APPROVED

THE HIGH COURT

[2024] IEHC 246

Record No. 2012/683P

BETWEEN/

PAUL NEWPORT AND PAUL NEWPORT AS THE EXECUTOR FOR THE ESTATE OF GARY NEWPORT, DECEASED

PLAINTIFFS

-AND-

PAUL CONNOLLY AND STEPHEN OPPERMANN AND COLM HORAN AND KIERAN DOYLE ALL TRADING AS "GREENHILLS CO OWNERSHIP"

FIRST TO FOURTH NAMED DEFENDANTS

-AND-

PAUL CONNOLLY AND STEPHEN OPPERMANN AND COLM HORAN AND KIERAN DOYLE PRACTISING UNDER THE STYLE AND TITLE OF OPPERMANNS ASSOCIATES

FIFTH TO EIGHTH NAMED DEFENDANTS

-AND-

WS ATKINS

NINTH NAMED DEFENDANT

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 12th day of April 2024

INTRODUCTION

Preliminary

1. In these separate but related applications, the Sixth and Seventh Named Defendants, Mr. Stephen Oppermann and Mr. Colm Horan, who practice under the style and title of Oppermann Associates ("Oppermanns") and the Ninth Named Defendant, WS Atkins (Ireland) Limited ("Atkins"), seek orders pursuant to the inherent jurisdiction of the court dismissing the Plaintiffs' claim against them for want of prosecution on the grounds of inordinate and inexcusable delay in prosecuting the claims as against them and/or pursuant to Order 122(11) of the Rules of the Superior Courts 1986, as amended ("RSC 1986").

2. In summary, the substantive proceedings concern a contract in relation to a construction project (comprising *inter alia* two factories and a link road) on lands in Drogheda, County Louth.

3. For the purpose of this application and without prejudice to any future position the parties may adopt, Oppermanns were the architects and Atkins were the engineers on the construction project and the main action is an alleged professional negligence claim by the Plaintiffs against these Defendants.

4. Alan Doherty SC and Hugh O'Flaherty BL appeared for the Plaintiffs. Conor Quinn BL appeared for Oppermanns and Angus Buttanshaw BL appeared for Atkins.

THE LEGAL TEST

5. The legal test to be applied to the Defendants' applications is well-settled.[1]

6. The three elements of the *Primor* test which apply to these applications are as follows: first, the Defendants must establish that the delay on the part of the Plaintiffs in prosecuting the claim has been inordinate; second, if that is established, then the Defendants must establish that the delay has been inexcusable; and third, if it is established that 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 continuing of the case.

7. In these applications there was agreement between the parties that the first element of the *Primor* test – inordinate delay – was met, insofar as the second question of whether that inordinate delay was inexcusable, the Plaintiffs adopted a more nuanced approach, accepting that there were significant periods of delay which, in the context of these types of applications, were inexcusable but also seeking to explain 'some' of that delay; the parties agreed that most of the issues in the respective applications related to the court's assessment of the balance of justice.

8. The nature and extent of the delay remains, of course, a central consideration in the exercise of the court's discretion in assessing the balance of justice. Where, for example, (as I have found in this judgment with these applications), inordinate and

[1] *Primor v Stokes Kennedy Crowley* [1996] 2 I.R. 459; *Cave Projects Ltd v Gilhooley & Others* [2022] IECA 245; *Doyle v Foley* [2022] IECA 193.

inexcusable delay has been demonstrated, the court has to be satisfied that there is a *causal connection* between that delay and the matters relied upon, for example, logistical or substantive prejudice, for the purpose of establishing that the balance of justice warrants the dismissal of the claims in respect of the Sixth and Seventh and/or Ninth Named Defendants. In this regard, Mr. Doherty SC correctly points out that the exercise of the court's jurisdiction in this application is not to punish because of the delay. Rather, in considering these applications, I have sought to assess the consequences for the Plaintiffs and the Sixth, Seventh and Ninth Named Defendants and to balance as between them whether or not it is fair to the Defendants to allow the Plaintiffs' case to proceed as against them, on the one hand, or whether it is fair to the Plaintiffs to bring their case as against these Defendants to an end, on the other hand. In doing so, it is no part of the court's jurisdiction on a *Primor* or O. 122 RSC 1986 application to form a view on the strengths or weaknesses of the Plaintiffs' case.

9. When assessing the balance of justice, the question of specific/concrete prejudice and general prejudice are central factors to be considered. As set out in this judgment, the specific/concrete prejudice can include unavailability of witnesses and loss of documentation. Equally, general prejudice, such as the difficulty witnesses may have in giving evidence (fallibility of memory recall) and difficulties in resolving conflicts of fact/evidence at many years removed from the trial of the action, may arise. The general prejudice must be attributable to the period of inordinate and inexcusable delay for which the Plaintiffs are responsible.

GENERAL CHRONOLOGY

10. The following is a general chronology as between the Plaintiff and the Sixth and Seventh named Defendants and the Plaintiff and the Ninth Named Defendant.

February 2006 – July/August 2010	Events which are the subject matter of the proceedings as between the Plaintiffs and Oppermanns Associates
24 January 2012	Plenary Summons issued
24 February 2012	Plenary Summons served
2 July 2013	Notice of Change of Solicitor and Notice of Intention to Proceed on behalf of the Plaintiffs
21 October 2013	Requisite Order obtained by Plaintiffs
21 November 2013	Appearance on behalf of the Sixth and Seventh Named Defendants
17 February 2014	Date of the Second Named Plaintiff's passing
14 March 2014	Plaintiffs' Statement of Claim delivered (Atkins)
2 April 2014	Statement of Claim
27 June 2014	Atkins' motion seeking to compel Plaintiffs to Reply to Particulars
5 September 2014	Replies to Particulars issued by Plaintiffs
10 September 2014	Notice of Particulars on behalf of the Sixth and Seventh Named Defendants
12 February 2015	Replies by the Plaintiffs to the Notice for Particulars on behalf of the Sixth and Seventh Named Defendants
23 March 2015	Court Order ordering Plaintiffs to provide additional Particulars (Atkins)
28 April 2015	Plaintiffs provide additional Particulars
1 July 2015	Atkins delivers its Defence
22 July 2015	Atkins serves Indemnity Notice on other Defendants
27 August 2015	Motion issued for judgment in default of Defence by the Plaintiffs against the Sixth and Seventh Named Defendants
27 October 2015	Return date for motion for judgment in default of Defence against the Sixth and Seventh Named Defendants
24 November 2015	Defence of Sixth and Seventh Named Defendants

24 April 2017	Notice of Intention to Proceed served on behalf of the Plaintiffs
14 August 2018	Notice of Intention to Proceed on behalf of the Plaintiffs
10 February 2020	Order (pursuant to *ex parte* motion brought by the Plaintiffs to reconstitute proceedings) substituting Paul Newport as executor of the estate of Gary Newport for Gary Newport (deceased) as Second Named Plaintiff
15 January 2021	Plaintiff notifies Atkins' solicitors of making of an order reconstituting proceedings by way of a letter
11 November 2022	Motion issued on behalf of Oppermanns seeking dismissal of the proceedings on the grounds of delay

ASSESSMENT & DECISION IN RELATION TO OPPERMANNS' APPLICATION

Inordinate delay

11. I find that the following three periods of delay have been established by Oppermanns: first, there was pre-litigation delay (in circumstances where the defects were raised in May 2008 and the snagging process ended on 17th August 2010 when the building contractor went into liquidation and there were no other works after that date) of 1 year and 5 months between 17th August 2010 and the issue of the Plenary Summons on 24th January 2012; second, there is a delay of 2 years and 1 month from the service of the Plenary Summons on 24th February 2012 to the delivery of the Statement of Claim on 2nd April 2014; third, the substantive period of delay is 6 years and 11 months between the delivery of the Defence by Oppermanns on 24th November 2015 and the issue of this application (by way of Notice of Motion) on 11th November 2022.

12. The total period of delay is 10 years and 5 months (9 years of which is after the issue of the proceedings) and together these periods, in my view, amount to inordinate delay on behalf of the Plaintiffs. (Separately, and by way of observation, 18 years have elapsed since Oppermanns were engaged in February 2006; 15 years and 8 months have elapsed since the first of the two buildings were occupied in June 2006; 13 years and 6 months have elapsed since the snagging process).

Inexcusable Delay

13. While the main part of the arguments in these applications centred on the question of the balance of justice and the Plaintiffs accept that some of the delay is inexcusable, this is not accepted for all of the delay.

14. I find, however, that the delay in relation to the three periods of inordinate delay is inexcusable. In this regard and in assessing this application, I am not concerned with the question as to whether pre-litigation delay is or is not inexcusable because the question of whether delay is inexcusable is referable to the delay in prosecuting the proceedings. (Outside of this particular question, I can have regard to the period of 1 year and 5 months between 17th August 2010 and the issue of the Plenary Summons on 24th January 2012 in assessing whether any post-litigation delay was inexcusable. In this regard, I note that the evidence is that any prospect that the parties could have resolved their differences ended with the property collapse. Mr. Oppermann has averred that by 17th August 2010 there was no realistic hope of an amicable resolution and no excuse has been provided by the Plaintiffs for the period between 17th August 2010 and 24th January 2012).

15. In relation to the delay of 2 years and 1 month from the service of the Plenary Summons on 24th February 2012 to the delivery of the Statement of Claim on 2nd April 2014, the following explanations offered by the Plaintiffs do not meet the legal threshold of excusability: insofar as it is argued that the Plaintiffs had to change solicitors and there were delays in obtaining the files, this cannot excuse delay[2]; insofar as it is argued that a motion was required to be issued before Messrs Oppermann and Horan put in an appearance in their capacity as co-owners, this in fact took place outside of these periods of delay, and the relevant claim is, in any event, against Oppermanns and not the co-ownership; in relation to the passing of Mr. Gary Newport on 17th February 2014, as set out later in this judgment, the decision of the High Court (Baker J.) in *O'Leary v Turner* [2018] IEHC 7 determined that personal circumstances cannot excuse otherwise unexplained delay[3]; the refinancing of a loan with AIB cannot explain the delay.

16. In relation to the delay of 6 years and 11 months between the delivery of the Defence by Oppermanns on 24th November 2015 and the issue of this application (by way of Notice of Motion) on 11th November 2022, the following explanations are also not excusable: the reference to the Plaintiffs' involvement in other legal proceedings, Mr. Paul Newport's health issues (as just mentioned in *O'Leary v Turner* [2018] IEHC 7 the High Court determined that personal circumstances cannot excuse otherwise unexplained delay); insofar as it is argued that there were difficulties in instructing experts, this could have been addressed, had the proceedings been instituted earlier and does not explain a delay of 7 years.[4]

[2] The conduct of legal advisers cannot excuse delay in this regard: see *McAndrew v Egan* [2017] IEHC 346; *Kelleher v Tallis & Company Ltd* [2023] IEHC 212 per Ferriter J. at paragraphs 2-21.
[3] See also *Darcy v AIB* [2022] IECA 230 at paragraph 41.
[4] *Egan v Bank of Ireland* [2022] IECA 294 per Noonan J. at paragraph 61.

17. As set out later in this judgment, the Plaintiffs have adopted a common position in relation to the question of excusability/inexcusability and the respective applications of Oppermanns and Atkins.

18. The Plaintiffs' explanation for the inordinate periods of delay, for example, can be further summarised as a series of events, some of which are personally tragic, and include the sad passing of Mr. Gary Newport in February 2014. I have also addressed these matters in more detail later in this judgment in dealing with the Atkins' application.

Assessing the balance of justice

19. In *Kelleher & Anor v Tallis & Company Ltd & Ors* [2023] IEHC 212, the High Court (Ferriter J.) considered the approach to be taken in such applications against a factual context which raised similar matters to these applications.

20. The decision in *Kelleher* concerned claims by the plaintiffs against the defendants (which included builders and engineers) for damages for breach of contract and negligence arising out of the allegedly defective construction of a house in rural Kilkenny which was to be their family home. Ferriter J. applied recent jurisprudence, including the decision of the Court of Appeal (Collins J.) in *Cave Projects Ltd v Gilhooley & Others* [2022] IECA 245, and insofar as the balance of justice and the issue of prejudice was concerned, Ferriter J. stated that "*the question of assessing the balance of justice … on the basis that the defendants have an onus of demonstrating to the court that there is some likely prejudice to them which is moderate (in the sense*

of not insignificant), which arises from the nature of the matters which will have to be addressed at any trial and which is attributable to periods of the plaintiffs' inexcusable delay. Such prejudice will then be weighed in the balance of justice along with other relevant factors such as the nature of the plaintiffs' claims, the constitutional and Convention imperatives to ensure cases are progressed and determined expeditiously, and any material acquiescence by the defendants in the delay."[5]

21. As stated, the issues in *Kelleher* bore similarities to the applications in this case. In assessing the balance of justice, the court, in that case, had regard *inter alia* to a number of matters – the various witnesses as to fact and expertise (some of whom (including an expert) had died and some of whom had left the firm), the unreality of the inspection of a property at that point in time which had effectively lay idle since late 2000, and the loss of documentation in a flood – in coming to the view that both the builder and engineering defendants would be significantly prejudiced in attempting to defend the action at that remove as a result of the loss or unavailability of relevant factual and expert witnesses and documentary evidence.[6] For example, in assessing the Plaintiffs' complaint that claimed prejudice by the building company (*i.e.*, that none of the staff in the building company who were employed by it at the time of the job were still employed by it except for a director, block layer and digger-excavator operative) did not reveal any specific prejudice, Ferriter J. observed that "*[w]hile this allegation of prejudice may be said to be at a quite generalised level, the court needs to take a common sense approach to evaluating this head of alleged prejudice. It is very difficult to see how individual workers who worked on the*

[5] *Kelleher v Tallis & Company Ltd* [2023] IEHC 212 per Ferriter J. at paragraph 85.
[6] *Kelleher v Tallis & Company Ltd* [2023] IEHC 21 per Ferriter J. at paragraph 106.

construction aspects of the project would be in a position to give meaningful evidence as to precisely what they were instructed to do or what they did well over 25 years (at this point) from the time the work was done" and he accepted that likely prejudice to the first defendant in that case was made out.

22. Similarly, in assessing the balance of justice in this case, I also accept the emphasis placed (on behalf of Mr. Oppermann and Mr. Horan, the architects) on the availability of witnesses and the requirement of oral evidence and that fair trial prejudice is caused by the passage of time in the inordinate and inexcusable delay of 10 years and 5 months.

23. In this context, whilst Mr. Doherty SC argues for what he submits may be a novel point, which is that both Oppermanns' and Atkins' difficulty in procuring witnesses is a failure by each of those defendants to take reasonable care to ensure that those witnesses are available, the authorities have set out the nature of fair trial prejudice which, in my view, has been established in both applications.

24. In the context of Oppermanns' application, for example, I find that fair trial prejudice arises in relation to the following witnesses of fact: for example, the two senior architects assigned to the project were Stephen Oppermann and Michael Payne. In the post-design phase of the project, to which most of the Plaintiffs' case relates, Michael Payne had almost total responsibility for the project. He left Oppermanns in August 2022 and it is stated by Stephen Oppermann that he does not know if Michael Payne would be available as a witness, what the state of his recollection would be and that, since this project was completed, he would have been involved in approximately one

hundred other projects with Oppermanns. Of the two more junior members of staff who assisted Michael Payne, Tommy Borthistle left Oppermanns in or around 2009/2010 and Gerhard Meyer left in or around 2009. Stephen Oppermann avers that he does not know their whereabouts, has had no contact with them and does not believe that either would have any recollection of the project.

25. Further, a number of alleged factual pleas will require to be addressed by way of oral evidence. For example, these are addressed at paragraphs 21(i) to (vi), and paragraph 22 of the Affidavit of Stephen Oppermann sworn on 7th March 2023 and replied to in the Supplemental Replying Affidavit of Paul Newport sworn on 6th April 2023. I do not think it is correct to describe what Mr. Oppermann has sworn in this regard as 'nuanced'. In his Affidavit of 7th March 2023, for example, Stephen Oppermann, by reference to paragraphs in Oppermanns' Defence, alleges that these factual matters included the following:

    (i) the Plaintiffs entered into an agreement directly with the Building Contractor to substantially modify the project from the original plans without reference to the architect, and an additional sum was sought by and paid to the Building Contractor in respect of these works (and reference is made to paragraph 21 of the Defence);

    (ii) the Plaintiffs entered into occupation of the two buildings, entered into an agreement to lease one of the two buildings and permitted the tenant to occupy it, without notice to the architects. The Plaintiffs permitted both buildings to be occupied without providing a snag list to notify the Defendants of any alleged defects that required to be remedied before the buildings were occupied (and reference is made to paragraph 24 of the Defence);

(iii) the Plaintiff thereafter delayed in agreeing a final snag list and/or in seeking to procure agreement from the building contractor and the engineer in relation to same (and reference is made to paragraph 25 of the Defence);

(iv) the Plaintiffs are on full proof that the architects were not notified of the alleged effects in a timely manner or at all (and reference is made to paragraph 26 of the Defence);

(v) the Affidavit denies that Oppermann Associates or the architects had any lawful or contractual duty to ensure that the relevant schedule of works were in fact carried out or implemented. It was agreed that the Building Contractor would carry out works to ensure completion of all the matters identified on the snagging of the project works; however, the Building Contractor went into liquidation before the said works were completed. The Plaintiffs thereafter failed to engage another contractor (and reference is made to paragraph 34 of the Defence);

(vi) in addition, it is pleaded that Oppermann Associates or the architects were not project administrators or project managers (and reference is made to paragraphs 14 and 40 of the Defence).

26. It is clear that insofar as many of these matters at (i) to (vi) (above) are contested in the Supplemental Replying Affidavit of Paul Newport sworn on 6th April 2023, the same will have to be resolved by way of oral evidence.

27. Further, it is pleaded that Oppermann Associates or the architects bear no responsibility for any alleged failure by WS Atkins (the Ninth Named Defendant) to

properly carry out this function and role (and reference is made to paragraph 35 of the Defence).

28. In this case oral testimony will be required to address these matters which will include *inter alia* the Plaintiffs, the original tenants in one of the buildings, Doyle Building Contractors, Oppermanns Associates and WS Atkins.

29. Common to both applications on behalf of Oppermanns and Atkins, of the witnesses who are available, and assuming a trial date in 2025, approximately 15 years will have elapsed since the conclusion of events at issue in or around August 2010 and 19 years will have elapsed since the start of events in or around February 2006. This constitutes, in my view, prejudice in relation to fading memory and hence the reliability of witness evidence.

30. Oral evidence will also be required to resolve further disputes between the parties in relation to site meetings held between them and the minutes of those meetings.

31. I also accept that any expert report based on inspections carried out in or around *this time* will be of limited assistance in resolving many of the issues in dispute because 15 years later, it will not be clear which alleged defects are due to the construction of the buildings, or are due to wear and tear, or whether further works were carried out by the Plaintiffs or their tenants during those 15 years.

32. Further, again common to both applications, discovery has not yet been carried out and the elapse of 15 years will impact negatively on that interlocutory process.

33. It is further argued on behalf of Oppermanns, from the perspective of reputational prejudice, that the Plaintiffs have issued proceedings in this case against Oppermanns, alleging matters of professional negligence without procuring an architectural expert report to inform such proceedings before they were issued and reliance is placed on the decision of this court (Simons J.) in *Rooney v HSE* [2022] IEHC 132 and that the only expert report procured by the Plaintiffs was an engineer's report. On behalf of the Plaintiffs, it is argued that both Oppermanns and Atkins have failed to set out independent reports from the perspective of their respective defences.

34. In assessing the various arguments on *Primor* type applications it is important *not* to engage in assessing the strength or weakness of the Plaintiffs' case. Therefore, without assessing this precise question concerning the procurement of independent experts, I am of the view, separate to the aforesaid arguments made by the parties on that issue, that the Plaintiffs' inordinate and inexcusable delay in having unresolved legal proceedings being in existence for over ten years, *in and of itself*, 'hangs over the head' of the Defendants, as professionals, in an unacceptable and prejudicial manner: *Primor v Stokes Kennedy Crowley* [1996] 2 I.R. 459 at page 476; *Collins v Minister for Justice* [2015] IECA 27 at paragraph 113; *Egan v Bank of Ireland* [2022] IECA 294, per Noonan J. at paragraph 73.

35. Separately, and a point which was not pressed by Mr. Quinn BL at the hearing of this application, by way of clarification, Mr. Oppermann at paragraph 7 of his Affidavit sworn on 24th April 2023 seeks to clarify as follows his previous averment at paragraph 35 of his Affidavit sworn on 7th March 2023:

"*For the avoidance of doubt, I did not mean to suggest or aver in my Second Affidavit that the present Proceedings are the sole cause of the requirement to reserve €50,000 in our accounts for the professional indemnity insurance policy excess and I apologise for any confusion caused. It is the case that more than the present Proceedings have contributed to this requirement and to increased premiums. However the fact remains that the present Proceedings, due to the fact that they have not been prosecuted with proper expedition, have contributed to both increased premiums and to the requirement for large reserves in our accounts for well over a decade now.*"

36. Previously, in his second Affidavit sworn on 7th March 2023, Stephen Oppermann had also stated that "*the existence of these Proceedings causes me significant worry, stress and sleepless night. This is made worse by the fact that the Proceedings have been hanging out there unresolved for so many years.*" Whilst the fact of these proceedings is contributing to Oppermanns' increased premiums and the requirement to have a reserve, there is no evidence as to the proportion of such increase arising from *these* proceedings. Further, the fact that legal proceedings may be stressful may apply to many participants in litigation. While I have had regard to these matters, I do not place any material weight on claims which do not go further than saying the fact of these proceedings continue to cause stress and have contributed to a reserve and increased premiums but which are not particularised.

37. In contrast, as mentioned earlier, I do, however, place weight on the fact that legal proceedings, which have remained unresolved for a number of years, are a source of prejudice in and of themselves for professional persons and the clarification in the third Affidavit from Mr. Oppermann further contextualises matters insofar as this general point is made that no professional person should have to have a set of legal proceedings 'hanging over them' for a number of years.

38. Finally, whilst Mr. Doherty SC fairly recognised that the personal circumstances of the Plaintiffs, including matters such as the loss of a business, the death of a brother and a cancer diagnosis, may not go to excusability, and recognises the difficulty in establishing a causal link between these matters and delay, he contends that they are factors which can be considered by the court when addressing the question of the balance of justice. In this regard, whereas the decision of the High Court (Geoghegan J.) in *Corcoran v McArdle* [2009] IEHC 265 is authority for the general proposition that excuses based on extraneous activities are taken into account and weighed as part of the balance of justice exercise, in *O'Leary v Turner & Others* [2018] IEHC 7, which concerned a strike out/dismiss claim involving alleged professional negligence regarding the statutory renewal rights of a tenant under the Landlord and Tenant (Amendment) Act 1980 (as amended), the High Court (Baker J.) determined that '*personal circumstances*' similar to that at issue in this application, should not be considered in addressing the balance of justice, observing as follows at paragraph 57:

> "*(57) The personal circumstances of the plaintiff do not, in my view, offer her an excuse for not expeditiously prosecuting the present proceedings. Taking her argument at its height, the circumstances she describes do not offer justification for me to depart from the clear line*

of authority that mandates that she proceed efficiently and expeditiously to bring her claim on for hearing. Her personal circumstances were most unfortunate but I cannot excuse her delay on account of circumstances which became less acute in the years after the service of the summons, and her personal difficulties were not at a level that caused her to be incapable of instructing solicitors to commence the proceedings, to engage the intermediary and to engage other litigation and continue, albeit in a limited way, her business interests. No authority has been identified that permits a court to excuse culpable and otherwise unexplained delay on account of personal and financial circumstances of the type identified".

39. During the hearing, while there was some reference, by analogy, to the consequences of a Notice of Indemnity and Contribution insofar as the First to Eighth Named Defendants are concerned, this issue does not arise in these applications as no such notice was served and it was raised, rather, in the context of an argument being advanced. Strictly speaking, therefore, the following observations are *obiter*.

40. In this context, in *Sneyd v Stripes Support Services Ltd* [2023] IEHC 68, the High Court (Barr J.) observed also *obiter* (commencing at paragraph 53) that the service of a notice of indemnity/contribution between defendants was not relevant to the issue that the court had to determine on an application by a defendant to strike out proceedings on grounds of delay because the court was only considering the balance of justice between the plaintiff and that defendant. When considering such an application, the key question was whether there had there been inordinate and

inexcusable delay by the plaintiff and, if so, did the balance of justice, as regards that defendant, demand that the action should be dismissed. In his judgment in *Sneyd v Stripes Support Services Ltd* [2023] IEHC 68, Barr J. referred at paragraph 48 to dicta in *Mangan v Dockery & Ors* [2020] IESC 67, where the Supreme Court (McKechnie J.), having held that there would not be a risk of injustice to the second or third defendants in allowing the action to proceed against them, went on to note that even if the applications by the moving party defendants to be let out of the proceedings on grounds of delay were successful, both of the defendants would remain in the action pursuant to the notice of contribution and indemnity that had been issued on behalf of the first defendant (per paragraph 146 of the judgment of McKechnie J.). At paragraph 49 of his judgment in *Sneyd*, Barr J. also referred to the judgment of the High Court (Butler J.) in *Gibbons v N6 (Construction) Limited and Galway County Council* [2021] IEHC 138, where Butler J. took into account the fact that there were multiple defendants and the consequences that may ensue under the Civil Liability Act 1961, if one of the defendants was let out of the proceedings. At paragraph 57 of his judgment in *Sneyd*, Barr J. accepted that the dicta of the Supreme Court in *Mangan* case and that of Butler J. in the *Gibbons* case may be construed as leaning against the conclusion that service of a notice of indemnity/contribution is irrelevant to the consideration of the balance of justice question under the *Primor* test and for that reason, indicated that he would await a case where the point had been fully argued before giving a decision on this issue. As stated, I adopt a similar position in this case as the consequences of a Notice of Indemnity and Contribution insofar as the First to Eighth Named Defendants are concerned do not arise.

41. Insofar as the position of the Fifth Named Defendant (Paul Connolly) is concerned, Oppermanns' Defence at paragraph 2(iii) pleads (and clarifies) that "*[f]or the purposes of clarity in this defence the parties be referred to as follows: The Fifth Named Defendant is a member of the Greenhills Co-Ownership only and has no connection whatsoever to the architects engaged by the Greenhills Co-Ownership.*" Neither Paul Connolly nor Kieran Doyle work for Oppermanns.

42. Accordingly, for the reasons set out above, I shall exercise my inherent jurisdiction and strike out the Plaintiffs' claim against Stephen Oppermann and Colm Horan practising under the style and title of Oppermanns Associates by reason of the Plaintiffs' inordinate and inexcusable delay in the prosecuting of its claim against those Defendants.

PROPOSED ORDER IN RELATION TO OPPERMANNS' APPLICATION

43. Subject to hearing from the parties, I shall make an Order pursuant to my inherent jurisdiction striking out the Plaintiffs' claim against Stephen Oppermann and Colm Horan practising under the style and title of Oppermanns Associates by reason of the Plaintiffs' inordinate and inexcusable delay in the prosecuting of its claim against those Defendants. I shall put the matter in before me at 10:30 on Thursday 25th April 2024 to address any consequential or ancillary matters and also the question of costs.

ASSESSMENT & DECISION IN RELATION TO ATKINS' APPLICATION

Inordinate delay

44. Insofar as Atkins' motion is concerned, I find that there was inordinate delay in the following periods: (i) insofar as pre-litigation is concerned, there was a delay of 2 years and 9 months between the date of the completion of the works from on or about 1st April 2009 to the commencement of these proceedings on 24th January 2012; (ii) there was a delay of 2 years and 1 month from the 25th January 2012 to 14th March 2014 in delivering a Statement of Claim; (iii) of less significance, there was a period of three months in replying to Atkins' Notice for Particulars dated 29th April 2014 (from 1st June 2014 to 5th September 2014) and 7 months arising from the inadequacy of the replies to particulars dated 5th September 2014). Mr. Buttanshaw BL accepts that these particular periods are relatively short and does not place any great emphasis on them; significantly, there was a delay of 7 years and 8 months between the delivery of Atkins' Defence on 1st July 2015 and the bringing of this application on 2nd March 2023. It is common case that these periods of delay comprise inordinate delay and, independent of the Plaintiffs' acceptance, I so find that these periods of delay comprise in ordinate delay.

Inexcusable delay

45. Leaving aside the question of pre-litigation delay in the context of the question of excusability, the delay of 2 years and 1 month from 25th January 2012 to 14th March 2014 in delivering a Statement of Claim appears to be directed at the Plaintiffs' former solicitors and, as pointed out earlier, in the context of the Oppermanns' application, this is not a permissible excuse.

46. The principal period of delay is the period of 7 years and 8 months between the delivery of Atkins' Defence on 1st July 2015 and the bringing of this application on 2nd March 2023. The explanation from the Plaintiffs in this regard is a repetition of the responses in the Oppermanns' application referred to earlier in this judgment.

47. In this regard, and as mentioned at the beginning of this judgment, the Plaintiffs have adopted a common position in relation to the question of excusability/inexcusability in relation to the respective applications of Oppermanns and Atkins. On the one hand, they accept there are "*significant periods of delay which are in the context of these types of application inexcusable*"[7] but, on the other hand, seek then to explain 'some' of that delay.

48. For the following reasons, however, I find that the inordinate periods of delay, as so found, are also inexcusable and the following applies to both Oppermanns' motion and Atkins' motion.

49. As referred to earlier, the Plaintiffs' explanation for the inordinate periods of delay, particularly in the period of 7 years and 8 months between the delivery of Atkins' Defence on 1st July 2015 and the bringing of this application on 2nd March 2023, can be summarised as a series of events, some of which are personally tragic for members of the family.

[7] Paragraph 26 of the Plaintiffs' Legal Submissions under the sub-heading "Inordinate and inexcusable delay."

50. When the events are viewed separately and in the round, they do not provide an excuse for not progressing with the litigation. In summary, the events include, for example, the untimely passing of Mr. Gary Newport in February 2014; the appointment of a receiver over the lands in 2015; the liquidation of the family business on 20th February 2015; the commencement of litigation with the receiver in 2017 and its resolution in 2020; the fact Mr. Paul Newport had kidney cancer diagnosis in 2017 and a skin cancer diagnosis in 2019.

51. Further, when this context is applied to the periods of delay (referred to above), Atkins (and Oppermanns) have succeeded in establishing that the delay is inordinate and inexcusable. As referred to earlier in the judgment, Mr. Doherty SC accepted that the personal circumstances of the Plaintiffs, including matters such as the loss of a business, the death of a brother and a cancer diagnosis did not apply to the question of excusability and recognised the difficulty in establishing a causal link between these matters and the delay, while arguing that they could be assessed in relation to the question of the balance of justice.

52. Further, while the Plaintiffs were in receipt of an expert's report dated 8th July 2009 from Walsh Goodfellow Engineers addressing the alleged problems with the buildings these proceedings were not commenced until 24th January 2012; in relation to delay during the course of the pleadings, the Plenary Summons was served in 2012 and the Statement of Claim was served on 14th March 2014. As mentioned, explaining this period of delay because of a change of solicitors may explain the delay but it does not excuse it. Further, there is no connection between the series of events (as so described) and the failure to prosecute or progress these proceedings. It is also the

case that separate proceedings were instituted in 2017, progressed and resolved in 2020; the main period of inordinate delay is a period of 7 years and 8 months between the delivery of Atkins' Defence on 1st July 2015 and the bringing of this application. The sad passing of a family member, serious health issues involving another family member and the involvement in other proceedings do not excuse the failure to prosecute these proceedings during that period of delay and the claimed difficulty in briefing experts may be a consequence of the delay but is not a reason for it. In relation to this last issue, as mentioned earlier, the Plaintiffs were in receipt of an expert's report dated 8th July 2009 from Walsh Goodfellow Engineers which addressed the alleged problems with the buildings and it appears that the suggestion of retaining an architect was not addressed until 16th March, 2015 and, further, Mr. Joe Behan Engineer who inspected the property in August 2015 and informed the Plaintiffs that he was retiring and Dr. Rod Goodfellow does not appear to have been engaged since in or around 2015.

53. Accordingly, and as stated above, I find that the inordinate delay was also inexcusable.

Assessing the balance of justice

54. Having found that inordinate and inexcusable delay has been demonstrated by Atkins, I now address the balance of justice. For the following reasons, I am satisfied that there is *a causal connection* between the inordinate and inexcusable delay, as so found, and the prejudice claimed by Atkins which warrants the dismissal of the Plaintiffs' claim against Atkins. In so finding, I have sought to balance the consequences for each of the parties. For example, as a consequence of acceding to

the motion on behalf of Atkins, the Plaintiffs will no longer be able to seek compensation from Atkins. However, the Plaintiffs have not set out details of their understanding of what their claim against Atkins is worth in relation to a contract which is described in their legal submissions as being concluded at the height of the property boom and in circumstances where separate proceedings commenced in 2017 and resolved in 2020.

55. In addressing the question of prejudice in the context of the balance of justice, in *Vaughan v English* [2023] IEHC 281, the High Court (Ferriter J.) made the following observation at paragraph 27 of his judgment:

> "*Both parties relied on different aspects of the analysis of the question the balance of justice, when exercising the Primor jurisdiction, as set out by Collins J. in his recent judgment in Cave Projects v. Gilhooly [2022] IECA 245 ("Cave Projects"). I considered that analysis (in particular as to the question of the degree of prejudice required to be shown by a defendant applicant when seeking to demonstrate that the balance of justice favours strike out of proceedings) in my recent judgment in Kelleher v. Tallis & Co. & ors [2023] IEHC 212 and concluded (at para. 85) that Collins J. held that applicant defendants have an onus of demonstrating to the court that there is some likely prejudice to them which is moderate (in the sense of not insignificant), which arises from the nature of the matters which will have to be addressed at trial and which is attributable to periods of the plaintiff's inexcusable delay*."

56. In her Affidavit sworn on 14th February 2023, Martina Finn, the Managing Director of Atkins provides a number of examples of what I consider to be *a causal connection* between the inordinate and inexcusable delay of the Plaintiffs and the subsequent prejudice claimed by Atkins which I consider also meets the threshold of prejudice identified by Collins J. in *Cave Projects* and referred to by Ferriter J. in *Kelleher* and in *Vaughan* of moderate prejudice.

57. First, Atkins (and similarly Oppermanns) could be characterised as second tier defendants, with the building contractor having gone into liquidation but they were not the builders of the building. Yet, they face the prospect of having to defend a claim 7 years and 8 months after the delivery of their Defence and the bringing of this application to dismiss. Doyle Building Contractors went into liquidation in or around August 2010 and neither Atkins nor Oppermanns are in a position to say what witnesses are available from that source.

58. Second, it is likely that a hearing will be in late 2024 or 2025 and therefore the trial of the action will take place approximately 15 years after the alleged events and Atkins' have expressed concerns about both securing the availability witnesses and the reliability of the memories of those witnesses who may be available. In relation to securing witnesses, for example, Ms. Finn points out that the managing director of Atkins until December 2022, Tom O'Malley, has recently died.

59. In relation to others, she points out that Camilla Sjostrand, who was the Project Director on the project, left Atkins in or around 2009 and Damien Hughes, who was the Civil and Structural Engineer for the project, left Atkins in or around 2015. Ms.

Finn states that while she believes each may be available to give evidence, it would be unrealistic to involve them in the preparation and presentation of Atkin's Defence. She points out that Justin Norman was the Structural Engineer on the project and is available and works for a connected entity. The general point is also made that the Plaintiffs' delay means that persons who are no longer employees have no obligation to Atkins and that accordingly the preparation of their Defence is adversely impacted.

60. Third, similarly, the engineers are not the contracted builders (who went into liquidation) and the inspection of the building for alleged defects at this late stage will have become complicated by wear and tear from the time the buildings were built thereby creating a further prejudice to Atkins. In this regard, by correspondence dated 28th April 2015 from the Plaintiffs' Solicitors to Atkins' Solicitors in relation to a Particular (paragraph 18 raised by Atkins) seeking *inter alia* confirmation that the alleged defects the subject matter of the proceedings arose from an alleged failure to carry out the development works in accordance with drawings and designs and that none of the same is alleged to arise from a defect in such drawings or in the design of the works, it is *inter alia* stated on behalf of the Plaintiffs that "*[w]ithout prejudice to the foregoing, the Plaintiffs have not identified specific design defects in the drawings that have been provided to them to date*".

61. Further, the trial of the substantive action is not, as submitted on behalf of the Plaintiffs, primarily a documents case and the hearing of oral evidence will be necessary to address the three main allegations which the Plaintiffs allege against Atkins, namely: (i) that Atkins allegedly failed to administer the building project/building contract so as to ensure it progressed and was completed in a timely

manner; (ii) that Atkins allegedly failed to effectively supervise the execution of the building works; and (iii) that Atkins allegedly certified that the works were compliant with the applicable Building Regulations when it is alleged that they were not so compliant. In addition, the Plaintiffs' inordinate and inexcusable delay may very likely mean that some documentation which may have been available earlier after the project was completed will no longer be available.

62. Fourth, the corollary of the lack of detail and quantification from the Plaintiffs in their claim is the inability of Atkins to address this matter. In her Affidavit sworn on 14th February 2023, Martina Finn for Atkins at paragraph 25 states that "*[a]s for quantum, I understand that the Plaintiffs have not quantified their claim. In replies to Particulars delivered on 5th September 2014 they indicated that particulars of the loss and damage which they claim to have suffered would be provided (reply No.20). However, more than eight years later and nearly fourteen years after the claim first arose, this information has not been furnished. It would seem to be inevitable that Atkins' ability to investigate and respond to the Plaintiffs' damages claim will be adversely impacted by this period of delay.*" Ms. Finn then makes the point that given that the extent of the Plaintiffs' claim against Atkins remains to be quantified, she cannot make any assessment of the prejudice which the Plaintiffs would suffer if their claim against Atkins were to be dismissed and states *inter alia* at paragraph 26 of her Affidavit sworn on 14th February 2023 that it may be that "*in light of events which happened since 2009, succeeding in the claim would, in effect, represent a windfall for the Plaintiffs and that they would suffer no real prejudice of their claim were to be dismissed*" and she believes that the prejudice to Atkins of having to defend the claim outweighs that of the Plaintiffs.

63. Fifth, and finally, Atkins have not delayed in their defence of the action.

64. Accordingly, pursuant to my inherent jurisdiction, I shall strike out the Plaintiffs' claim herein against WS Atkins Ireland Limited by reason of the Plaintiffs' inordinate and inexcusable delay in the prosecuting of its claim against the said Defendant.

PROPOSED ORDER IN RELATION TO ATKINS' APPLICATION

65. Subject to hearing from the parties, I shall make an Order pursuant to my inherent jurisdiction striking out the Plaintiffs' claim herein against WS Atkins Ireland Limited by reason of the Plaintiffs' inordinate and inexcusable delay in the prosecuting of its claim against the said Defendant.

66. I shall put the matter in before me at 10:30 on Thursday 25th April 2024 to address any consequential or ancillary matters, in addition to the question of costs.