme Court in In *Mangan v. Dockery & Ors* [2020] IESC 67, on which McKechnie J. stated as follows at para. 105:

"To this day, the dicta of Hamilton C.J. in Primor Plc v Stokes Kennedy Crowley [1996] 2 I.R. 459 ("Primor") is without doubt the most generalised statement of the law on this topic. Whilst it has been joined by many other authorative decisions, it remains, as described by McMahon and Binchy, the "locus classicus", in this area (Law of Torts, 4th ed., [46.115].)"

17. Decisions in other cases allowing or disallowing applications to dismiss on the basis of particular time periods are of limited assistance to the court. Whilst the principles set out are of general application, each case uniquely turns on its own facts.

18. The parties in the present case are largely agreed as to the general legal principles. There is also agreement that in applications such as this, the moving party bears the onus of proving that the balance of justice favours the dismissal of the plaintiffs' claim, and that this onus does not shift from the plaintiffs to the defendants on the establishment of inordinate and inexcusable delay. This was recently confirmed by the Court of Appeal in *Alan Barry v. Renaissance Security Services Ltd* [2022] IECA 115 ("*Barry v Renaissance"), Gibbons v N6 (Construction) Limited* [2022] IECA 112 ("*Gibbons"*) and *Cave Projects Limited v Gilhooley and Ors* [2022] IECA 245 ("*Cave Projects*").

19. The principal areas of disagreement as between the parties relate to the court's approach to the requirement on the part of the defendants to demonstrate some prejudice, either specific or general, and to the assessment of the defendants' delay in bringing this motion to dismiss. I will address both these issues in due course.

Is the delay inordinate?

Is there pre-commencement delay?

20. It is widely accepted that in considering whether delay has been inordinate the court may also have regard to any significant delay prior to the issue of the proceedings. Thus, a plaintiff who issues proceedings very close to the expiry of the limitation period prescribed for the relevant claim, has a special obligation of expedition to move matters forward once proceedings are commenced.

21. The defendants allege both pre-commencement and post-commencement delay in these proceedings. The Finance Bill which limited the use of student accommodation tax relief by high income individuals was announced by the Minister for Finance in his budget statement on 7th December, 2005, the new legislative provision was initiated on 2nd February, 2006. Therefore, although the amendments were first introduced in the Finance Act, 2006 (which took effect from 1st January, 2007) and the Finance Act, 2010 (which took effect from 1st January, 2010), the defendants maintain that the plaintiffs would have become aware in late 2005/early 2006 of the potential impact of the new legislative provisions. It is argued that there was a significant pre-commencement delay of over six years between the date when the new restrictions were first announced and the date on which the proceedings were instituted in November 2012.

22. In response, the plaintiffs argue that although the relevant amending provisions entered into force on the dates stated, they did not suffer loss as a result of the provisions until November 2010 when the first plaintiff filed his tax return for the year ended 31st December, 2009. The plaintiffs then suffered a much more significant loss in the subsequent year and, once again, this loss only crystallised in November 2011 when the first plaintiff filed his tax returns for the relevant year.

23. Although pre-commencement delay can potentially run prior to the commencement of the limitation period (for example in the case of proceedings brought by an infant plaintiff in respect of events many years prior), it would be unusual for a plaintiff to be accused of pre-commencement delay prior to the accrual of a cause of action. Rather, the focus is generally on whether, after the accrual of the cause of action, the plaintiff has then waited until very close to the expiry of the limitation period to commence proceedings. In light of the Supreme Court judgment in *Cantrell v. Allied Irish Banks Plc* [2020] IESC 71, the courts must adopt a pragmatic approach in which the identification of damage for accrual of a cause of action must bear a close relationship to a lay person's understanding of that term. That, the Supreme Court stated, is real actual damage for which a person would consider commencing proceedings. In the present case, the plaintiffs might well have known at an earlier point that their tax position was likely to be adversely affected by the impending legislative amendments. However, the first plaintiff could not have known whether he would necessarily have significant rental income to offset against the student accommodation tax relief for the years in question. In short, I do not think that the plaintiffs can be said to have been guilty of delay that is inordinate (still less inexcusable) merely because they waited until the loss crystallised before commencing proceedings.

24. The defendants also make a separate point that, aside from the plaintiffs' earlier knowledge of the likely impact of the new legislation, the statutory time limit for filing the plaintiffs' tax returns in 2009, being the first year in which any alleged loss was incurred, was 31st December, 2010. In these circumstances, the defendants contend that there was "*clearly a delay"* by the plaintiffs between this date and 9th November, 2012 when the plenary summons was issued. I reject this argument. I fail to see how the expiry of two years from the date of crystallisation of the loss to the date of the initiation of proceedings can be said to amount to a

significant pre-commencement delay. In short, I do not see this as a case in which there has been significant pre-commencement delay on the part of the plaintiff.

Post-commencement delay

25. On the other hand, there has been significant post-commencement delay. The plenary summons was issued on 9th November, 2012 and after entry of the defendants' appearance, the statement of claim was served a little over three months later. The defendants issued a motion for particulars approximately four months after this and replies were furnished six months later. The defence was then filed within a further two month period. The defendants observe that there was then a significant delay by the plaintiffs of over one year between the filing of the defendants' defence on 17th February, 2014 and the next step in the proceedings which was the issue of the plaintiffs' request for voluntary discovery on 24th March, 2015.

26. The first plaintiff accepts that there was a delay during this period but avers that, given the complexity of the issues involved, it took some time to formulate the request for discovery. The plaintiffs accept that this excuses only some of this period of delay but observe that their delay in requesting discovery is of a similar order to the defendants' delay in making the discovery sought and ultimately ordered. This is correct. Subsequent to the plaintiffs' request for voluntary discovery of 24th March, 2015, correspondence was exchanged regarding the request culminating in the plaintiffs issuing a motion for discovery some six months later on 15th October, 2015. An order for discovery was made on 9th November, 2015 pursuant to which the defendants were ordered to make discovery within a twelve week period. The defendants required an extension of time in which to make discovery, which was granted in February 2016. The defendants delivered three initial affidavits of discovery between February and March 2016 and a further three affidavits of discovery between July and October 2016.

27. The above time sequence demonstrates that there is force in the plaintiffs' argument that the discovery process generally was complex. Accordingly, I would not find that the plaintiffs' delay of one year in seeking voluntary discovery, particularly when balanced against the defendants' delay in complying with the order for discovery made on foot of this request – which also took a year-can be described as inordinate.

28. Since then, however, there has been very little progress in the proceedings. Correspondence was exchanged between April and June 2017 in relation to the redactions in certain of the affidavits of discovery. It also appears that there were certain discussions between the parties in the summer of 2017. There was then some delay on the part of the plaintiffs in instructing their solicitors to request an advice on proofs from senior counsel. Proofs were advised on 11th May, 2018 pursuant to which senior counsel identified a number of steps to be taken before the matter could be set down for trial including obtaining an expert report.

29. This marks the beginning of the most significant period of delay on the part of the plaintiffs. A period of over four and a half years passed between the date of the last correspondence regarding discovery on 13th June, 2017 and the date of the present motion in February 2022. I think that there can be no argument but that this delay is irregular, outside normal limits and excessive. Accordingly, I find the plaintiffs' delay to be inordinate.

Is the delay inexcusable?

30. In his replying affidavit, the first plaintiff acknowledges that senior counsel advised proofs in May 2018 and seeks to explain his delay on two bases. He first outlines difficulties in procuring an expert report. The first plaintiff says that the initial expert advising him on tax matters in 2012 became unavailable and that it was therefore necessary to identify an alternative expert willing to act. Although such an expert was ultimately identified, it does not appear that any report had been furnished by this expert either by the time of the issue and

service of the defendants' motion to dismiss or indeed by the time of the first plaintiff's replying affidavit sworn in March of 2022. In his replying affidavit the first plaintiff avers that after the defendants issued this motion, he spoke with the expert in question in order to expedite the preparation of the report and was assured that the report would be to hand within four weeks from that date. Notwithstanding the passage of over six months since that time, the plaintiffs had not, prior to the hearing date of the motion formally notified the defendants that the report was to hand. However, during the course of the hearing, counsel for the plaintiffs indicated that the expert witness report is now to hand and ready to exchange.

31. The first plaintiff also avers that the covid 19 epidemic delayed matters. He avers that he is 71 years old and was advised that he was in the at risk cohort if he contracted covid 19. The first avers that he is no longer resident in Ireland and spent much of 2020 and 2021 in lockdown in Spain. This, he said, inhibited his ability to focus on the case and to give detailed instructions.

32. In determining whether or not the plaintiffs' delay is excusable, the court must consider whether or not the reason advanced actually explains or excuses the delay. Neither of the potential reasons or excuses advanced by the plaintiffs could explain the four year delay. Although it was clearly difficult to secure an independent expert witness, the first plaintiff is a well-resourced and experienced businessperson who ought to have been in a position to move matters forward and, if necessary, identify alternative experts. In addition, given the availability of modern methods of communication, the mere fact that the plaintiffs were in Spain during much or all of 2020 and 2021 in no way excuses the inordinate delay which occurred since 2017.

33. During the course of the hearing counsel for the plaintiffs argued that it would not have been possible in any event to bring the matter on for hearing in 2020 or 2021 due to the lockdown and the restrictions on court resources. This may well be correct and would be a

point of some weight if the case had been ready for trial at that time. That however was not the position.

34. Making some allowances for delay in securing an expert report, there is still a period of inordinate and inexcusable delay which I would estimate is at least three years.

Balance of justice

35. The fundamental principle remains that the court must try to ascertain where the balance of justice lies as between the parties. The possibility of ultimately having a fair trial and the requirements of procedural justice are central to the inquiry. Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied upon by the defendant for the purposes of establishing that the balance of justice warrants dismissal. A defendant therefore cannot rely on matters which do not result from the plaintiff's delay.

Presence, nature and degree of prejudice required

36. The plaintiffs argue that the defendants may not obtain an order dismissing the proceedings for delay unless they are in a position to establish prejudice. Specific/concrete prejudice is not necessary. However the plaintiffs say that prejudice in some form must be present.

37. In this submission there is an echo of comments made by Collins J. in the Court of Appeal's recent judgment on dismissal for delay, *Cave Projects.* Collins J. was wary of the suggestion that proceedings may be dismissed even in the absence of general prejudice. Ultimately, Collins J. viewed this point as best explored when pressed in argument. The same is true here because I did not understand the defendants in the case before me to argue that these proceedings should be dismissed notwithstanding the absence of any prejudice. Rather

the defendants contend that the delay has in fact caused them to suffer identifiable prejudice. It is not therefore necessary to decide whether, absent any such prejudice, the court might still dismiss the proceedings. Suffice it to say, that I respectfully agree with Collins J.'s observations that dismissal absent any prejudice - either specific or general - may be inconsistent with the emphasis in the authorities that the jurisdiction is not punitive or disciplinary in character.

38. The specific or general prejudice as may suffice to justify dismissal of proceedings is not confined to *"fair trial"* prejudice (albeit that this form of prejudice is, as Collins J. observes centre stage). It may include damage to a defendant's reputation or business. In *Cave Projects,* Collins J. suggested that this was an issue that should be approached with a degree of caution lest it confer upon particular categories of defendant - in particular professional defendants - some form of privileged status. In any event, there is no contention in this case that the professional reputations of the defendants are in jeopardy or are otherwise impacted by excessively protracted proceedings.

39. As to the nature of the prejudice required, the plaintiffs were of course correct to concede that specific/concrete prejudice is not a precondition to an order dismissing proceedings for delay. The courts have frequently stated that general prejudice may suffice for the balance of justice to weigh in favour of striking out proceedings on grounds of inordinate and inexcusable delay where a significant period of time has elapsed between the event giving rise to the proceedings and the trial date. However, In *Cave Projects,* Collins J. noted that assertions of general prejudice must be carefully and fully assessed to confirm that they have a sufficient evidential basis.

40. As to the degree of prejudice which must be suffered, the plaintiffs argue that at least moderate prejudice is required to give rise to dismissal. The defendants on the other hand emphasise that in *Flynn v Minister for Justice* [2017] IECA 178, Irvine J. stated that once a defendant establishes inordinate and inexcusable delay, he or she can urge the court to dismiss

on grounds of "*relatively modest prejudice"*. This reference to "*relatively modest prejudice*" potentially sufficing was cited with apparent approval by Faherty J. in *Barry v. Renaissance* at para. 84. The defendants also observe that in the presence of inordinate and inexcusable delay the court has occasionally referred to "*marginal prejudice*" as potentially sufficient to warrant a dismissal (see *Millerick v Minister for Finance* [2016] IECA 206 ("*Millerick*")).

41. On the other hand, in *Cave Projects,* Collins J. expressed the view that marginal prejudice, which suggests insignificant or negligible prejudice, is unlikely to suffice and that it was wiser in this context to continue to refer to moderate prejudice.

42. I fully agree with Barr J. in *Barrett v. Traymount Construction Limited & Ors.* [2022] IEHC 502, that where this court is faced with conflicting decisions of the Court of Appeal, the appropriate course is to follow the most recent decision which gives consideration to the earlier authorities. In *Cave,* Collins J. considered the recent cases of the Court of Appeal on dismissal for delay including *Millerick, Gibbons, Barry v Renaissance, Greenwich Project Holdings Limited v Cronin* [2022] IECA 154 and *Doyle v Foley* [2022] IECA 193. Accordingly, for the purposes of this application this court will proceed on the basis that marginal prejudice is unlikely to suffice and that moderate prejudice is likely to be necessary. Indeed, Collins J. emphasised that although the authorities suggested that "*even moderate prejudice*" may suffice this is not necessarily a universal standard. Rather whether moderate prejudice will warrant dismissal, or whether something more serious must be established will depend on all of the circumstances, including the nature and extent of the delay involved, the nature of the claim and the defence and the conduct of the defendant.

Prejudice asserted in this case

43. The defendants' grounding affidavit did not assert any specific prejudice arising from the plaintiffs' delay. In oral argument, counsel for the defendants submitted that two particular prejudices arose in this case.

Oral evidence on the motivation for the plaintiffs' investment

44. In *Gibbons,* Barniville J. (as he then was) stated that although it was not particularly helpful to draw a formal distinction between different kinds of cases, it is undoubtedly considerably more difficult for a defendant to establish prejudice justifying dismissal in certain types of cases. Although they accept that this is not a purely "documents case", the plaintiffs nonetheless argue that many issues in the case will turn on documentary and expert evidence and that the passage of time will not therefore diminish the nature or quality of the evidence that will be available to the trial judge. The plaintiffs have clarified the precise representations on which they intend to rely in their replies to particulars. They will not rely on private statements or oral representations of the Minister for Finance or his officials. Instead, they will rely on speeches given by the Minister for Finance in public or in Dáil Éireann, on the statutory scheme in force when the plaintiffs made their investments, on published ministerial guidelines and on the documents generated in connection with the investments.

45. The defendants' affidavit does not identify any witnesses whom they had intended to call but who are now unavailable. No argument is made that any relevant documentation is no longer to hand. However, the defendants place significant reliance on the plea, at paragraph 15 of the plaintiffs' statement of claim, that the sole reason for which the plaintiffs invested in the relevant student accommodation was in order to benefit from the student accommodation tax relief. This plea is put squarely in issue in the defence. The defendants accept that the plaintiffs are not necessarily required to prove detrimental reliance in order to succeed in a claim based on legitimate expectation. However, as the plaintiffs also advance a claim based on promissory

estoppel, they will be required to establish detrimental reliance. Consequently, it is said that the plaintiffs' state of mind at the time of the investments is a factual matter in issue between the parties. The defendants submit that as a result of the effluxion of time, they will be impeded in contesting the plaintiffs' factual assertions on this issue. It is said that the nature and quality of the evidence required to determine this issue of fact has been diminished by the passage of time to the extent that justice is put at the hazard. Thus expressed, the prejudice asserted is perhaps more in the nature of general than specific prejudice. But, as the primary questions are whether this prejudice has been made out and, if so its likely impact, it is not strictly speaking necessary to decide what label to attach to the prejudice in issue.

46. A potential weakness in the defendants' argument is that the plaintiffs bear the onus of proof on the issue of their detrimental reliance. If the determination of this issue depends on the first plaintiff's oral evidence, then insofar as his memory is unreliable, one would expect that this would pose more of a difficulty for the plaintiffs than for the defendants.

47. However, the defendants contend that they will be impeded in their cross examination of the first plaintiff in relation to his motives for making the relevant investments. The defendants observe that if the first plaintiff's memory has become less cogent over time, it will be more difficult to establish that his assertions as to his motivation are incorrect or inconsistent. I fully accept that there may be cases in which the erosion of the first plaintiff's memory by the passage of time may disadvantage the defendant even in respect of a factual issue on which the plaintiff bears the burden of proof. For example, in a case in which the credibility of the plaintiff is crucial (for example insofar as concerns the description of a disputed accident, incident or conversation), a defendant might be disadvantaged if the plaintiff could retreat, in answer to exacting cross examination, to an admission that he does not well remember certain matters, thereby diluting the force of inconsistencies in his account. The defendants emphasise that the plaintiffs made the investments of relevance in this case as long

ago as 2001 (in respect of the Foster residence in University College Dublin) and 2004 (in respect of the Proby residence on Carysfort Avenue). The investments therefore predate the likely date of trial by approximately 20 years.

48. For the following reasons, the defendants have not in my view made out anything close to specific prejudice (or indeed general prejudice) on this ground.

49. First, I note that the particular argument made was not presaged in any way in the defendants' grounding affidavit. The plaintiffs therefore had no opportunity to swear a replying affidavit on this issue. It is obviously not possible to speculate on what such a replying affidavit might have said or what evidence it might have put before the court. Conceivably, the first plaintiff's position may be that his memory of events is very full, thus avoiding the difficulty envisaged. Alternatively, the first plaintiff might have outlined in general terms the evidence upon which he proposed to rely in support of his plea as to the motivation for his investments. It may equally be that contemporaneous documentation will go a long way towards establishing the plaintiffs' motivation in entering the scheme. However, the plaintiffs were denied an opportunity to put any such evidence on affidavit because the particular objection now made was not set out on affidavit or in the defendants' written legal submissions. In these circumstances, less reliance can be placed upon this argument.

50. Second, even if the relevant investments predate the likely trial date by many years, it does not appear that the defendants can rely upon defects in memory spanning the entirety of that period. In *Cave Projects*, Collins J. emphasised that in seeking to establish that the balance of justice favours dismissal within the context of the *Primor* jurisdiction (as opposed to the parallel jurisdiction based on *O'Domhnaill v Merrick* [1984] IR 151), the defendants cannot rely on matters which do not result from the plaintiff's delay. Collins J. also stated that general prejudice should not necessarily be assessed by reference to the entire period between the events giving rise to the claim and the date of trial, rather than by reference to the period of

inordinate and inexcusable delay in issue. I have found that the plaintiffs' culpable delay in this case occurred over the last three years. There is no particular reason to think that this period would be particularly or disproportionally operative in degrading the first plaintiff's memory.

51. Third, regard must be had to the particular case made by the plaintiffs. The plaintiffs' case is that were it not for the existence of the student accommodation tax relief they would not have invested in the student accommodation. The plaintiffs make no case that had they not invested in the student accommodation, they would have invested in other more profitable ventures. Nor do the plaintiffs appear to be making a claim that obtaining a certificate of compliance necessitated increased development costs. The plaintiffs make no claim for the costs of the construction or design etc of the student accommodation. Rather, the plaintiffs' case relates only to the tax reliefs which they would have obtained had the student accommodation tax relief not been withdrawn. The first plaintiff's case is simply that he invested in a tax scheme in order to take advantage of that tax scheme. The defendants may wish to demonstrate that the plaintiffs would have invested in the development of student accommodation in any event. Indeed, this may well be the case. However, the fact remains that if the student accommodation tax relief had not been withdrawn, then in addition to any other profit (or loss) connected with the development, the plaintiffs would, all things being equal, have been able to avail of certain tax reliefs which they contend are now unavailable. Whatever personal motive the plaintiffs may have had for investing in the scheme, the parameters of the scheme will delineate the tax advantage they could have hoped to enjoy. It seems to me therefore that the first plaintiff's evidence relating to his reliance or otherwise upon the existence of the scheme as the sole motive for the investment is of less relevance than it might otherwise be.

52. Fourth, I think that the plaintiffs are correct in contending that the issue of detrimental reliance is unlikely to turn on issues of credibility and memory in any event. One would expect

that the rationale for the investment in the student accommodation will be apparent from the contemporaneous documents recording the tax, financial and legal advice given to the plaintiffs.

53. Finally, the defendants' reliance on *Flynn v. Minister for Justice* is somewhat misplaced. That case involved an appeal against a decision of the High Court dismissing the plaintiff's proceedings for assault and false imprisonment on grounds of inordinate and inexcusable delay. The Court of Appeal, per Irvine J., held that the passage of time meant that the relationship between the assault and the plaintiff's alleged psychological condition would be more difficult to establish or indeed to dispute by medical examination which of necessity would be carried out several years after the event. The plaintiff's injuries would not be ascertainable in an objective manner such as would often be the case with injuries of a physical nature which are captured by medical or hospital records. Thus Irvine J. found that the passage of time would inevitably prejudice the defendant's ability to test the plaintiff's evidence concerning the nature and extent of his injuries and their connection to the events the subject matter of the claim.

54. The same cannot be said here. The plaintiffs' case does not in any real sense turn upon disputed issues of fact. There is no particular event dependent on the recollection of witnesses which may have faded or become distorted by the passage of time. The outcome of these proceedings will not depend primarily upon the testimony of witnesses of fact, but upon the interpretation of a series of statutes and statutory guidelines, the ascertainment of their legal effect and expert evidence on the nature of the plaintiffs' loss. Although not a pure "documents" case, the primary oral evidence in this case will be expert evidence. To the extent that the first plaintiff himself gives evidence one would expect that the key aspects of his evidence would be corroborated by contemporaneous documentary evidence.

55. Any inconsistencies in the plaintiffs' account can be tested by cross examination by reference to the contemporaneous documents. Those documents would, in any event, have been the primary source of cross examination even had the trial come to fruition several years ago. I do not see that delay is the factor which goes to this point one way or another. If the plaintiffs' position was lacking in credibility or consistency in 2018, then the same will remain the position today. In short, the issues of fact and law in the case are ones which it is safe to try.

The "radical" nature of the proceedings

56. The defendants characterise the plaintiffs' case as novel, unusual and radical. The plaintiffs seek to have the amending legislation declared invalid or inapplicable. The defendants argue such an outcome could have far reaching impacts on other legislative regimes and exert a chilling effect on the legislature. As a result, it is argued that the delay in bringing the case forward constitutes both a specific and a general prejudice from the State's point of view.

57. I take the point that the case made by the plaintiffs may have far reaching implications. My general view is that inaction on the part of a defendant, which cannot be characterised as culpable or as inducing delay on the part of the plaintiffs, will not disentitle that defendant to an order dismissing the proceedings (as to which see paragraph 63 below). However, if these defendants had wished to obtain clarity in this area of law, then there were steps open to them to accelerate the timetable. Therefore, whilst I would not hold that the defendants' failure to bring forward this application at an earlier point in time would disentitle them to the order sought (if same ought otherwise to be granted), it does in my view somewhat neutralise the argument of prejudice arising from persisting uncertainty in the law.

58. Furthermore, the argument advanced by the defendants could apply to any proceedings in which the constitutionality of an Act of the Oireachtas is challenged. Yet the defendants could point to no similar case in which this argument succeeded.

In summary, prejudice will not be presumed and must be established. It seems to me that the prejudice asserted on the part of the defendants is hypothetical only. I therefore find that there is no prejudice such as would be likely to give rise to a real risk of an unfair trial.

Defendants' delay

59. Over four and a half years passed between the last step in the proceedings, being a letter of 13th June, 2017 from the defendants to the plaintiffs' solicitors in relation to discovery, and the date upon which the defendants issued their motion seeking to strike out the proceedings on 2nd February, 2022. During this time, neither party took any step. The plaintiffs argue that this delay on the part of the defendants disentitles them to the relief sought in this motion.

60. As I find that the defendants have not established that the balance of justice favours an order dismissing the proceedings (see paragraph 64 and 65 below), it is not necessary to decide this issue. However, I feel bound to say that the plaintiffs' argument does not strike me as attractive.

61. It is clear from the Supreme Court's judgments in *Comcast* that if some form of recalibration is generally to be favoured then there must be some mutuality of adjustment as between the parties. Greater mutuality of adjustment does not, however mean that the defendant's and plaintiff's delay must be treated the same. Indeed, as pointed out by counsel for the defendants, were this not the case a defendant could very rarely succeed in an application to strike out for delay as a result of the passage of time from the last step in the proceedings since the defendants' corresponding delay could always be relied upon by the plaintiffs as neutralising their own delay.

62. I agree with the views expressed by Costello J. in *Doyle v Foley*, that unless the defendant has been in default, little weight should be attached to any delay or acquiescence on their part. Applying this test, I do not find that the defendants were guilty of culpable delay or

that any action or inaction on their part contributed to the plaintiffs' delay. Rather, the position appears to be that from 2018 the plaintiffs were fully aware that they required an expert report but found it difficult to secure same. Given that the plaintiffs took a further eight months after the issue of the present motion to secure the expert report, there is no reason to think that had the defendants written a warning letter notifying the plaintiffs of their intention to bring an application to dismiss for delay, matters would necessarily have moved any faster.

Conclusion

63. Overall, I am not persuaded that the defendants have established anything like the level of prejudice that might assist them in succeeding in this application. Acknowledging that the degree of prejudice required under the third leg of *Primor* may be significantly less than that required in the absence of inordinate and inexcusable delay, the defendant has not established same.

64. As emphasised by McKechnie J. in *Mangan v. Dockery & Ors*, even where inordinate and inexcusable delay is established, the balance of justice test must be applied: does it favour the continuation or termination of the proceedings? McKechnie J. stated that there may be several diverse factors at play but that all lead to an assessment of whether it would be unfair to allow the action to proceed or would be unjust to strike the action out. This involves a balancing of the respective prejudice to the plaintiff if the action is struck out and to the defendant if it is not. Striking out the proceedings would have grave consequences for the plaintiffs depriving them of any opportunity whatsoever to bring forward their litigation. There is very little countervailing prejudice to be balanced against this on the part of the defendants. The striking out of these proceedings would be far too draconian a remedy. The jurisdiction to strike out is not intended to punish parties but to ensure fairness of procedure. I have no

hesitation whatsoever in holding that a trial can be fairly conducted. In such circumstances, the balance of justice clearly favours the continuance of the proceedings.

65. I will decline the order sought by the defendants dismissing the proceedings. It is nonetheless appropriate that the proceedings are now governed by a very strict timeframe. I will hear the parties in relation to such directions as might be appropriate in order to secure and ensure the early trial of these proceedings. To that end, I will list this matter for final orders and costs at 11.00am next Tuesday, 20th December, 2022.