THE HIGH COURT

[2023] IEHC 170

Record Number 2018/5494 P

BETWEEN

MARK CONAN

Plaintiff

AND

SHERRY FITZGERALD (COMMERCIAL) LIMITED

Defendant

JUDGMENT of Mr. Justice Mark Heslin delivered on the 31st day of March 2023

Introduction

1. This judgment concerns the defendant's application to dismiss the plaintiff's claim on delay grounds. The defendant's motion, which was issued on 11 January 2022 and initially returnable for 28 March 2022, seeks orders (i) pursuant to the Court's inherent jurisdiction dismissing the plaintiff's claim for want of prosecution and on the grounds of inordinate, unconscionable and/or excessive delay; and (ii) pursuant to the provisions of Order 122 of the Rules of the Superior Courts, dismissing the Plaintiff's proceedings for want of prosecution.

2. I am very grateful to Mr. O'Brien BL for the defendant and to Mr. McCarthy SC for the plaintiff, both of whom made detailed oral submissions with clarity and skill during the hearing which took place on 7 March 2021. Written legal submissions were also prepared on behalf of the defendant. These submissions, written and oral, were of great assistance to the court and I will refer to the principal submissions made by both sides during this judgment.

3. It is fair to say that there was no material dispute between the parties as to the relevant legal principles and, during the course of this judgment, I will refer to certain relevant authorities.

4. As both sides agree, there can be no 'one size fits all' approach by the court to an application of the present type. On the contrary, this Court must engage with the specific facts and circumstances of this case, as disclosed by the pleadings and evidence, and provide a 'bespoke' response to the application underpinned by the interests of justice and guided by the relevant principles. For that reason, the focus of this Court must be very much on the specific facts and circumstances of the present case, and I now turn to an examination of same.

Chronology

5. I have carefully considered the pleadings and evidence before the court comprising of the following: -

(i) Affidavit sworn by Mr. Harry Fehily, solicitor for the defendant, on 6 January 2022 and the exhibits thereto:

(ii) Replying affidavit of Mr. Mark Conan sworn on 17 May 2022, and the exhibits thereto; and

(iii) Supplemental affidavit sworn by Mr. Fehily on 28 February 2023 and the exhibit thereto.

From the foregoing, a chronology of relevant matters arises, as follows.

November 2012

6. At para. 7 of the plaintiff's 11 July 2018 Statement of Claim, it is pleaded that: "*In or about November 2012, Allied Irish Banks plc. (the owner of EBS) sold a portfolio of EBS loans, including the plaintiff's loans, to Vesta Mortgages Investment Ltd. ("Vesta"), a subsidiary of the US–based private equity firm, Lonestar".* The defendant confirms at para. 7 of the Defence delivered on 4 December 2018 that the foregoing pleas are admitted.

7. At para. 8 of the plaintiff's Statement of Claim it is pleaded that, following the assignment of the plaintiff's loans, Vesta invoked a "*Loan to Value Covenant"* ("LTV Covenant") to which the loans were subject and directed the plaintiff to engage valuers to provide valuations of the properties held as security.

9 September 2013

8. At para. 10 of the Statement of Claim the plaintiff pleads that Vesta directed the plaintiff to instruct "*either Savills or DTZ*" to carry out valuations on the plaintiff's commercial properties located at Fade Street, Dublin and Cheltenham, England respectively. At para. 10 of the Defence it is denied that, on 9 December 2013 the plaintiff instructed the defendant to carry out a valuation but, without prejudice to the foregoing, the defendant pleads that, on 9 September 2013 the plaintiff "*instructed the defendant to address a letter of engagement to Vesta Mortgage Investments Ltd. and whereby at all material times that company was the client and/or retained the defendant*".

22 October 2013

9. It is common case that the defendant carried out a valuation of the Fade Street property in the sum of €1,686,000.00. Para. 12 of the Statement of Claim describes the property as comprising "*two adjoining terraced commercial buildings containing the following units: (a) a retail unit at no. 14 extending over ground and basement with office/workshop accommodation overhead; (b) a public house trading as the Market Bar from 14(a) which extends over ground and mezzanine levels with a large courtyard/smoking area to the front of the property".*

10. In essence, the plaintiff claims that the valuation of the property by the defendant was carried out in breach of contract, negligently and in breach of duty, as a consequence of which the plaintiff claims to have suffered financial loss totalling €840,989.00. This loss is said to have arisen in circumstances where, on the basis of the valuation, the plaintiff failed the relevant LTV Covenant. The plaintiff asserts that, had the valuation been properly carried out, this would not have occurred. He pleads that the value of the property was significantly greater than reported by the defendant to Vesta. The plaintiff claims *inter alia* that in order to meet the LTV Covenant he was obliged to liquidate some of his investments, including selling shares held in Ryanair, and converting Sterling cash balances to Euro. He also pleads *inter alia* that the payment to Vesta had a consequential impact on the plaintiff's finances, leading him to sell properties at Cheltenham, England and an apartment at George's Quay.

August 2014

11. At para. 6 of his replying affidavit, sworn on 17 May 2022, the plaintiff avers *inter alia* that:-

"*While the proceedings concern a valuation report dated 22nd October 2013, all of the losses flowing from that report were not crystalised until August 2014 when I had to sell the properties in Cheltenham and George's Quay".*

25 April 2017 - 5 May 2017

12. At para. 7 of his affidavit, the plaintiff avers that, prior to issuing the proceedings, he was advised that he would have to get an independent expert opinion in respect of the valuation/losses. He avers that "*To this end I appointed Paul Good, chartered valuation surveyor who provided a preliminary opinion on the 25th April 2017 and provided a further report on the 5th May 2017*".

29 November 2017

13. With respect to the pre–commencement position, the plaintiff also makes the following averment, at para. 7 of his affidavit:-

"*I also engaged Browne Murphy and Hughes accountants who provided a draft report on the 29th November 2017…".*

2013 - 2017

14. At para. 6 of his affidavit, the plaintiff avers *inter alia* that: "*I suffered significant stress from the consequences of the defendant's negligence which led me to suffer a cardiovascular disorder".* He then refers to and exhibits a letter, dated 29 January 2018, written by Dr. Ross Murphy, whom the plaintiff describes as his cardiac surgeon. With respect to the contents of this letter, the plaintiff makes the following averment:-

"*In the letter, Dr. Murphy expresses his view that my cardiac problems stemmed from the stress that I was suffering from during the period 2013 to 2017 which was when I was dealing with Vesta and the consequences of my dealing with them. I had a stent inserted in June 2017".*

15. It does not seem to me that the contents of Dr. Murphy's letter go as far as the plaintiff's averments. It is appropriate to quote the said letter *verbatim*: -

"*To whom it may concern,*

This is to certify that this 60-year-old man presented acutely in June 2017 with coronary artery disease. I understand he had significant psychosocial stresses from the period 2013 to 2017. The role of stress in producing coronary disorders is best evidenced by the Whitehall Civil Service studies which suggest that over a chronic period of time, the loss of locus of control of the stress can be associated with excess cardiovascular disorders.

Many thanks,

Yours sincerely

Dr. Ross Murphy
Consultant cardiologist".

16. It seems uncontroversial to say that Dr. Murphy was not a witness to the events of which the plaintiff complains, and that the doctor's *understanding* is based exclusively on what he was told by the plaintiff. This seems clear from the fact that, according to the letter, the plaintiff first *"presented acutely in June 2017"*. Nor does Dr. Murphy go as far as stating that the plaintiff's cardiac problems "*stemmed from*" the effect on the plaintiff of dealing with Vesta. Rather, Dr. Murphy comments on the role of stress in producing coronary disorders and a particular study which suggests that stress "*can be*" associated with excess cardiovascular disorders.

17. Insofar as Dr. Murphy's report is proffered with a view to explaining pre–commencement delay on the part of the plaintiff, it does not seem to me to provide anything like a full answer. I say this because, on the plaintiff's case, his losses crystalised as of August 2014 and he did not present acutely with a cardiac issue until June 2017. The interregnum represents a period of almost three years. One could have nothing but sympathy for anyone suffering from stress, but it does not seem to me that there is evidence before the court to the effect that, prior to June 2017, the plaintiff was not in a position to issue proceedings.

18. Furthermore, although the plaintiff "*had a stent inserted in June 2017*", no details are given in relation to how long the recovery from that procedure may have taken. On the plaintiff's account, it did not rule out progress in that, as of 29 November 2017, Browne Murphy and Hughes accountants provided their draft report. In other words, whilst the plaintiff underwent a medical procedure in June 2017, it does not seem to me that he has proffered evidence which would allow for a finding that his medical issues were the cause of a further twelve months elapsing until his proceedings were issued on 15 June 2018. With respect to that twelve–month period, the following is what can be gleaned from the plaintiff's affidavit.

June 2017 – June 2018

19. At para. 8, the plaintiff avers that: "*Prior to issuing the proceedings I had several consultations with my solicitor as well as junior and senior counsel".* He does not say when these consultations took place. Nor does he explain why these consultations could not have taken place in the wake of his losses crystalising in August 2014. He also avers at para. 8 that his then senior counsel was appointed to the Bench in April 2018. Doubtless, this resulted in delay which might well be measured in weeks or possibly months but certainly not years.

20. The plaintiff caused a plenary summons to issue on 15 June 2018, in which the following is claimed:-

(i) Damages for breach of contract, negligence, negligent misstatement, equitable compensation and breach of duty;

(ii) An order for judgment in the amount of €840,989.00;

(iii) Such further or other order that the court deems fit;

(iv) The costs of the proceedings;

(v) Interest.

27 June 2018

21. On 27 June 2018, an Appearance was entered for the defendant by Holmes O'Malley Sexton, solicitors ("HOMS").

11 July 2018

22. The plaintiff caused a Statement of Claim to be delivered, dated 11 July 2018. The nature of the plaintiff's claim is clear from the "*PARTICULARS OF BREACH OF CONTRACT, NEGLIGENCE AND BREACH OF DUTY OF THE DEFENDANT*" which are pleaded in the following terms at para. 17 of the Statement of Claim:-

"(a) Failed to apply a market rent when calculating the value of the Property;

(b) Failed to ascertain the proper market rent for the Property;

(c) Failed to make any or any adequate enquiry in relation to recent transactions in comparable properties;

(d) Relied on other property transactions that were not relevant to the Property;

(e) Failed to value the Property by reference to the annual turnover of the public house trading from the Property;

(f) Failed to consider adequately or at all the location, construction, condition and use of the Property;

(g) Failed to take into account adequately or at all the nature of the property market in the area of the Property at the relevant time;

(h) Failed to comply with the RICS Practice Standards on the Capital and Rental Valuation of Licenced premises in the making and preparation of the valuation report;

(i) Failed to have regard to the trading potential of the Property;

(j) Failed to request the turnover figures prior to carrying out the valuation;

(k) Incorrectly applied a discount to the rental income received from the Property without any justification or reason;
(l) In the circumstances failing to exercise reasonable care and skill in valuing the Property;
(m) Failed to appoint a person to perform the valuation who had the knowledge, skills and understanding to undertake the valuation competently;
(n) Valued the Property at €1,686,000.00 when its real value was significantly more and at least €2,400,000.00".

23. It is clear from the foregoing that central to the determination of the plaintiff's claim will be expert evidence from professional valuers. In other words, the nature of these proceedings is wholly unlike, say, a road traffic accident where the determination of negligence hinges on a court making findings of fact having heard conflicting accounts from witnesses (as to issues such as speed, distance, lighting, weather etc.). The fact that the defendant produced a valuation of the relevant property in a certain sum is not in dispute. In the manner presently examined, there is no question of any relevant documentation having been lost due to delay or otherwise. Nor is there any question of any valuation expert not being available as a result of delay.

24. At para. 19 the plaintiff pleads that, at the time of the valuation, the plaintiff had outstanding borrowings of €5,264,546.68; the total value of the properties was €6,192,760; giving a shortfall of the LTV Covenant of €310,340.68. Particulars are given in relation to the relevant accounts, and each is specified by number, giving the aforesaid total. Particulars are also given with regard to the valuations used in the LTV calculation, namely: -

"*14/14(a) Fade Street €1,686,000.00*
Apartments €280,000.00
26/26 & 30/32 Promenade, Cheltenham €4,226,760.00
Total €6,192,760.00"

25. Schedule 1 to the Statement of Claim comprises a list of the plaintiff's loans with EBS. Schedule 2 comprises a calculation of loss and damage.

4 September 2018

26. By letter dated 4 September 2018, Denis McSweeney, solicitors for the plaintiff, wrote to the defendant's solicitors referring to the delivery of the Statement of Claim on 12 July 2018; pointing out that the 28–day period for the filing of a defence had expired; and calling for delivery of a Defence within 21 days, in default of which a motion seeking judgment would issue without further notice.

5 September 2018

27. By letter dated 5 September 2018, HOMS, solicitors for the defendant, replied stating that papers were with counsel and asking for forbearance in relation to a motion. It is fair to say

that some forbearance was afforded, because no motion for judgment in default issued at that stage.

1 October 2018

28. By letter dated 1 October 2018, the plaintiff's solicitors wrote again to the solicitors for the defendant stating that they were under instructions to issue a motion without further notice.

3 October 2018

29. By letter dated 3 October 2018, the defendant's solicitors responded stated: "*We would be most obliged if you could bear with us in this regard and would advise that a reminder has issued to counsel… regarding the defence".* It seems clear that a certain amount of additional forbearance was afforded, in that it was not until almost three weeks later that the relevant motion issued.

23 October 2018

30. On 23 October 2018, the plaintiff's solicitors issued a motion seeking judgment in default of defence as against the defendant. That motion was grounded on an affidavit sworn on 23 October 2018 by Ms. Sinead O'Boyle, solicitor.

31. It will be recalled that the Statement of Claim is dated 11 July 2018. Under the then Superior Court Rules, a defendant had 28 days to deliver a defence. It is fair to say that the defendant was in delay, given that the plaintiff's motion was issued some three and a half months after the delivery of the Statement of Claim.

4 December 2018

32. It was not until 4 December 2018 that the defendant delivered its defence. This was approaching five months after the delivery of the Statement of Claim. The defendant also raised a Notice for Particulars on the same date.

33. As mentioned earlier, the defence pleads *inter alia* that the defendant provided the valuation at the request of Vesta. The defendant also denies that the valuation was provided in breach of contract, negligently and/or in breach of duty. It is denied that the property was worth significantly more than the value reported by the defendant; and it is denied that the plaintiff has incurred the losses alleged.

34. At para. 25 of the defence, the defendant denies the plaintiff suffered acute stress and, without prejudice to the foregoing, pleads that: "*Any treatment for coronary artery disease diagnosed and/or treated in June 2017 is wholly remote from the alleged negligence of the defendant, its servants or agents, which is denied and/or any claim in respect of alleged acute stress is unforeseeable".* This plea was made in circumstances where, at para. 24 of the Statement of Claim (and after setting out particulars of the sum of €840,989.00 claimed), the plaintiff stated:

"*In addition, the plaintiff has suffered from acute stress arising from the negligence of the defendant. In June 2017 the plaintiff was treated for coronary artery disease which his doctor has certified as being caused by the psychosocial stress experiences by the plaintiff during the period from late 2013 through to June 2017 when he presented himself to his doctor".*

35. It seemed to me that, notwithstanding the foregoing wording, no claim for personal injuries had, in fact, been articulated in the writ. Nor had any Personal Injuries Summons been issued (for which a verifying affidavit would be required etc.). In response, counsel for the plaintiff made clear that the claim by the plaintiff is limited to the €840,989.00 (calculated at para. 24). That calculation does *not* include any general damages claim and the total of €840,989.00 represents alleged financial loss arising from the disposal of certain shares; the encashment of Sterling; sales of properties and lost rental income.

Not a claim for personal injuries

36. Counsel for the plaintiff put matters beyond doubt, submitting that "*It is not a claim for personal injuries*". The significance of the foregoing is that, at any future trial, the determination of loss would not require any evidence touching on alleged personal injuries, be that from the plaintiff, any other witness as to fact, or any medical expert.

37. In other words, this is a straightforward claim with a single central issue, namely, whether the defendant's valuation, which placed a value of €1,686,000.00 on the commercial property in question, was provided negligently and/or in breach of contract and/or in breach of duty. The manner in which the plaintiff alleges this to be the case is clearly pleaded at para. 17(a) to (n), inclusive.

Expert valuation evidence

38. As noted earlier, the determination of the central question will depend on evidence by expert valuers proffered on both sides. The defendant put it as follows at para. 6 of their written submissions: -

"*The dispute arises from a claim of professional negligence and will be determined primarily having regard to issues concerning property valuation techniques".*

Later, in the defendant's submissions, it was confirmed, very appropriately, that: -

"…*it is accepted that the plaintiff's claim will primarily be determined on the basis of expert evidence concerning the valuation report provided…".*

39. At para. 26, of the defence the following, *inter alia*, is pleaded: "*It is denied that the defendant has the alleged or any liability to the plaintiff in the manner as alleged or at all in circumstances where the plaintiff on or about 12th December, 2013 required a copy of the defendant's valuation on the Property ostensibly for the purpose of the plaintiff's 2013 tax return and further in circumstances where the valuation was only made out to the plaintiff subsequent to that date and subsequent to the plaintiff being aware of the defendant's valuation of the*

property and the alleged breach of the loan to value covenant and/or the liquidation of investments in or about October, 2013 again by the plaintiff".

40. The reality that the determination of the dispute is likely to hinge on expert evidence from professional valuers on both sides is underlined by the pleas made at paras. 27 and 28 of the Defence:-

"*27. Further, and again without prejudice to the foregoing, if the defendant was retained by the plaintiff in the manner as alleged or at all, which is denied, then at all material times the defendant, its servants or agents acted within the terms of engagement and/or within the terms of its retainer and/or within the terms of its profession and acted with such reasonable care as was required in the circumstances.*

28. The defendant intends to offer expert valuation evidence at the trial of the action with the defendant's said expert having a field of expertise in surveying and/or valuations". (emphasis added)

17/18 December 2018

41. The plaintiff's motion seeking judgment in default of defence came before the court (Cross J.) on 17 December 2018, at which point it was ordered, by consent, that the motion be struck out; that the defendant pay the plaintiff the costs of the motion and order to be taxed in default of agreement; with the costs order to be stayed pending the determination of the proceedings. That order was perfected on 18 December 2018.

14 February 2019

42. On 14 February 2019, the plaintiff's solicitors delivered Replies to the defendant's 4 December 2018 Notice for Particulars.

Documents

43. It is plain from the contents of the said Replies that a certain amount of relevant documentation was provided by the plaintiff to the defendant at that juncture. I say this in light of the following:-

- Para. 1 of the Replies states *inter alia*:-
  "*Please find enclosed attached the Letters of Offer referred to in Schedule One of the Statement of Claim";*
- At para. 9 of the Statement of Claim, the plaintiff pleaded that:-
  "*By letter dated 30th August 2013, the plaintiff informed Vesta that he had engaged Quinn Agnew & Co. to carry out the valuation of the property at Fade Street, CBRE to carry out the valuation on the apartments and Downings Bentley to carry out the valuation on the Cheltenham property";*
- At para. 9 of the Notice for Particulars, the defendant sought a copy of this letter and para. 9 of the plaintiff's Replies stated:-

"*Please find enclosed the letter dated 30th August 2013 referred to in paragraph 9 of the Statement of Claim";*

- Para. 12 of the plaintiff's Replies states:-
  "*By email dated 9th September 2014 Jonathan Ross of the defendant wrote to the plaintiff stating: -*

  > *'Many thanks for seeking the fee quote for the valuation of the above property [14/14(a) Fade Street Dublin]. We would provide a valuation report to you and your nominated bank of €3,500 plus VAT. If successful, please email me back and we will send out formal terms of engagement to the nominated parties'.*

  By reply the plaintiff wrote to Jonathan Ross in the following terms: -

  > *'Thanks for the email. Please proceed. Kindly provide me at 3 Willfield Park, Dublin 4, a letter of engagement addressed to: Vesta Mortgage Investments Ltd, 25/28 Adelaide Road, Dublin 2. The purpose of the valuation is a Loan to Value Covenant and test. The valuation is required no later than 26th September 2013'.*

  Please find enclosed copies of the emails referred to".
- Para. 13 of the plaintiff's Replies refers to and encloses a copy of "*the letter of engagement dated 20th September 2013*".
- Whereas, at para. 19 of the Statement of Claim, the plaintiff pleaded particulars of outstanding borrowings used in LTV calculation (totalling €5,264,548.68) para. 23 of the plaintiff's Replies states *inter alia* that:-
  "*The matters pleaded in para. 19 of the Statement of Claim are the balances in bank accounts on a certain date";*
- Para. 24 of the plaintiff's Replies stated:-
  "*Please find enclosed copies of the valuations carried out on 26/28 & 30/32 Promenade, Cheltenham which is dated 11th October 2013 and the valuation carried out on the apartments which is listed 18th October 2013 referred to in para. 19 of the Statement of Claim";*
- Whereas, at para. 21 of the Statement of Claim, the plaintiff pleaded that, by letter dated 25 October 2013, Vesta directed the plaintiff to make a payment of €310,340.68 by 1 November 2013, failing which Vesta would deem the plaintiff to be in breach of his obligations, para. 25 of the plaintiff's Replies stated: -
  "*Please find enclosed letter dated 25th October 2013 which is referred to in para. 21 of the Statement of Claim";*
- At para. 29 of the Replies, the plaintiff stated *inter alia* that, at the trial, he would give evidence in respect of the rental income alleged at para. 24(d) of the Statement of Claim (as regards property at Cheltenham and George's Quay). The reply at para. 29 went on to state *inter alia* that:-
  "*Without prejudice to the foregoing, the rental income of £190,000 Sterling arises on foot of the Lease in place in respect of 26/28 providing for an annual rent of*

£73,000 Sterling and a lease and arbitration award in respect of 30/32 providing for a rent of £117,000 Sterling, the latter being determined in 2011";

- At para. 30 of the Replies, the plaintiff indicated that he would give evidence at the trial of the action in respect of the George's Quay rental income, and he went on to state that:-

  "*Without prejudice to the foregoing, the rental income in respect of George's Quay for the relevant period is comprised as follows:-*

  22, 2–4 George's Quay, Luisa Bongiovanni €4,625.00; 22, 2–4 George's Quay, Karthik Thiru, €6,475.00; 22, 2- 4 George's Quay, Kate Mulcahy Car Space €600.00; 22, 2–4 Georges Quay, Ingrid Olsson Car Space €500.00 = €12,200.00".

44. It is appropriate to note at this juncture that neither side assert that any relevant documents will not be available to a future trial judge. It will be recalled that, at para. 28 of the Defence, it was pleaded that: "*The Defendant intends to offer expert value evidence at the trial of the action …".* The fact that both sides intend to proffer expert valuation evidence is also clear from the contents of the plaintiff's Replies wherein (at paras. 16; 17; 18; 19; 20 and 22, it was stated that the plaintiff will rely on evidence given by the plaintiff's "*expert witness*").

6 January, 2022

45. On 6 January, 2022, Mr. Harry Fehily, solicitor for the defendant, swore an affidavit to ground an application to dismiss the plaintiff's claim on delay grounds.

11 January, 2022

46. The present motion was issued at the central office on 11 January, 2022. The original return date for the said motion was 28 March, 2022. The hearing before me took place on 7 March, 2023. In those circumstances, it seems to me that the appropriate period, in respect of calculating the plaintiff's delay is the period up to, but not beyond, 11 March, 2022 (when the defendant issued the present motion). In other words, it does not seem appropriate to hold the plaintiff responsible for delay in having the motion *heard*.

Agreed chronology

47. Having looked in some detail at relevant events in chronological order, the following is a useful of summary by way of an agreed chronology:-

Date	**Action**
26 September 2013	Valuation carried out by defendant
August 2014	Crystallisation of losses
7 March 2017	Initiating letter

27 April 2017	Preliminary report from Paul Good, chartered valuation surveyor (retained by plaintiff)
5 May 2017	Additional report from Paul Good, chartered valuation surveyor
5 May 2017	Draft report from Browne Murphy Hughes accountants (retained by plaintiff)
15 June 2018	Plenary summons
27 June 2018	Entry of appearance by defendant
11 July 2018	Statement of Claim
23 October 2018	Plaintiff's notice of motion seeking judgment in default of defence
4 December 2018	Notice for Particulars raised by defendant
4 December 2018	Defence
14 February 2019	Replies to particulars by plaintiff
19 February 2019	Final report from Browne Murphy Hughes accountants
11 January 2022	Defendant's motion to dismiss proceedings

Pre-commencement delay

48. The significance of pre-commencement delay was highlighted by Irvine J. (as she then was) 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 Anor v. Revenue Commissioners and Ors [2010] IEHC 95 and McBrearthy 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*."

49. The valuation, the subject of these proceedings, is dated 26 September, 2013. It was approaching five years later before the plenary summons was issued. In the manner referred to earlier in this judgment, the fact that the plaintiff "*…presented acutely in June 2017 with coronary artery disease"* (*per* a 29 January, 2018 letter from Dr. Ross Murphy, consultant cardiologist) does not explain the four years of delay *prior* to that point. Even if one calculates from August 2014 onwards (i.e. when, according to para. 6 of the plaintiff's 17 May, 2022

affidavit) his losses had "*crystallised*", there was a period of almost three years pre-commencement delay which is not explained. Furthermore, a full year elapsed between June 2017 when (*per* para. 6 of the plaintiff's affidavit) he had a "*stent inserted"* and 15 June, 2018 (when the plenary summons issued).

50. In light of the foregoing, I take the view that there has been pre-commencement delay on the part of the plaintiff. In other words, the plaintiff made what is often referred to in the authorities as a 'late start' and, that being so, he was under a particular onus to progress the proceedings with due expedition.

51. Order 122, rule 11 of the RSC provides that, where there has been no proceeding for two years, a defendant may apply to dismiss a claim for want of prosecution and, on the hearing of such application, the Court may order that the matter be dismissed, or may make such other order as the Court deems just.

52. The jurisprudence in the area is very well known and comprises two overlapping lines of authority derived from (i) the Supreme Court's decision in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459; and (ii) the Supreme Court's earlier decision in *O'Domhnaill v. Merrick* [1984] IR 151.

53. At the risk of oversimplification, the *O'Domhnaill* approach is focussed on whether a defendant would suffer a patent injustice or unfair burden if required to meet the delayed claim. At para. 40 of the decision by McKechnie J. in *Comcast International Holdings Ltd v. Minister for Public Enterprise* [2012] IESC 50, the learned judge articulated the 'test' in accordance with the *O'Domhnaill* principles by means of the following three questions:

(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?

54. In *Primor,* the test outlined by Hamilton C.J. (at p.p. 475, 476) was put 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*."

***Primor* test**

55. It is fair to say that the 'test' in *Primor* requires this court to pose the following three questions:

(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? It is this test which determines the present application.

Inordinate?

56. What constitutes inordinate delay is not a complex or difficult concept. As Cooke J. indicated in *Framus Ltd v. CRH* [2012] IEHC 316: "*In its ordinary meaning delay is 'inordinate' when it is irregular, outside normal limits, immoderate or excessive*".

57. Having regard to the foregoing, it seems uncontroversial to say that delays of several months at a time may well be inordinate, whereas delay measured in years is *prima facia* inordinate. In the present case, matters proceeded with reasonable expedition on the part of the plaintiff from 15 June, 2018 to 14 February, 2019. However, thereafter, no formal step was taken by

the plaintiff to progress his claim. Thus, almost three years elapsed between the delivery by the plaintiff of Replies to Particulars, on 14 February, 2019 and the issuing, by the defendant, of the present motion.

58. At para. 5 of the plaintiff's affidavit, he accepts that there have been delays in the progress of the case, but he avers that his delay is not inordinate. In light of the facts which emerge from an examination of the evidence in the present motion, I take the view that the plaintiff's post-commencement delay *has* been inordinate. Indeed, during the hearing before me, the plaintiff's counsel conceded, very appropriately, that the plaintiff's delay was inordinate (going on to submit that this delay was excusable and, without prejudice to the foregoing, that the interests of justice favoured the case proceeding to trial). I now turn to the question of whether the plaintiff's inordinate delay is inexcusable, or not.

Inexcusable?

59. At para. 9 of his affidavit, the plaintiff refers to the delay on the part of the defendant with respect to delivery of a defence and the necessity for the plaintiff to issue a motion. In the manner examined earlier, the plaintiff delivered a Statement of Claim dated 11 July, 2018 and it was not until almost five months later that a defence, dated 4 December, 2018 was delivered. However, it does not seem to me that I can properly take the foregoing into account in deciding whether the plaintiff's delay is or is not excusable. This is not least because the defendant's delay was brought to an end by the delivery of a defence, dated 4 December 2018, whereas the plaintiff's inordinate delay did not commence until 15 February 2019 (following the plaintiff's delivery of Replies to Particulars). Thus, prior delay on the defendant's part does not seem to me to be relevant to the second question under the *Primor* test.

60. The matters said by the plaintiff to excuse his delay are averred to at paras. 10 and 11 of his affidavit, as follows:

"10. The Covid pandemic closed the economy in March 2020 and this had an impact on my financial resources. I earn a significant portion of my income from rental income and this source of income was decimated for the period from March 2020 until November 2021. This made it difficult for me to fund the ongoing litigation. Given my history of cardiac issues I was also deemed a high risk person with regards to Covid.

11. In November, 2020 it was discovered that I had a tear in my heart which required open heart surgery. This was discovered during a review which should have taken place sooner but was delayed because of Covid. As a result, I had to have open heart surgery which was carried out by Dr. Michael Tolan, cardiothoracic surgeon/Dr. Ross Murphy, consultant cardiologist on the 27th April, 2021. I beg to refer to a copy of a letter from Dr. Murphy dated 23rd March, 2022 which I have marked with the letters 'MC2' and signed my name prior to the swearing hereof. The surgery was very difficult, and my chest was tender for a significant period of time. This also had an effect on me psychologically and I found it very difficult to deal with. It took me six months to recover, and I think that I only started getting back to normal by Christmas 2021. This motion then issued in January 2022."

61. Whereas the plaintiff avers that the Covid pandemic closed the economy in March 2020 with an impact on his financial resources, he offers no explanation whatsoever for delay of well over a year (from 15 February 2019, onwards). In other words, neither financial difficulties nor health difficulties are said to excuse a material part of the plaintiff's inordinate delay.

62. With respect to the *status quo* as of February 2020 (prior to Covid-19 and the attendant restrictions), the plaintiff was neither suffering from a new cardiac issue, nor any income difficulties. Yet the evidence is *not* that he was writing to the defendant to explain his delay of twelve months or, for that matter, serving a Notice of Intention to Proceed. In other words, there is nothing to suggest that, as of February 2020, his ongoing delay was about to be brought to an end by *him,* or that the Covid-19 pandemic and the restrictions in response to same frustrated efforts which the plaintiff was actively making or about to make at *that* stage.

63. No excuse whatsoever is given as to why a year and a month elapsed (i.e. up to March 2020) without any activity on the part of the plaintiff in respect of these proceedings.

64. I regard myself as bound to accept that, from March 2020, there were reasons which explain the lack of progress from that point onwards. The plaintiff has made an explicit averment that a significant portion of his income (i.e. rental income) was "*decimated*" from March 2020 until November 2021, and that this made it difficult for him to fund the ongoing litigation. He has also averred that, due to his history of cardiac issues, he was deemed a *"high risk"* person in respect of Covid-19 which, as we all recall, was then a virus without a vaccine. The plaintiff has also averred that, as of November 2020 a *"tear in his heart"* was discovered, which required surgery, which took place on 27 April 2021.

65. Although it seems to me that the plaintiff can fairly be criticised for not alerting the defendant to these financial and health difficulties (by means of correspondence via the plaintiff's solicitor) it does seem to me that the foregoing are material matters which, between them, explain delay.

66. The letter dated 23 March, 2022 to which the plaintiff refers in para. 11 of his affidavit states *inter alia* the following:

"Dear Sir/Madam,

Mr. Conan was noted to have a new murmur at clinic on the 2nd November, 2020. This was documented then to represent flail mitral prolapse with 4+ mitral regurgitation. He underwent cardiac surgery on the 27th April, 2021 and had a mitral valve replacement with bioprosthetic mitral valve. After a slow recovery from surgery he has made a significant clinical recovery and was reviewed in clinic in September 2021 with now normal functional status. He has no further angina. I would be happy to further elaborate.

Many thanks,

Yours sincerely,
Dr. Ross Murphy."

67. The foregoing letter seems to me to allow for a finding that a "*new*" cardiac difficulty was noted, as of 2 November 2020.

68. Few of us will not recall the government's announcement in March 2020 and the country entering the first national 'lockdown' in mid-March of 2020. In light of the letter from Dr. Murphy and the averments made by the plaintiff, less than eight months into the Covid-19 pandemic, he encountered new cardiac difficulties which required surgery the following April, 2021.

69. Dr. Murphy's letter indicates that, as of September 2021 the plaintiff, on review, was found to have a "*normal functional status".* Insofar as the plaintiff avers that it took him six months to recover from the surgery, six months from 27 April 2021 is the end of October 2021. In other words, as of the beginning of November 2021 the plaintiff's health difficulties would no longer appear to explain his inaction with respect to progressing these proceedings.

70. In the manner examined, the beginning of November 2021 is two months *after* the review by Dr. Murphy "*in clinic"* where the plaintiff was found to have a normal functional status. On the question of financial, rather than medical issues, it will be recalled that the adverse effect on the plaintiff's rental income was said to be between March 2020 and November 2021.

71. In light of the foregoing, there is no evidence before this court of any impediment, be it medical *or* financial, which prevented the plaintiff from progressing his claim *after* November 2021. To put matters in concrete terms, the state of the evidence allows for a finding that nothing prevented the plaintiff from instructing his solicitor from November 2021 to (i) write to the defendant's solicitor explaining the reasons for his inaction; and/or (ii) serve a Notice of Intention to proceed. The plaintiff did neither. As 2021 gave way to 2022, it was the defendant, not the plaintiff, who took action by issuing the present motion on 11 January, 2022.

72. In Mr. Fehily's supplemental affidavit, sworn on 28 February, 2023, he makes *inter alia* the following averments:

"3. As appears from Mr. Conan's affidavit, he sets forth an excuse that he was medically incapable or hindered from dealing with this case or progressing this litigation during the period November 2020 – Christmas 2021 by reason of a heart condition.

4. I have caused a search to be made for other litigation involving commercial disputes that appears to involve the plaintiff during this period. I say and believe and am advised that it appears that the plaintiff was capable of giving instructions to pursue litigation in the

following cases and matters during the period when he now alleges that he was incapable for medical reasons of progressing the litigation the subject matter of this application;
(a) Mark Conan v. Mercoft Taverns Ltd (OAC.NO.2021/544S) – summary summons issued on 31st August, 2021.
(b) Mark Conan v. Fade Street Restaurant Ltd (2021/545S) – summary summons issued on 31st August, 2021."

73. Mr. Fehily also exhibits a newspaper article from "www.businesspost.ie", dated 5 September, 2021 entitled "*Market Bar landlord sues pub operators in leasehold disputes"* which refers *inter alia* to legal proceedings issued the previous week by the plaintiff.

74. The fact that the plaintiff caused two sets of legal proceedings to be issued on 31 August 2021 does not appear to be inconsistent with the contents of Dr. Murphy's letter to the effect that, on review in September, 2021, the plaintiff was found to have "*normal functional status".* Whilst the plaintiff avers (at para. 11 of his affidavit) that the April 2021 surgery had an effect on him psychologically; and that he found it very difficult to deal with; and that it took him six months to recover; and that he thinks he only started getting back to normal by Christmas 2021, he does *not* aver that as a result of his medical condition, he was incapable of giving instructions to his solicitor to progress the present proceedings as of the end of August 2021 when, it appears, he did give instructions to commence other proceedings.

75. It will be recalled, however, that there were twin reasons (i.e. medical and financial) proffered by the plaintiff in an attempt to excuse his delay. In relation to the plaintiff's *financial* difficulties, the state of the evidence before the court in this motion is that there is an uncontroverted averment that the plaintiff's rental income was decimated from March 2020 until November 2021 which made it difficult for the plaintiff to fund *these* proceedings. I cannot ignore sworn averments from the plaintiff to that effect, even though it would appear that the plaintiff issued, two months earlier (on 31 August 2021) two sets of proceedings (of a different nature i.e. *summary* proceedings under record numbers 2021/544S and 545S, respectively). It also seems appropriate to note that the fact that such summary proceedings were *issued* does not, of itself, say anything about how they were *funded.*

76. The court is asked in the present application to conduct what might crudely be termed a 'papers only' exercise and, thus, where a factual dispute arises, it cannot be determined. However, on close examination, it does not seem to me that there is, in reality, any dispute on the facts. It can also be observed that no application was made to cross-examine the plaintiff on any averment made by him. For these reasons, I regard myself as obliged to take the evidence at face value (and it seems to me that it would be impermissible, in absence of oral evidence, to do otherwise). In the manner explained, the evidence allows for a finding that as of the end of November 2021 and thereafter, there was no impediment (be that medical *or* financial) which prevented the plaintiff from progressing this claim. On the evidence there was a 'window of opportunity' between November 2021 (from which point, neither his medical, nor his financial difficulties explain delay) and 11 January 2022 (when the present

motion was issued). If that window of opportunity is measured from 1 November 2021 onwards, it comprises the period of ten weeks. If it is calculated from 30 November 2021, it still amounts to a period of almost six weeks. Either way, the fact that the plaintiff took no step whatsoever during this period seems to me to deprive him of any valid excuse for his delay.

77. Having regard to the foregoing analysis I am satisfied that the evidence allows for the following findings:

(i) The plaintiff has offered no reason whatsoever to explain his delay between mid-February 2019 and mid-March 2020 (one year and one month);

(ii) There is nothing in the evidence to suggest that the plaintiff was on the point of taking any action to progress his claim which was frustrated by the outbreak of Covid-19 and the restrictions in response thereto;

(iii) I accept that a combination of financial difficulties resulting from the Covid-19 pandemic and medical difficulties comprising of the newly diagnosed cardiac issue constituted reasons for lack of progress between mid-March 2020 and November 2021;

(iv) However, as of November 2021, the foregoing ceased to be reasons for the plaintiff's failure to progress his claim, yet the plaintiff took no such step.

(v) This seems to me to be as extraordinary as it is unexplained by the plaintiff, particularly given the 'late start' which he made to his case, as he must have been well aware at all material times.

(vi) Against this backdrop, the 'boil' of delay was 'lanced' by the defendant (not the plaintiff);

(vii) In these circumstances I am not satisfied that the plaintiff's inordinate delay is excusable.

78. Put simply, I do not believe that I can fairly say that a period of two years and eleven months delay by the plaintiff is excusable in circumstances where no excuse whatsoever has been offered for over 14 months of that period (comprised of some 13 months delay *before* the period for which an explanation has been given and over a month *after* the excuses ceased to apply).

79. Insofar as the plaintiff's approach to his proceedings from the end of November 2021 onwards, there is neither evidence of impediment in terms of progressing, nor effort to progress, and it seems to me that the plaintiff's inordinate delay can fairly be described as (i) a lengthy period of entirely inexcusable delay, followed by (ii) a longer period for which excuses exist, succeeded by (iii) another period of entirely inexcusable delay, which was brought to an end *not* by the plaintiff, but by the proactivity of the defendant.

80. Counsel for the defendant submitted that a combination of the financial and medical difficulties experienced by the plaintiff comprised both an explanation and an excuse for his delay. That, submitted the plaintiff's counsel, was "*the end of the matter*." With respect, and for the foregoing reasons, I cannot agree. I now turn to an analysis of where the balance of justice lies.

Balance of justice

81. In circumstances where this court has found the answer to the first two of the three questions in the *Primor* test to be in the affirmative, it seems fair to say that the *status quo* prior to an analysis of the third question in *Primor* is that the scales are already tilted in favour of delay. If that were not the position, it would seem to render irrelevant the court's engagement with the first two questions in *Primor.*

82. Commenting on this issue, the Court of Appeal stated the following in *Sweeney v. Cecil Keating t/a Keating Transport & McDonnell Commercials (Monaghan) Ltd* [2019] IECA 43: *"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."*

Burden of proof

83. However, even though this court commences the assessment of where the balance of justice lies on the basis that the scales are tipped in favour of dismissal, this does *not* mean that the defendant ceases to bear the burden of proof. On the contrary, the onus lies on the party seeking dismissal to meet all three elements of the *Primor* test. As Barniville J. (as he then was) made clear at para. 80 of the Court of Appeal's decision in *Gibbons v. N6 (Construction) Ltd* [2022] IECA 122:

> "*As the moving party on the application to dismiss, the defendant also has the burden of proving that the balance of justice favours the dismissal of the claim (see, for example, per Irvine J. in Cassidy at para. 35). However, … the defendant does not have to establish the same level or degree of prejudice which must be established in order to have a claim dismissed under the second strand of jurisprudence described in O'Domhnaill. Although it did not feature in the written or oral submissions on this appeal, on one reading of paras. 21, 29 and 30 of her judgment, the judge might be understood as stating that once inordinate and inexcusable delay is established by the defendant, the plaintiff bears the onus of proving that the balance of justice lies in favour of allowing the claim to proceed. While nothing turns on this in terms of the outcome of the appeal, if and insofar as the judge may have felt that the plaintiff bore that onus of proof, I do not believe that that would be correct. The onus remains on the defendant to establish that the balance of justice favours the dismissal of the case*."

84. In seeking to discharge the aforesaid burden, the solicitor for the defendant, Mr. Fehily makes the following averments at paras. 8 and 9 of his 6 January 2022 affidavit:

> *"In circumstances where the claim relates to alleged acts or omissions on the part of the defendant as a property surveyor or valuer in respect of matters which occurred in September and October 2013, the defendant is clearly prejudiced by the passage of time in having to deal with the alleged claims of the plaintiff and where, at this juncture, there is*

going to be a minimum of nine years between the said events and the matter coming on for hearing…"

85. It seems to me that the foregoing is an averment made in very general terms indeed. I take this view for several reasons:

(i) As observed earlier in this judgment, there is no dispute about the fact that a valuation was produced by the defendant and the central issue is whether it was produced negligently and in breach of contract etc;

(ii) The foregoing averments do not engage with the reality that both sides intend to call expert valuation evidence and there is no suggestion that the plaintiff's delay has affected in any way the ability of the defendant to call its valuation experts(s);

(iii) There is no suggestion that any documents have, as a result of the defendant's delay, gone missing or been destroyed;

(iv) Given that a valuation was in fact provided and remains available, and there is no question of any relevant documents being missing, it does not appear that there are issues of fact of central importance, the determination of which would require a future trial judge to hear disputed oral testimony from witnesses relying on their *memory* of events.

Prejudice is not to be presumed

86. In other words, it seems to me that the gravamen of the averments by the defendant's solicitor is to suggest that, because there has been delay, it is axiomatic that prejudice has arisen. However, as Collins J. stated recently in the Court of Appeal's decision in *Cave Projects Ltd v. Gilhooley & Ors* (p. 34 of 67): "*Prejudice is not to be presumed: AIG Europe Ltd v. Fitzpatrick [2020] IECA 99, per Whelan J. (Donnelly and Power J.J. agreeing).*"

Discovery

87. Mr. Fehily's averments at para. 8 continued in the following terms:

"However, in circumstances where the issue of discovery has not, as yet, been visited by either party the delays are likely to be far more significant and in particular given the level of financial discovery which will be required by the defendant in light of the alleged financial losses claimed by the plaintiff."

88. By means of the foregoing averments, the defendant is not suggesting that any relevant documents are no longer available due to delay. Rather, it is suggested that because the discovery issue has not yet been addressed, additional delay is inevitable. Although, at first glance, this might appear to be a factor weighing in favour of dismissal, on closer examination it does not seem to me to be a factor which should be given any, or any material, weight in this particular case. I say this for the following reasons.

89. It will be recalled that the defendant delivered a defence and raised a Notice for Particulars, dated 4 December 2018. The plaintiff delivered Replies to Particulars dated 14 February 2019.

The *status quo*, at that point in time, was that the pleadings had 'closed' (and, at that juncture, there had been no post-commencement delay on the plaintiff's part). Indeed, the only post-commencement delay had been on the defendant's part, with respect to delivering its defence). Thus, it was open to the defendant to seek discovery in February 2019. The defendant failed to do so, and the defendant cannot conceivably point to the plaintiff's post-commencement delay (none had occurred) as a reason for not requesting voluntary discovery in February 2019 or the weeks and months which followed, if it regarded discovery as necessary.

90. The foregoing also brings to mind the observation by Hamilton C.J. in *Primor* that "*Litigation is a two party operation*" and "*the conduct of both parties should be looked at".* For this reason, I do not believe that the prospect of the defendant seeking discovery (which the defendant could have sought in February 2019) and any resultant delay, between now and a future trial date, is a factor which adds any material weight in favour of dismissal.

91. Remaining with the principle that the conduct of both parties should be looked at, it will be recalled that the defendant's delay required the plaintiff to issue a motion seeking judgment in default of defence. The outcome was the delivery by the defendant of a Defence, dated 4 December 2018 (approaching five months after delivery of the 11 July 2018 Statement of Claim). The appropriateness of the plaintiff's motion and the fact of the defendant's delay are both evidenced by the consent order made, on 18 December 2018, whereby the costs of the plaintiff's motion were ordered *against* the defendant. I accept entirely that this delay on the part of the defendant represents only a small fraction of the plaintiff's delay, but it is appropriate that it not be ignored. In other words, it is something which counts against dismissal, albeit a factor which, of itself, carries little weight in the particular circumstances of this case.

92. Paragraph 8 of Mr. Fehily's affidavit concluded in the following terms:

> *"I say that the defendant is further prejudiced by virtue of the fact that the proceedings touch on the Defendant in a professional capacity and therefore which has ramifications for its professional indemnity renewals on an annual basis."*

93. Again, this is an averment made in the most general of terms. In other words, it is neither stated nor suggested that, by virtue of the existence of the proceedings or by reason of the plaintiff's inordinate delay (from February 2019 to January 2022) the defendant is said to have, for example: (i) lost any business; (ii) received any adverse publicity; (iii) had difficulty recruiting or retaining staff; (iv) been unable to secure professional indemnity insurance; or (v) has faced any increased insurance premium.

94. It seems to me that none of the averments made in para. 8 of Mr. Fehily's affidavit establish any specific or concrete prejudice and seem to me to invite the court to *presume* general prejudice, in the absence of an evidential basis for same.

95. Furthermore, whilst general prejudice is asserted, the present proceedings (wholly unlike, for example, a personal injuries action arising out of a road traffic accident) do *not* fall to be determined on the basis of conflicting accounts of fact proffered by witnesses relying on their memories. Rather, the core issue falls to be determined as a result of a consideration by the trial judge of evidence by expert valuers who will not be relying on memory, as opposed to documentation, none of which is said to be missing, as well as relying on their own expertise.

96. Bearing in mind that the plaintiff's inordinate and inexcusable delay commenced as of February 2019, I have been unable to identify any prejudice caused to the defendant which can be attributed to the period of delay commencing in February 2019 (other than the fact of the proceedings 'hanging over' the defendant from February 2019 onwards). However, and with regard to the latter issue, this is not a situation where, as a result of the proceedings 'hanging over' the defendant, the latter has been able to point to any additional expense (e.g. with regard to an annual insurance premium) or specific cost (e.g. lost business or business opportunity).

97. For these reasons, the height of what emerges is general prejudice of a very minor type which most certainly has *no* bearing whatsoever on the potential for a fair trial.

Absence of fair trial prejudice

98. During the course of oral submissions, counsel for the defendant made clear, very appropriately that: "*This is primarily a case involving expert evidence of the valuers".* Recognising, very appropriately, that there is no question of any witness whatsoever not being available, still less any issue with respect to non–availability of expert witnesses, counsel for the defendant conceded - very appropriately in my view - that: "*It will be very difficult for the defendant to establish any prejudice*" of the "*fair trial"* type. None has been established.

The question of who retained the defendant

99. Although conceding that evidence from expert valuers would determine the main issue in these proceedings, counsel for the defendant submitted during the hearing before me that the question of "*who"* retained the defendant "*would require oral evidence"*. What I took from that submission is the contention that the court could hold that prejudice of a general sort had arisen due to delay. For the following reasons I find myself unable to agree:-

(i) Nowhere does Mr. Fehily, the defendant's solicitor, aver that the plaintiff's delay has prejudiced or adversely affected in any way the ability of a trial judge to determine the question of *who* retained the defendant;

(ii) Counsel for the plaintiff submitted, without objection, that had Mr. Fehily raised that issue, the plaintiff could and would have responded by exhibiting the valuation report which was addressed to him by the defendant;

(iii) The plaintiff's counsel also submitted, again without objection, that even if the valuation in question had not been sent by the defendant to the plaintiff, the latter was plainly someone within the defendant's contemplation in the context of the valuation prepared;

100. Without for a moment determining any issue in the underlying proceedings, there is obvious force in the foregoing submissions, particularly when it is common case that no witness of relevance to the question of who retained the defendant is said to be unavailable; and all documents relevant to that question are available. Having regard to the foregoing, I am not satisfied that this amounts to prejudice of any sort.

101. Counsel for the defendant also very fairly and appropriately stated "*I fully accept there is no concrete prejudice; I cannot identify any particular witness who is not available."* It is also worth noting that the valuer who provided the report which is at the heart of the present proceedings has not sworn an affidavit to suggest that the defendant (or he) has suffered any prejudice whatsoever touching on their professional reputation or professional indemnity insurance.

102. In submissions, the defendant places particular reliance on the dicta of O'Hanlon J. in *Celtic Ceramics Ltd v. IDA* [1993] ILRM 248 wherein (at p. 259-260) the learned judge stated:

"*It seems very unfair and unjust that persons whose professional standing and competence is under attack should be left with litigation hanging over their heads for years by reason of inordinate and inexcusable delay on the part of a plaintiff and I would respectively echo the view expressed by Henchy J. in Sheehan v. Amond that it should be passable to invoke 'implied constitutional principles of basic fairness of procedure to bring about the termination of such procedures' "*.

103. The defendant also relies on similar comments by Irvine J. (as she then was) in *Collins v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2015] IECA 27 wherein, (at para. 113) the former president stated:

"*Finally, in considering where the balance of justice lies in this case, it is important to recognise that in dismissing a claim such as the present one the court is, in effect, revoking the plaintiff's constitutional right of access to the courts. However, that is not an unqualified right and is one which must be considered against the backdrop of the other competing rights in the case, namely; the right of the defendants to protect their good name as is their entitlement under Article 40.3.2. and the court's own obligation to administer justice in a fair and timely manner as is to be inferred from Article 34.1. Nobody against whom serious allegations of the nature at the heart of these proceedings are made, particularly where their professional reputation is at stake, should have to wait 10 or more years before being afforded opportunity to clear their good name*."

104. Whilst there could be no issue taken with the foregoing statements of principle, an assessment of the balance of justice question in the present application must engage with the facts which emerge from a careful analysis of the evidence. When that is done, certain facts of relevance emerge (i) the professional who prepared the impugned valuation does not say that his or the defendant's reputation has been adversely affected in any way; (ii) no employee officer or representative of the defendant company claims that its reputation has been damaged at all;

(iii) nor do they assert that it was more difficult or more expensive to obtain annual professional indemnity insurance by reason of either the existence of these proceedings or the specific period of delay for which the plaintiff is responsible; and (iv) such averments as are made by the defendant's solicitor are, it seems to me, put in the most general of terms only.

105. It seems to me that they do no more than suggest that prejudice in terms of professional reputation is something which may arise and that difficulties in terms of annual professional indemnity insurance is also something which can happen. However, and notably, it is not claimed that any such difficulties or prejudice have, in fact, arisen for this defendant under these headings.

106. Specific or concrete prejudice is not even asserted in this case. The only element of prejudice contended for is that of a general sort. In my view, it has not been made out by the defendant.

Quantifying loss at a particular point in time

107. In oral submissions, counsel for the defendant also contended that "*The plaintiff's loss was quantified with reference to a particular point in time",* going on to submit that "*The passage of time makes the consideration and rebuttal of evidence"* as regards valuations at that point in time more difficult. Again, the thrust of that submission was to invite the court to conclude that, whilst no specific prejudice could be identified, general prejudice had been established, as regards the defendant's ability to defend the plaintiff's claim. For the following reasons, I cannot agree:-

(i) No valuer retained by the defendant has made any such claim;

(ii) No representative of the defendant company has sworn an affidavit in which such a claim is made;

(iii) Nowhere in the averments made by the defendant's solicitor, Mr. Fehily, does he state or suggest that there is any difficulty whatsoever with expert valuers giving evidence as to values at different points in time, specifically September/October 2013.

108. In light of the foregoing, despite the skill with which the submission is made on behalf of the defendant, it is not a submission grounded in evidence. Thus, based on the important principle that prejudice is *not* to be presumed by the court, I am satisfied that the defendant has neither established specific nor general prejudice, as regards the defendant's ability to meet the plaintiff's claim.

109. Not only is the foregoing true with reference to the period of delay for which the plaintiff is responsible, it is true with reference to the entire period since the plaintiff's cause of action is said to have accrued. In other words, given that this is a case where no documents are said to be missing, and where the central issue is one which will be determined on the basis of expert evidence proffered by valuers on both sides, which expert evidence remains available, a fair trial is just as possible (i) now, or (ii) in the foreseeable future, as it was (iii) in 2019,

had either side set the matter down for trial or, for that matter (iv) had the plenary summons been issued in 2014 and the proceedings secured a trial date as early as, say, 2016 or 2017.

No 'moderate' prejudice

110. In light of the foregoing analysis, I take the view that the defendant has not established even "moderate" prejudice, in the sense in which that term is used in the authorities. However, and lest I be wrong *not* to do so, I have conducted the 'balance of justice' analysis on the assumption that general prejudice of moderate degree *has* been established.

111. The significance of this assumption is clear from the decision of the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74. There Irvine J. (as she then was) stated (at para. 60) that: *"even moderate prejudice against a backdrop of inordinate inexcusable delay may be deemed sufficient to tip the scales of justice in favour of dismissing the proceedings."* (emphasis added). [See also the decision of Irvine J (as she then was) in *McNamee v. Boyce*, wherein the learned judge made clear that moderate prejudice may be sufficient to justify dismissal of a case *per* the *Primor* principles).

112. In light of the foregoing, *moderate* prejudice to a plaintiff is sufficient to engage this Court's jurisdiction to strike out a claim on delay grounds. That does not mean, however, that once moderate prejudice is established, a dismissal is the inevitable result. As Collins J. made clear in *Cave*:

> "*Cassidy does not, it seems clear, purport to establish a universally applicable standard of prejudice. Rather, whether 'moderate prejudice' will warrant the dismissal of a given claim, 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 of the defence to it and the conduct of the defendant*." (at p. 35, para. 36).

113. In the present case the defendant has not established actual or specific prejudice. To the extent that general prejudice has been established, it is not material or significant. However, accepting for the purposes of the analysis, that the defendant *has* established moderate prejudice, this is by no means the end of the analysis and I now turn to a factor which, in my view, is a very weighty one indeed.

Fair trial

114. It seems to me entirely uncontroversial to say that in assessing where the balance of justice lies, it is essential to take into account whether a fair trial remains possible. The evidence before the court in the present motion allows for a finding that a fair trial remains entirely possible. There is no evidence which would allow for a finding that there is any risk whatsoever to a fair trial. All witnesses and documents are available to any future trial judge who may be called upon to determine the matters in dispute. Whilst the plaintiff's delay is to be deprecated, it seems to me that the prospects of a fair trial remain precisely as they were in February 2019 (i.e. before the plaintiff's post-commencement delay). In the present case, I take the view that this is a factor which should be given very significant weight indeed.

A simple money claim

115. It is also fair to say that the plaintiff's claim is, in relative terms, a simple one. He contends that the valuation in question involved professional negligence. He claims that if the valuation had been carried out properly, the property in question would have been valued at a minimum of €2.4 million (as opposed to the €1.68 million reflected in the valuation report). He claims that, because of the negligently low value, he was in breach of certain LTV covenants, as a result of which he had to make a payment of in excess of €300,000; convert certain sterling monies; and sell certain properties. As to the straightforward nature of the plaintiff's claim, the defendant's written submissions state *inter alia:* "*Ultimately the plaintiff's claim here is not in the nature of a catastrophic injury. Rather, it is in the nature of a simple money claim arising out of a commercial property investment venture*…" (emphasis added). That a simple money claim is capable of being fairly determined at a future trial is a factor which, in my view, weighs very heavily against dismissal.

A portion of the plaintiff's delay explained

116. Although, for the reasons explained earlier in this judgment, I was satisfied that the plaintiff had not *excused* his inordinate delay, it is fair to say that there is uncontroverted evidence before the Court which provides an explanation for a *portion* of the plaintiff's delay, namely, from March 2020 (the outbreak of Covid-19 with its catastrophic effect on a substantial portion of the plaintiff's income) to November 2021 (the end of the plaintiff's averred financial difficulties resulting from Covid-19, by which point his cardiac health difficulties no longer provided an explanation for failing to progress his claim thereafter). Financial difficulties stemming from a global pandemic, coupled with cardiac health issues, comprise very particular circumstances which could hardly be called foreseeable, or 'run of the mill', and it seems to me that it would be unfair, in the context of a balance of justice assessment, *not* to take them into account. In other words, whilst not an excuse for the plaintiff's inordinate delay, the fact that certain of the delay *can* be excused does seem to me to add some weight against dismissal.

'On hold'

117. On behalf of the defendant, it is submitted that a party who wishes to put proceedings 'on hold' for any reason should, at a minimum, place on record with the other side that such a course of action is being adopted. There can be no issue taken with that principle (see Clarke J. (as he then was) in *Comcast v. Persona Digital Telephony Ltd*. [2012] IESC 50, at paras. 5.8 and 5.9; Noonan J. in *Darcy v. AIB* [2022] IECA 230; and Sanfey J. in *Pugh v. P.G.M. Financial Services Ltd*. [2020] IEHC 49). I entirely agree with the defendant's submission that there was an onus on the plaintiff to inform the defendant of any difficulties (be they financial or medical) which were said to cause delay, such that the defendant was assured of the plaintiff's intention to proceed. The plaintiff failed in that duty which, of course, could readily have been discharged *via* their solicitor on record. That said, although greater weight could, and would, have been placed by this Court on explanations had they been given contemporaneously, fairness cannot preclude this Court taking account of the reasons averred

to *ex post facto* by a plaintiff seeking to have his delay excused. This latter point seems to me to be particularly important, given that, to some extent at least, the explanations now given by the plaintiff are accompanied by independent third-party support (in the form of Dr. Murphy's letters) to which I have referred earlier in this judgment.

Terminal prejudice

118. I have also given due weight to the consequences for both sides of such decision as the court might make on this application. This includes the "*terminal prejudice"* to the plaintiff (see *Granahan t/a CG Roofing and General Builders v. Mercury Engineering* [2015] IECA 58) were his claim to be dismissed. Plainly this weighs against dismissal, but is not, of itself, a determining factor (given that it arises for every plaintiff in every application of this type).

119. I accept entirely the proposition, upon which counsel for the defendants laid considerable emphasis during the hearing, that endless indulgence by the court is a thing of the past. In this regard, I have taken full account of *inter alia* the analysis by the Supreme Court (Clarke J. (as he then was)) in *Comcast International Corporation & Ors. v. Minister for Public Enterprise* [2012] IESC 50 (para. 3.3 *et seq*); and the analysis in this Court's decision (Twomey J.) in *Diamren Ltd. v. Clare County Council* [2021] IEHC 408 (paras. 123 – 124) [See also Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290 (at p. 293-294); Hogan J. in *Donnellan v. Westport Textiles Ltd* [2011] IEHC 11 (at para. 31); Irvine J. (as she then was) in *Millerick v. The Minister for Finance* [2016] IECA 406 (at para. 40); and Hogan J. in *Quinn v. Faulkner t/a Faulkner's Garage & Anor* [2011] IEHC 103 (at para. 29)]. I have also taken full account of the observations by Barniville J. (as he then was) at para. 93 of *Gibbons v. N6 (Construction) Ltd, wherein he stated:*

> "*The judge correctly observed that while the fundamental principles to be applied have not changed since Primor, 'the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court's obligation to ensure that litigation is progressed to a conclusion with reasonable expedition'."*

120. It seems to me that, whilst a thread running through the jurisprudence is the need for less indulgence on the part of the court (against the backdrop of European Convention on Human Rights obligations), the public interest in having cases dealt with efficiently and the constitutional imperative in bringing 'stale' litigation to an end *cannot* be at the expense of justice. In *Cave,* Collins J. stated (at p. 27):

> *"…it would seem to follow that such an order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is <u>clearly against</u> allowing the claim to proceed. Adapting slightly what was said by Barniville J in Gibbons v N6 (Construction) Limited, the court must be satisfied that the 'the hardship of denying the plaintiff access to a trial of his claim would, in all the circumstances, be [.]proportionate and [.]just' (at para. 86)."* (emphasis added).

121. I am not satisfied that the balance of justice is *clearly against* allowing the claim to proceed. I am not satisfied that, in all the circumstances, it would be *proportionate and just* to deny the plaintiff access to a trial. As Collins J. also observed in *Cave* (p. 36 of 67):

"*The dismissal of a claim is, and should be seen as, an option of last resort. If the Primor test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant*." (emphasis added)

122. Having carefully examined the evidence put before the court in the present motion I am not satisfied that permitting the plaintiff's claim to proceed would result in "*some real and tangible injustice"* to the defendant in the very particular circumstances of this case.

123. There is simply no question of the defendant having met the *O'Domhnaill* 'test' in respect of which far greater prejudice (i.e. speaking directly to the fairness of a trial) must be established. Nor did counsel for the defendant suggest that the *O'Domhnaill* test had been satisfied. Nevertheless, given the relief sought in the defendant's motion and for the sake of clarity and completeness only, the answer to all three of the following questions is in the negative:

(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?

Decision summarised

124. No specific or concrete prejudice has been established.

125. I have been unable to identify any evidential basis to support a finding that there is general prejudice to the defendant in respect of their ability to meet the plaintiff's claim.

126. There is no evidence of any damage to the defendant's reputation and business, as opposed to averments, made in the most general of terms, which, in effect, invite the court (absent any evidence of same) to *presume* such damage. I do not believe this is the proper role of the court in an application of this type.

127. It does not seem to me that the averments made by the defendant's solicitor establishes that the existence of the present proceedings, - or, more significantly, their ongoing existence

during a period of delay for which the plaintiff is exclusively responsible - has resulted in what might be called 'oppressiveness' to them. No representative of the defendant has asserted that having the present proceedings 'hanging over' the defendant has created any difficulty whatsoever (be that, for example, with regard to reputation, recruitment, marketing, profitability, insurance, or otherwise).

128. The authorities, up to and including *Cave* emphasise the importance of the court assessing carefully and fairly assertions of general prejudice in order to ensure that they have a sufficient evidential basis.

129. Even if I am entirely wrong in the view that prejudice has not been established by the defendant, it seems to me that any prejudice to the defendant is of a general and minor sort which falls below what could be considered moderate.

130. There is no question of any 'fair trial' prejudice arising in the present case.

131. In the very particular circumstances of this case, moderate prejudice (had it been established) would *not* be sufficient to tip the scales in favour of a dismissal.

132. I take this view in light of the nature of the case, the extent of the delay, the excuses for a portion of it, the complete absence of specific prejudice, and the reality that a fair trial remains as possible now, and for the foreseeable future, as at any other time to date.

133. I have not been able to identify a causal connection between the plaintiff's delay and the matters relied on by the defendant as a basis for contending that the balance of justice requires the dismissal of the plaintiff's claim.

134. As the authorities make clear, every case will turn on its own facts and circumstances. In my view, whilst parts 1 and 2 of the *Primor* test have been met by the plaintiff, the balance of justice decidedly favours the dismissal of the present application, in circumstances where the defendant has failed, by a wide margin, to meet the 3rd element of the *Primor* test.

135. Therefore, and for the reasons explained in this decision, the present application falls to be dismissed.

136. I am conscious that the defendant issued this motion in January, 2022 which was nine months *prior* to the delivery by the Court of Appeal of the decision in *Cave.* The final portion of para. 37 in *Cave* states *inter alia:*

> *"It is entirely appropriate that the culture of 'endless indulgence' of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction.*

The dismissal of a claim is, and should be seen as, ***an option of last resort****. If the Primor test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be* ***incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting,*** *the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant*." (emphasis added)

137. It seems to me that, had the defendant had available to it, in January 2022, the foregoing statements of principle, it might well have given greater consideration to the appropriateness of the present application. It is certainly an application which has created both additional *delay* (with respect to the ultimate determination of the underlying proceedings) and a *burden* on necessarily limited *court resources*.

138. However, given that the Court of Appeal's decision in *Cave* was not available to the plaintiff when the motion was issued, and notwithstanding the defendant's failure, by a wide margin, to discharge the burden of proof resting on it (i.e. to establish the third element of the *Primor* test) my preliminary view on the question of costs is that the appropriate order which best meets the interests of justice is for costs to be 'costs in the cause', in circumstances where the court answered, in the affirmative, the questions of whether delay was inordinate and inexcusable.

139. If either party contends for a different order with respect to costs, short written submissions should be furnished by no later than 5pm on 28 April.

140. Finally, the parties are also invited to communicate, in order to agree (also by 28 April) a 'timetable' of such steps as require to be taken between now and a trial (to include, for example, the exchange of any requests for voluntary discovery; responses to same; the issuing of any motion(s); exchange of witness schedules/experts reports etc). A copy of that agreed timetable should be furnished also by 28 April and will comprise an agreed 'Directions Order" which will be included in the order dismissing the present motion, once perfected.