THE HIGH COURT

[2025] IEHC 40

Record No. 2012/1729P

BETWEEN

PETER BYRNE and ANGELA BYRNE

PLAINTIFFS

AND

THE IVEAGH TRUST

DEFENDANT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 30th day of January, 2025.

INTRODUCTION

1. These proceedings relate to whether the Plaintiffs' home at 418 Iveagh Trust, New Bride Street, Dublin 8 (hereinafter "the Property") is fit for human habitation. The Defendant is the Plaintiffs' landlord, a charitable trust.

2. The Plaintiffs moved to live in the Property in 1994. While it is contended that the Property was in poor condition from the outset, the claim in these proceedings has been expressly limited to a period of six years prior to the institution of proceedings in February, 2012 (from February, 2006).

3. The matter comes before me on the Defendant's application to dismiss the Plaintiffs' claim on account of delay grounded on an Affidavit of Mr. Gaynor, Solicitor

and Mr. Peter Fitzpatrick, Director of Housing with the Defendant. The Second Named Plaintiff has sworn an affidavit to oppose the application.

4. The Plaintiffs accept that the delay has been inordinate and partly inexcusable. They maintain, however, that the Defendant falls short of establishing that the balance of justice favours dismissing the proceedings. This is the central issue that I must now decide.

FACTUAL BACKGROUND AND CHRONOLOGY

5. In or about the 6th of May, 1994, the Defendants entered into a letting agreement with the Plaintiffs for one of their apartments, consisting of 4 rooms on the ground floor on a week to week letting in consideration for a weekly rent of £39.09. A further letting agreement was made and entered into between the parties on the 9th of September, 2002, for a 5-year tenancy which provided for an additional one room.

6. It is pleaded on behalf of the Plaintiffs that they encountered difficulties arising from the condition of the Property almost immediately upon entering occupation, principally in relation to mould and damp. It is further claimed that the Property has always been particularly cold, as it is a ground floor apartment and above cellar, and most of its walls are exposed to the outside. It is claimed that because of the condensation and mould, damage was caused to the interior of the Property and required the Plaintiffs to frequently replace items of clothing and furnishings which were no longer usable.

7. It is acknowledged in the Statement of Claim that steps were taken to address the problem (including the installation of additional radiators) but nonetheless it is the Plaintiffs' claim that the problem persisted. It is claimed that in or about October, 2006, (within six years of institution of the proceedings), the Defendant installed what is referred to in the Statement of Claim as a "*ventilation system*". The Plaintiffs contend

that based on assurances that this would solve their problems, they replaced all the contents of their home at a cost of €40,000, taking out a Credit Union loan to fund the works and adding savings. The Plaintiffs complain that far from resolving their problems, the new ventilation system exacerbated the already poor conditions. In further particulars of claim, they maintain, *inter alia*, that the Property became infested with insects or "*silver fish*" which it was then sought to address by arranging for the Property to be fumigated.

8. As for periods of post-commencement prosecution delay relevant to this application, I refer to chronologies helpfully prepared by both parties, which when combined provide an overview of relevant steps taken in these proceedings and a timeline as follows:

07.07.2010 Pre litigation letter to Defendant

16.09.2010 Plaintiffs engage expert witness Tom Breen Architect

15.11.2010 Agreement with Defendant for joint inspection by Architects

10.02.2011 Initial correspondence received from solicitor appointed by Defendant

18.02.2011 Initial joint inspection of Property by Architects scheduled

25.01.2012 New Solicitor appointed by Defendant

31.01.2012 Plaintiffs request for waiver of Statute of Limitations in consideration of forbearance on litigation

14.02.2012 Architect's meeting for joint inspection of Property

01.03.2012 Plenary Summons issued (18 years post first occupation of apartment)

25.06.2012 Appearance

17.08.2012 Statement of Claim delivered

23.10.2012 Notice for Particulars raised on Statement of Claim

23.10.2012 Defence delivered

19.11.2012 Notice for Particulars from Defendant

19.11.2012 Plaintiffs vacate the Property to facilitate refurbishment works by Defendant

11.01.2013 Plaintiff engages the services of expert witness Loss Adjuster NJ

Carroll & Associates

06.02.2013 Plaintiffs raise Notice for Particulars on the Defence

26.06.2013 Defendant's Replies to Plaintiffs Notice for Particulars.

14.10.2013 Plaintiff received initial report from expert witness Loss Adjuster NJ Ca1Toll & Associates

29.11.2013 Plaintiffs Replies to Notice for Particulars delivered in October, 2012

13.12.2013 Plaintiffs take possession of refurbished Property

18.12.2013 Property flooded from overhead flat

January, 2014 Property partially flooded again by employee or agent of Defendant

03.01.2014 Plaintiff's Discovery Request

08.04.2014 Plaintiffs issued Motion for Discovery

12.05.2014 Order for Discovery obtained against Defendant - 6 weeks granted

21.08.2014 Defendant's first Affidavit of Discovery sworn

17.12.2014 Complaint letter to Defendant relating to deficiencies in discovery issued

16.04.2015 Supplemental Affidavit of Discovery received from Defendant

17.06.2015 Plaintiff receives preliminary Advice on Proofs from Senior Counsel

02.02.2016 Vouchers for replacement of damaged contents sent to Defendant's Solicitor

24.05.2016 Plaintiff receives Property Condition Report from expert witness Tom Breen Architect.

20.06.2017 Plaintiffs issued Notice of lntention to Proceed

13.12.2018 Plaintiffs receive amended Loss Adjuster's Report to confine claim to six years pre-Summons

10.02.2022 Plaintiffs issued Notice of lntention to Proceed

24.10.2023 Defendant's Notice of Intention to Proceed

05.12.23 and **18.01.2024** Letters to Defendant inviting expert witnesses to agree Scotts Schedule (no reply)

24.01.2024 Defendant's Motion to Dismiss

23.01.2024 Hearing of Application to Dismiss

9. It is apparent from the pleadings and the affidavits filed in support of this application that the Plaintiffs rely on expert evidence to claim that the way in which the Defendant installed the ventilation system had the opposite of the intended effect. Instead of warming up the Property and reducing the impact of condensation and mould, the ventilation system when inspected by the Mr Dominic Fay, the Plaintiff's Engineer, is alleged to have been operating in reverse. It is contended that the system was extracting heat from the Property and heating the Defendant's basement. In consequence the system is claimed to have been *increasing* the impact of condensation and mould in the Property, rather than ameliorating the situation.

10. A full Defence has been delivered. In their defence of these proceedings, the Defendants have denied all liability and have also pleaded variously, *inter alia*, that the Plaintiffs contributed to their problems by causing vents and convector heaters in the apartment to be encased and blocked up, preventing their proper functioning role within the apartment to protect and eliminate against high humidity levels, condensation, cold, wet dampness and mould growth. It is also pleaded that they contributed to the problem by causing the Property to be overcrowded (by both people and furniture).

11. In addition, it is contended that the Defendant properly responded to complaints raised by, *inter alia*, the installation of a mechanical ventilation system with heat recovery with multiple vents installed throughout the apartment (referred to as a "MVHR Unit"); the installation of a gas central heating system in the apartment with multiple radiators fitted throughout which system was adequate to prevent a build-up of condensation and unacceptable humidity levels if properly used and regulated at normal room temperatures and the letting of an additional room to the Plaintiffs to provide for increased space and ventilation within the dwelling and for the improved comfort of its occupants. It is pleaded on its behalf that the Defendant renovated the apartment from time to time, carrying out reconstruction works thereto particularly when the mechanical ventilation system and central heating system were fitted, when the additional

room was added to the apartment and the fitting of new double-glazed windows throughout the Property to ensure it was properly secured and the heat was retained.

12. In terms of persons named in the pleadings and identifiable as potentially relevant witnesses, it is expressly pleaded that complaints were made by the Plaintiffs variously to Ms. Louise Richards, Mr. John Mahony, Mr. Ray Woods, Mr. Fred Stevens, Mr. Nobby Hanlon and Mr. Gene Clayton. These persons would appear to have relevant evidence to offer at the full hearing of these proceedings. In respect of the availability of these individuals as witnesses, it is pointed out on behalf the Defendant in the affidavit evidence grounding the application to dismiss that Ms. Louise Richards, who was a development manager/asset manager for periods between 2007 to 2015, has left employment. Furthermore, Mr. John Mahony, who was Director of Housing from 2000 to 2023, is retired. In addition, Mr. Ray Woods, who was Estate Manager from 1990 to 2006 and then moved to another role in the organisation of the Defendant, is retired since 2019. Also, Mr. Fred Stevens, who was CEO/General Manager of the Defendant from 1959 to 2005, is retired. Finally, Mr. Gene Clayton, who swore affidavits of discovery in these proceedings and was CEO/General Manager from 2003 to 2019, is retired.

13. On the other hand, it is accepted that one of the primary points of contact with the Defendant for the Plaintiffs over almost thirty years, Mr Nobby Hanlon, remains in the employment of the Defendant and has been employed as Estate Manager since 2006 and has continued to work for the Defendant throughout the full period of time covered by the Plaintiffs' claim.

14. It is clear from the pleadings and affidavit evidence that various experts were retained on both sides in relation to the Plaintiffs' complaints and for the purpose of these proceedings. It appears that the Plaintiffs have obtained expert reports from Mr. Tom Breen, Architect, Mr. Jake Reilly, Damp Expert, Mr. Dominic Fay, Engineer and Mr. Niall Carroll, Quantity Surveyor. Contemporaneous records comprising plans and photographs are included with the reports of the Plaintiffs' experts. These reports have been furnished to the Defendant.

15. Separately, Mr. Michael Malone of Edward Brady Associates Limited, Architects, was engaged on behalf of the Defendant, as was Mr. Frank Duff, Loss Assessor of Claims Direct Limited. Edward Brady Associates Limited is dissolved since 2022 and Mr. Malone is a retired and elderly gentleman. It is noted that the Defendant's solicitors claim not to have received a report from Mr. Malone, notwithstanding that in correspondence with previous solicitors in 2012, it had been indicated that a report was awaited and it is clear from discovery that an early report was furnished in December, 1997, with the result that averments on the part of the Defendant in relation to the non-availability of a report from Mr. Malone are confusing.

16. One of the builders engaged by Edward Brady Associates Limited, named as Mr. Liam Garrahan, to carry out some works on the Plaintiffs' apartment is retired on grounds of ill-health. The deponent on behalf of the Defendant deposes to a belief that he is suffering from Alzheimer's Disease but no further evidence of same is offered.

17. The Company that formerly employed Mr. Frank Duff, Loss Assessor, Claims Direct Limited, went into liquidation in 2018. It is not suggested, however, that Mr. Duff is elderly or sick or otherwise unavailable.

18. From the correspondence exhibited, it is clear that joint inspections were suggested in correspondence by both sides on a number of occasions following pre-litigation correspondence threatening proceedings on behalf of the Plaintiffs by letter dated the 7th of July, 2010. References to joint inspections were repeated in letters between the parties dated the 15th of July, 2010, 15th of November, 2010, 10th of February, 2011, and from this correspondence it is clear that the Plaintiffs had by then engaged Mr. Breen to represent their interests and the Defendant had re-engaged Mr. Malone, who had had previous involvement on behalf of the Defendant.

19. By letter dated the 1st of March, 2011, the Defendant's then solicitors refused to give any assurances in respect of pleading the Statute of Limitations, as requested on behalf of the Plaintiff when they were asked to refrain from issuing proceedings. At that time the Defendant's solicitors stated:

"We are not in a position to make any comment with regard to the current state of the premises until we receive a report from Mr. Michael Malone, Architect. We are informed that Mr. Malone is preparing a report and as soon as we receive same we will be in contact with you."

20. When new solicitors were engaged, they wrote to the Plaintiffs' solicitor by letter dated the 25th of January, 2012, seeking permission for their engineer to inspect the premises at a mutually agreeable time and it appears that a joint inspection was arranged for the 14th of February, 2012. The Plenary Summons was served on the 22nd of February, 2012, just over a week later. Separately, from the correspondence, an inspection appears to have been conducted on behalf of the Defendant on the 7th of March, 2012.

21. Following the service of proceedings on the Defendant, the Plaintiffs were offered alternative accommodation while works were carried out at the Property. As this work was taking place, the proceedings were being progressed with the delivery of the Defence in October, 2012. From correspondence between the parties in November, 2012, it was clear that both sides had engaged or were in the process of engaging loss adjusters/assessors. In the event, as already noted, Mr. Frank Duff was engaged on behalf of the Defendant and Niall Carroll of N.J Carroll and Associates were engaged on behalf of the Plaintiffs.

22. The correspondence documents extensive engagement between the architects for both sides in 2013 in relation to the refurbishment of the Property following the works carried out. It is apparent from this correspondence that the Defendant's architect exchanged drawings to include "*dimension drawings*" and a digital layout drawing with the Plaintiffs' architect in 2013. It is apparent that these were the subject of discussion and revision as between architects and at least one meeting occurred (specifically a meeting is referred to as occurring in June, 2013). The correspondence between architects and solicitors contains considerable detail in relation to the work in train.

23. From the chronologies and papers, it is apparent that the Plaintiffs' Plenary Summons issued in February, 2012, within six years of the installation of the ventilation system referred to in the pleadings as exacerbating the problems experienced by the Plaintiffs. Between February 2012 and April 2015, the proceedings were progressing in the ordinary way. During that period, the parties exchanged pleadings and discovery. The Plaintiffs had to motion to the Defendant for discovery and to raise issues with the discovery provided. The Defendant subsequently provided a supplemental affidavit of discovery. The Plaintiffs instructed a variety of experts (and had instructed certain experts prior to February 2012, as had the Defendant). In addition, the Defendant took steps to conduct certain refurbishment works on the Property during that period.

24. Addressing this ten-year period from April, 2015, to January, 2025, the Plaintiffs' replying affidavit refers to six matters which it is contended partly excuse the delay, which are as follows:

(i) In 2015, the Property was flooded by the Defendant's workmen, which took some time to deal with.

(ii) In June 2016, the Plaintiffs' solicitor had a heart attack which caused delay in moving the case along until late 2017.

(iii) In 2018, the Second Named Plaintiff became quite ill and has had to undergo several operations to her knees, hip and four operations in relation to her stomach. These procedures spanned a significant period of time.

(iv) In May 2019, the Plaintiffs' son died which caused serious grief to both Plaintiffs and understandably precluded them from progressing with the proceedings for some time.

(v) In March 2020, the Covid-19 pandemic commenced. While this may not have excused a large well-resourced corporate entity from progressing with litigation, it is submitted that it would substantially impact a claim such as this.

(vi) In April 2022, a new senior counsel was instructed who had to prepare an advice on proofs and familiarize himself with the papers.

LEGAL PRINCIPLES

25. The legal principles governing an application to dismiss on account of delay are well-established. The leading authority identified by both parties remains *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The three core proofs that the Defendant must establish are that:

(i) The delay is inordinate
(ii) The delay is inexcusable
(iii) If the delay is both inordinate and inexcusable, then the Defendant must further establish that the balance of justice requires the dismissal of the proceedings

26. Pending decision of the Supreme Court in *Kirwan v. Connors* [2023] IESCDT 34, which involved a reconsideration of the *Primor* case, I have been referred on behalf of the Plaintiffs to the decision of the Court of Appeal in *Cave Projects Limited v. Gilhooley* [2022] IECA 245 where Collins J. identified the following points of relevance:

(i) The onus is on the Defendant to establish all three limbs of the test.
(ii) An order dismissing a case is a far-reaching one which is a very serious remedy. Such an order should only be made in circumstances where there has been significant delay and where the balance of justice is "*clearly against allowing the claim to proceed*."
(iii) When assessing the balance of justice, this is not a free-floating inquiry which is divorced from the delay. The nature and extent of the delay is a critical consideration in the balance of justice. Where a Defendant can establish inordinate and inexcusable delay, then there *must* be a causal connection between that delay and the matters relied upon for establishing that the balance of justice justifies the dismissal of the claim.

(iv) Each case necessarily turns on its own facts and circumstances. A court's assessment of where the balance of justice lies in one case will rarely provide a useful blueprint for another.

(v) The authorities increasingly emphasise that defendants bear a responsibility in terms of ensuring the timely progress of litigation. The contours of that relationship have not been definitively mapped, but any culpable delay on the part of a defendant will weigh against dismissal.

(vi) There are many statements throughout the caselaw that the "*question of prejudice is central*". In *Keogh v. Wyeth Laboratories Incorporated* [2005] IESC 46, [2006] 1 I.R. 345, the Supreme Court held that "*the central thread running through those principles are the concepts of fairness and prejudice, which should be at the forefront of the court's consideration as to where the balance of justice lies*".

(vii) Prejudice is not confined to fair trial prejudice. It might include damage to reputation or a business for example.

(viii) In most applications, the Defendant will assert that specific prejudice has arisen on account of the delay, such as the unavailability of witnesses, the fallibility of memory recall or loss of documentary records. The absence of any specific prejudice may be a material factor in the court's assessment. The absence of specific prejudice does not in and of itself necessarily prevent a case being dismissed.

(ix) Even moderate prejudice has been held sufficient to justify the dismissal of proceedings, albeit this cannot be detached from the particular circumstances and facts of any given case.

(x) The jurisdiction is not supposed to be a punitive or disciplinary one to punish a litigant for their delay.

(xi) The dismissal should be seen as an option of last resort.

DISCUSSION AND DECISION

27. This is undoubtedly a stale claim. Although it seems to me that the evidence in this case at trial, should it proceed to trial, will principally turn on events from 2006,

one cannot clinically say that this means that I am not concerned by pre-commencement delay prior to 2006, where it seems complaints were made from 1994. This is because it may be contended that whether complaints were made and how they were dealt with prior to 2006 have some residual relevance in determining liability for breach of duty in the landlord-tenant context. However, it is clear that the Court at trial will principally be confined to the evidence in relation to events post-February, 2006, and the real relevance of events dating back to before this is limited. As it is well within the remit of a judge hearing this action to ensure fairness insofar as evidence relating to events prior to 2006 is sought to be introduced, I consider that the question of the length of delay falls to be measured against a claim which dates to 2006, in respect of which proceedings issued in 2012.

28. Adopting a reasonable position, the Defendant does not press its application based on a complaint of delay between 2012 and 2015, the time between the issue of proceedings and the closing of pleadings. Rather, the application rests on the delay between 2015 and the present day, in circumstances where the proceedings relate to the condition of property from 2006 and where complaints are articulated in respect of conditions before that, albeit these conditions do not form part of the claim for damages. The long history to the complaints agitated in these proceedings is relevant as it gives greater force to a duty of expedition on the part of the Plaintiffs where proceedings issue in respect of a protracted situation.

29. For their part, the Plaintiffs acknowledge that the period after April, 2015, to the present date involves an inordinate delay, but that this 10-year delay is partly excusable for the reasons advanced in evidence. They maintain that it is quite clear that a fair trial is still possible.

30. Looking then at the post-commencement delay, it is undeniable that the first substantive step taken in the proceedings after April, 2015, was prompted by the service of the Notice of Intention to Proceed by the Defendant in October, 2023. It was only then that the Plaintiffs' solicitor wrote to the Defendant's solicitor to indicate that the matter was ready to proceed to hearing and suggested that expert witnesses should agree Scott's Schedule.

31. While I am satisfied that this sudden burst of energy was attributable to the fact that it was apparent that the Defendant was likely to bring this application and the proceedings were at risk of being dismissed as an effort to pre-empt the application or strengthen the Plaintiffs' hand in resisting it, I do not accept the Plaintiffs' submission that the Defendant can be treated as having acquiesced in delay.

32. Where proceedings are not being progressed, a defendant may deploy a legitimate "*wait and see*" litigation tactic, both in the hope that proceedings will not be pursued (perhaps because plaintiffs in a given case are satisfied by the remedial works undertaken and have lost appetite for the litigation) or with a view to strengthening their hand on an application to dismiss on grounds of delay. This should not be measured against a defendant to justify refusal of a dismissal application on the basis that they too delayed and could have caused the proceedings to be progressed by the simple expedient of serving notices at any time. A defendant who fails to take steps to cause proceedings against it to be expedited does not share responsibility with the plaintiff for inordinate delay unless the outstanding steps were matters for a defendant (such as delivering a defence or complying with requirements as to discovery).

33. I am very sympathetic to the explanations put forward by the Plaintiffs for delay, which include a very serious, close family bereavement and ill-health on the part of the Second Named Plaintiff and the Plaintiffs' solicitor. I fully acknowledge and understand the impact of traumatic life events on a person's ability to function. I am also mindful of the fact that there was a further unrelated flooding event at the Property which required attention in the intervening period and no doubt consumed the Plaintiffs' energy and attention. Nonetheless, I am satisfied that there has been both inordinate and inexcusable delay in this case, in circumstances where no substantive steps were taken to progress proceedings from the time pleadings closed in April, 2015, until after the Defendant served a Notice of Intention to Proceed in October, 2023. This period is unconscionable by any reckoning. Accordingly, the Defendant has satisfied me that delay in this case is both inordinate and inexcusable.

34. It remains for me to consider whether the balance of justice lies in favour of dismissing the proceedings in all the circumstances, either because of a risk to the fairness of trial, or otherwise. In conducting a balancing of justice exercise, a range of

issues are relevant, chief among them the question of prejudice to the Defendants. While prejudice is not limited to litigation prejudice and other types of prejudice may also be factored in, litigation prejudice is a most weighty concern and a dominant consideration for me in deciding on this application. On the other hand, although I do not find the manifestly inordinate delay to be excusable, the explanations offered for delay remain relevant and are factors which I am entitled to consider in determining where the balance of justice lies.

35. Considering then the chronology in this case and the explanations offered to excuse delay, my point of departure must be to acknowledge that this is not a case where proceedings were commenced and allowed to languish without any further steps being taken. On the contrary, reasonable expedition is apparent in progressing proceedings between 2012 and 2015 such that pleadings had closed, and the discovery process was complete within a three-year timeframe. A plaintiff who takes no action to progress proceedings having commenced them will have far greater difficulty in successfully resisting an application like this one. In balancing the constitutional rights of the Plaintiffs, including their right of access to the courts to pursue a remedy in respect of a legal wrong and weighing the Plaintiffs' rights against the Defendant's competing rights to expedition and fairness, I attach weight favourable to the Plaintiffs to the fact that serious life events have occurred since pleadings closed which explain some of the delay, while not justifying all of it.

36. Sympathetic as I may be to the Plaintiffs in view of the reasons offered as contributing to delay, none of these factors could sway me against making the order sought by the Defendant on this application, were I satisfied that the Defendant had demonstrated a real risk of prejudice in the defence of these proceedings or other consequential unfairness to the Defendant. Based on the affidavit evidence before me, however, I have not been so persuaded. This is because the Defendant has proceeded on little more than a bare assumption that the witnesses listed on affidavit grounding this application will not be able to give evidence without properly explaining why this might be, other than the fact that they are aged and substantial time has passed. The sole exception to this is the possible case of a builder named in the grounding affidavit, Mr. Liam Garrahan, now believed by a deponent on behalf of the Defendant to have

Alzheimer's Disease. In the case of Mr. Garrahan, however, the deponent does not disclose his own means of knowledge nor still less any medical support for his belief. Furthermore, even in the absence of proper evidence of his unavailability, it is not clear to me from anything said on affidavit that the evidence Mr. Garrahan could have to offer is essential evidence which is not otherwise available to the Defendant.

37. Importantly, no relevant identified witness is deceased. In grounding this application, it is pointed out on behalf of the Defendant that the architectural firm, Edward Brady & Associates Limited who employed Mr. Malone and who carried out "*planning and architectural work, overseeing the maintenance and construction / renovation works on the defendant's apartments including those for the Plaintiffs' apartment*", and the loss adjustors, Claims Direct Limited, who it appears employed Mr. Duff, were dissolved in 2022 and 2018 respectively. Of Mr. Malone, it is said that he is now in his 80's and retired. Nothing at all is said of Mr. Duff. It seems to me that the Defendant has not done enough to demonstrate that either witness is unavailable. Contrary to a seeming misapprehension on the part of the Defendant, the fact that a witness is no longer employed by the Defendant or by a company engaged by the Defendant or that a company has been dissolved or is in liquidation, is not an impediment to the individual who carried out work or inspected a property attending to give evidence, provided they can be located and they are fit to give evidence.

38. Specifically, the Defendant has not presented evidence of any unsuccessful attempts to locate either Mr. Malone or Mr. Duff or any other witness, still less evidence as to a specific and real impediment to them giving evidence (except possibly Mr. Liam Garrahan, Builder). To establish that a relevant witness is unavailable, it would suffice for the Defendant to explain firstly why their evidence is potentially relevant and then secondly document its real efforts to locate the witness. If located but not otherwise unavailable, it is important to explain why they are not available and provide an evidential basis for the assertions in this regard. If unfit to give evidence, it is appropriate to give an evidential basis, personal to the individual, to explain why this is so. Age alone cannot be advanced as a basis for asserting unavailability. Many persons in their 80's are perfectly competent to give evidence. Some are not. To dismiss based on witness unavailability due to incapacity, I would need some better evidential basis than a statement of age (80s) and occupational status (retired).

39. I cannot accept that the Defendant has suffered prejudice due to witness availability simply because witnesses are retired or have left the employment or the company for which they worked has been dissolved or, indeed, that they parted ways with the Defendant on bad terms (as in the case of one witness named in the grounding affidavit). The fact that an employee has left the Defendant's employment on bad terms does not arise from Plaintiff delay and does not mean that the person will be unavailable to give truthful evidence. Accordingly, it is not a factor to which I can legitimately have regard.

40. The Defendant has failed to engage appropriately with the facts to identify the extent to which real or specific issues of prejudice arise in this case by reason of witness unavailability. I agree with the Plaintiffs that in large part, the issues raised by the Defendant relating to the availability of witnesses are like those raised in *Duncan v. Butler* [2024] IEHC 135, leading Butler J. to comment that assertions of prejudice were vague and verging on speculative.

41. Absent evidence of unsuccessful attempts to contact witnesses or actual evidence that any of them are unfit to give evidence or are lacking in capacity, the claimed prejudice does not extend beyond a bare assertion that passage of time impacts on memories, a proposition I readily accept as supported by the authorities and for which no evidence is required. I proceed now on the basis that there is a risk that memories will have faded in this case by reason of the passage of time and this is a factor which weighs in favour of granting the order sought by the Defendant dismissing these proceedings even without evidence of specific prejudice.

42. The memory fade factor in this case, however, is less important than in others because this is, at least to some important extent, a "*documents*" case. The Defendant has sworn two affidavits of discovery, which make discovery of a range of documentation going back a significant period. The condition of the Property was logged, photographs were taken and architectural drawings prepared and exchanged and there are contemporaneous records available to assist witnesses in their recollection of events. Proposals were made by Mr. Malone, Architect for the Defendant for remedial works to be carried out and communications were exchanged between

Architects during 2012 and into 2013, in efforts to agree a schedule of works and specifications.

43. Accordingly, this is a case in which the parties each retained experts a significant time ago. Those experts identified the issues with the Property. The Defendant undertook significant works in 2013 on foot of that expert advice and, therefore, should be in a position to elaborate on the condition of the Property before the works took place and also after the works took place. The parties have photographic evidence of the condition of the Property which also ameliorates any unfairness due to the passage of time.

44. The same architectural firm which the Defendant has retained in these proceedings carried out an inspection of the Property as far back as December, 1997, as evidenced in the discovery provided by the Defendant and while the architect is now retired and elderly, any suggestion that he lacks capacity or is otherwise unfit to give evidence has not been substantiated.

45. The Defendant relies on little more than generalised and broad statements of prejudice that have not been properly articulated. Prejudice of this general kind is difficult to measure in advance of the hearing and carries less weight on an application to dismiss when weighing whether the balance of justice lies in favour of dismissing.

46. In relation to the quantum of the Plaintiffs' claim, the Plaintiffs' assessor has specifically limited the Plaintiffs' claim to take account of the fact that any losses which occurred prior to February, 2006, cannot be recovered in these proceedings. As such, the Defendant is not prejudiced by the way the case has been articulated and is not being asked to deal with claims for damage to property from any period earlier than that.

47. Nothing on the evidence put before me in support of this application persuades me that there is a real risk that a fair trial is not possible such that I should dismiss proceedings, although it is possible that at the hearing of the action it might still transpire to be so when the actual position as regards witness availability is established.

48. I am mindful when weighing competing factors in the balance of justice considerations, that had the claim been prosecuted to full hearing in 2015, there could be no complaint about delay. However, it was apparent from 2010 when solicitors' correspondence first issued, that this case was a potential litigation case and experts were engaged on behalf of the Defendant on that basis at material times. If it is indeed true, as I am told, that reports were not commissioned contemporaneous with these events and during the period when the litigation was active from the Defendant's architect, then in my view the Defendant must bear a measure of responsibility for this in the weight to be attached to the absence of such reports as a factor. The Defendant was on notice of a claim, was professionally advised, engaged an expert and had every opportunity to obtain such reports as it sought fit to procure in defence of the proceedings. It can hardly be laid at the door of the Plaintiffs if they failed to do so.

49. I note that proceedings are effectively ready for hearing, at least from the Plaintiffs' perspective. Pleadings are long since closed and discovery has been completed. As set out above, the Plaintiffs have retained all their necessary experts for the hearing. The Plaintiffs' solicitor has twice written to the Defendant's solicitor since the service of a Notice of Intention to Proceed in advance of making this application, requesting that there should be a meeting of certain experts. Pending the outcome of this application, this request has not been engaged with on behalf of the Defendant. It has been confirmed on affidavit that the Plaintiffs' senior counsel has provided an advice on proofs which only requires minor items to attend to before a Certificate of Readiness can be served and the proceedings can get a date for hearing. It was, however, intimated during the hearing before me that some additional particulars might be served on foot of an up-to-date inspection in advance of any hearing.

50. The state of readiness of the Plaintiffs' case as assured to the court is a factor which has been weighed by me as leaning against the making of a dismissal order in the balancing of justice consideration.

51. Weighing all relevant factors, I have concluded that the balance of justice is against the granting of an order dismissing these proceedings. It has not been demonstrated that the Defendant is unable to meet the case or has suffered some sort of irremediable or real prejudice in advancing a defence. While there has been a breach

of the Defendant's right to expedition, general prejudice associated with the passage of time is alleviated by the availability of contemporaneous documents such that I am not persuaded that it would be just to deny the Plaintiffs a remedy in respect of a legal wrong as part of their fundamentally protected constitutional rights in all the circumstances of this case. Nonetheless it is clear that the delay in progressing this case has been inordinate and further delay cannot be permitted to occur.

CONCLUSION

52. For the reasons set out, I refuse to make the order sought at this time because it has not been demonstrated on the evidence before me that the balance of justice is against the case proceeding to hearing, notwithstanding inordinate and inexcusable delay. Any further unnecessary delay in these proceedings advancing to hearing will not be tolerated. I urge the parties to liaise and to co-operate in agreeing an expedited timetable to address all outstanding matters.

53. I will list this matter for mention two weeks post-delivery of judgment for the purpose of arrangements, if necessary, to hear the parties in relation to fixing a case-management timetable and any other consequential matters. Where the timetable fixed is not complied with, an application to dismiss may be renewed. Furthermore, should it transpire at the hearing of this action that the fairness of the process has been irreparably impaired by reason of the Plaintiffs' delay, it remains open to the Defendant to renew this application to the trial judge who will be best placed to assess the real impact of delay on the fairness of proceedings and whose function it is to ensure that the requirements of constitutional justice are observed.