THE COURT OF APPEAL
UNAPPROVED

Record Number: 2022/71
High Court Record Number: 2014/2455P

Noonan J. **Neutral Citation Number [2022] IECA 294**

Faherty J.

Pilkington J.

BETWEEN/

BRIAN EGAN

PLAINTIFF/APPELLANT

-AND-

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

FIRST NAMED DEFENDANT

-AND-

JOHN G. DILLON-LEETCH AND ROBERT POTTER-COGAN FORMERLY PRACTICING UNDER THE STYLE AND TITLE OF DILLON-LEETCH & SONS SOLICITORS NOW JOHN G. DILLON-LEETCH PRACTICING UNDER THE STYLE AND TITLE OF DILLON-LEETCH & COMERFORD SOLICITORS

SECOND NAMED DEFENDANT/RESPONDENT

-AND-

SEAN MALONEY & ASSOCIATES

THIRD NAMED DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 20th day of December, 2022

1. This application is brought by the second defendants ("the Firm") to dismiss the claim of the appellant ("the plaintiff") on grounds primarily of delay.

Background

2. At all relevant times, the Firm acted as solicitors on behalf of the plaintiff in relation to the purchase of certain property ("the Property") in 2004. At that time, the plaintiff was the owner of a fuel filling station in Dunmore, County Galway, being the property comprised in Folio 41976 of the Register of Freeholders, County Galway, which he acquired in or about 1993. Immediately adjoining the filling station was a building known as the Alpha Centre, laid out in seven commercial units let to various tenants. In early 2004 the plaintiff was interested in acquiring this property and instructed Mr. Robert Potter-Cogan of the Firm to act on his behalf. The property to be acquired is comprised, in part at least, in Folios 56199 and 40857 of the Register of Freeholders, County Galway.

3. It would appear that the contract for sale was signed in February 2004. In or about this time, it seems that the plaintiff instructed Mr. Sean Maloney of the third named defendant firm who are building and planning consultants. On the 11th March, 2004, Mr. Maloney wrote to Mr. Potter-Cogan advising that he had met the plaintiff that day who furnished him with a drawing showing the building for which planning permission was granted. The plaintiff also explained to Mr. Maloney that the owners of the building had obtained planning permission for a change of use from the existing retail units to three townhouses and four apartments.

4. Mr. Maloney confirmed that he had examined the drawings of the existing building and compared it with that for which permission was granted and noted that they differed a lot and that the façade of the existing building was not the same as that shown in the permission. He also confirmed that he had met with the planning officer for Galway County Council on the same day explaining his concerns about the matter and the planning officer agreed that in his opinion, if the façade did not match that contained in the planning permission, retention permission would need to be sought.

5. Despite that, it would appear that the plaintiff was happy to proceed with the purchase and ultimately the sale was closed in September 2004. In February 2005, Mr. Potter-Cogan certified the title for the plaintiff's lender, the first defendant herein. In 2006, a fire occurred which damaged the Property and necessitated a further planning application to facilitate the rebuilding of the Property. Mr. Maloney was again retained by the plaintiff in relation to this matter.

6. One of the primary issues that arises in these proceedings is that the Land Registry maps for the two Folios comprising the Property do not coincide with the boundary on the ground. Thus, a substantial part of the building known as the Alpha Centre in fact falls outside the Land Registry maps and is on, what appears to be, unregistered land. This is alleged by the plaintiff to constitute a serious defect in his title which affects the marketability of the property. That contention has never been explained, and in particular why it could not be rectified by an application for first registration.

7. It would appear that by 2010, if not indeed earlier, the plaintiff was interested in selling on the Property and in the statement of claim ultimately delivered herein, the plaintiff pleads as follows:

"16. … In the course of 2010, the plaintiff was approached by Martin Smith, who offered €1,800,000 for the filling station, which would have cleared all the plaintiff's debt and allowed him to continue farming.

17. As a direct result of the title and planning difficulties, Martin Smith walked away from the deal …"

8. In the course of argument during the appeal, counsel for the plaintiff suggested that this event may have occurred as early as 2008 and is dealt with further below, but in any case, this pleading suggests that the plaintiff was, at a minimum, aware by 2010 at the latest that there were *"title and planning difficulties"* with the property.

9. It would appear from a medical report on Mr Potter-Cogan provided for the purposes of these proceedings that he ceased working as an active solicitor in 2011 although the plaintiff disputes this and points to a letter written to Mr. Potter-Cogan at the Firm in 2012. The plaintiff alleges that the Firm continued to represent him until 2013.

10. It is clear that by early 2014 at the latest, the plaintiff's concerns about the matter were such that he was actively considering bringing proceedings against the Firm. In that respect, he consulted Cormac McCarthy Solicitors of Athenry, who provided him with a letter addressed to "To whom it concerns" dated the 16th January, 2014. As this letter is of some importance in the context of this application, I should quote it in full:

"Re: Brian Egan – Purchase of Properties Folios 45857, 56199 and 41976 County Galway

Dear Sirs,

Please be advised that we have reviewed the enclosed file and have indicated to Brian Egan that he should seek some advices regarding a potential claim here in relation to the bank and his acting firm of solicitors.

In short, it appears that the property was purchased without any engineer's supervision and it now appears that there are huge difficulties in relation to boundary issues and in relation to planning. It appears from the file that the planning has been regularised in some respects. However, there is no certificate of compliance covering the whole of the development. More alarmingly, the property that was purchased does not include large sections of land at the back of the property and again an application for first registration is required if this property is to be sold.

It would appear that the bank were aware of some of the planning issues, but may be not so aware of the difficulties in relation to the boundaries.

If you have any queries whatsoever please do not hesitate to contact this office.

Yours etc."

11. The plaintiff explains in his replying affidavit that these solicitors were unwilling to act in the matter against local colleagues. The precise purpose therefore for which this letter was written is somewhat unclear and, in particular, why it is addressed *"To whom it concerns".* It was suggested by counsel for the plaintiff during submissions on the appeal that it was obtained for the purpose of demonstrating to any other firm of solicitors that may be consulted by the plaintiff that he had a stateable case. There is no evidence one way or the other on this point although it does seem somewhat surprising that one solicitor would write a letter for the benefit of another unknown solicitor with a view to persuading the

second solicitor that he should take on a case which the first solicitor was unwilling to do for whatever reason.

12. Be that as it may, it is, as submitted by counsel for the Firm, immediately apparent from this letter that Cormac McCarthy Solicitors were, at best, given incomplete instructions by the plaintiff and at worst, misled by him. Insofar as it purports to represent that the plaintiff purchased the property without the benefit of any expert advice in relation, at least, to the planning issue, it is manifestly incorrect as I have explained. Whilst not expressly so stated in the solicitors' letter, it does at least imply that the Firm did not advise the plaintiff to get an expert to look into the planning and other issues of which the plaintiff himself was undoubtedly aware.

Chronology of the Proceedings

13th February 2014 – the plaintiff issued a plenary summons acting as a litigant in person. He makes complaint of the fact that service of the summons was delayed by the refusal of Mr. John Dillon-Leetch of the Firm to accept service which he says delayed matters somewhat.

31st March 2014 – A statement of claim was delivered to which I will refer further.

12th January 2015 – The plaintiff brought a motion for judgment in default of defence.

6th March 2015 – The Firm delivered its defence.

14th July 2015 – The plaintiff requested voluntary discovery from the Firm.

23rd July 2015 – The Firm agreed to discover the plaintiff's file but not all categories of discovery sought by him.

27th July 2015 – The plaintiff accepted the Firm's offer of discovery.

14th January 2016 – The plaintiff issued a motion for discovery.

4th March 2016 – The plaintiff instructed Paul Kelly & Company Solicitors to represent him in the proceedings.

5th April 2016 – The Firm's solicitors, Beauchamps, wrote to Paul Kelly & Company in the following terms:

> *"Please note that we indicated to the court on 7 March last (*this presumably refers to the return date for the plaintiff's discovery motion*) that as your firm have now come on record for the plaintiff, we require confirmation that a Cooke v Cronin peer review has been obtained. We look forward to receipt of confirmation that you have obtained such a peer review and that you intend to make the appropriate amendments to the plaintiff's statement of claim on the basis of such peer review. We confirm that we will not require a motion and we will not object to any appropriate alterations to the statement of claim.*
>
> *We look forward to hearing from you by return."*

The plaintiff's solicitors did not reply to this letter.

4th December 2018 - two years and eight months after the correspondence above from Beauchamps, Paul Kelly & Company wrote to Mr. Barry Lysaght, an independent expert solicitor, seeking an opinion from him.

25th February 2019 – Paul Kelly & Company wrote to Beauchamps almost three years after the latter's correspondence above, not to reply to same but to complain

that the Firm's discovery did not include the requisitions on title. The reason for this subsequently transpired to be that although the Firm had made its full file available to the plaintiff, it did not include requisitions on title because these had been given to the first defendant bank. This complaint apparently arose from a request by Mr. Lysaght to see the requisitions.

12th June 2019 – Mr. Lysaght provided his first report to the plaintiff's solicitors.

5th December 2019 – The within motion to dismiss was issued.

17th January 2020 – Mr. Lysaght provided his second report to the plaintiff's solicitors, this time having had the benefit of seeing the requisitions on title.

6th March 2020 – Paul Kelly & Company have by now ceased to act and a second firm of solicitors came on record.

18th November 2020 – A third firm of solicitors came on record for the plaintiff.

15th April 2021 – The plaintiff's current solicitors came on record.

5th May 2021 – The plaintiff's solicitors served an amended statement of claim on Beauchamps seeking their consent to same, the day before the matter was due for hearing before the High Court. More than five years had now elapsed since an amended statement of claim was sought by Beauchamps. The latter responded on the same day indicating that they did not intend to comment on the amended statement of claim as they would be seeking to have the claim dismissed the next day.

6th May 2021 – The matter was heard by the High Court.

Evidence in the High Court

13. The Firm's motion is grounded on the affidavit of Mr. Dillon-Leetch sworn on the 26th November, 2019. He sets out the background and chronology of the proceedings as summarised above. He says that nearly three years after Mr. Kelly's appointment as the plaintiff's solicitor, no action or steps were taken by or on behalf of the plaintiff beyond making a complaint about discovery. He notes the plaintiff's complaints about planning difficulties and points to the fact that the plaintiff failed to identify that Mr. Maloney was advising him. He says that as far and he and Beauchamps are concerned, nothing happened in the proceedings between the Beauchamps' letter of the 5th April 2016 and the letter of the 25th February, 2019 from Paul Kelly & Company regarding discovery.

14. Under the heading "*Prejudice to the Firm*" Mr. Dillon-Leetch avers as follows:

> *"27. I say that the plaintiff's file was at all times dealt with by my former partner, Mr. Robert Potter-Cogan.*
>
> *28. I say that Mr. Potter-Cogan became quite ill, as he had multiple sclerosis, and he retired in May 2011. I say that in the subsequent eight years, his physical health deteriorated further and recently his cognitive function has suffered severely."*

15. Although he does not specify what is meant by *"recently"*, it suggests he is referring at least to the latter half of the eight-year period, thus between 2015 and 2019. He then exhibits a medical report from Mr. Potter-Cogan's General Practitioner, Dr. Michael Brogan dated the 3rd July, 2019. In this report, Dr. Brogan says that he attended Mr. Potter-Cogan at his home on the same date. He describes Mr. Potter-Cogan as having very significant physical and cognitive problems for the past number of years. He says that Mr. Potter-Cogan has not walked since 2011 and that he has been confined to a wheelchair because of a history

of multiple sclerosis. He deals with Mr. Potter-Cogan's medical history and notes that he ceased to work as an active solicitor in 2011 *"because of his MS and he also felt that his cognitive functions were deteriorating."*

16. Dr. Brogan's report then continues:

> *"[Mr. Potter-Cogan] himself describes his short term and long term memory as being 'in disarray'.*
>
> *In relation to the matter about which I was asked to examine him. He had a vague memory of the name Brian with a garage in Dunmore but could not remember his second name and could not remember any dealings he may have had with the person in question.*
>
> *When his wife Jill reminded Robert that Brian Egan and his wife called to their own home, Robert said he had absolutely no memory of this.*
>
> *On further cognitative (sic) assessment Robert was unable to tell me what year this is or what was today's date.*
>
> *He admits to having trouble remembering things that have happened recently.*
>
> *He has trouble recalling conversation with people a few days later.*
>
> *He is unable to manage his own money, financial affairs.*
>
> *He needs assistance with transport, either public or private.*
>
> *He is not able to manage his medication independently.*
>
> *In conclusion after spending about an hour with Robert, thirty minutes of which his wife Jill was in our company, it is my firm opinion that Robert would not be*

physically or mentally fit to attend court as a witness or give reliable evidence because of his cognitative problems."

17. Mr. Dillon-Leetch continues that apart from the issue of Mr. Potter-Cogan's health, both he and the Firm have suffered prejudice. He says that he has been required to disclose the plaintiff's claim to the Firm's insurers and as a result, the Firm's premiums have been increased. In addition, he says that the existence of the proceedings has caused him, as a professional person, significant personal stress and concern.

18. In his first replying affidavit, the plaintiff says that while he is criticised for not having issued proceedings 15 years earlier, during this time the Firm was still retained and acting for him as late as January 2013. He says that even when problems arose in 2010 when he tried to sell the property to Mr. Martin Smith, he still believed that the Firm *"had the experience to resolve those problems."* He refers to attending at Cormac McCarthy Solicitors in January 2014 and exhibits the letter to which I have referred. He avers that delay in the proceedings was caused by the failure of the Firm to deliver a defence which necessitated a motion for judgment in default. He also complains of the fact that although the Firm agreed to provide discovery in July 2015, an affidavit was not furnished until January 2016.

19. With regard to the fact that he did not appoint a solicitor until March 2016, the plaintiff says that it can be difficult to find a solicitor willing to sue another solicitor and also it was a financial challenge for him to pay a solicitor. He refers to mental health issues which he suffered in relation to his financial situation and the breakdown of his marriage and in that respect refers to a report of his General Practitioner of the 15th February, 2019 which he exhibits. This report indicates that the plaintiff attended his doctor in January 2012 with

severe anxiety and depression arising out of his business and marital difficulties and that his symptoms persisted until February 2014.

20. He disagrees that no steps were taken in the action for almost three years and says that in July 2018, the third defendant issued a motion. He says that during the same period his solicitor contacted three separate solicitors in order to try and get them to provide a peer review but for various reasons, they were unable or unwilling to do so until in December 2018, Mr. Lysaght agreed to give evidence. He refers to Mr. Kelly's letter instructing Mr. Lysaght dated the 4th December, 2018 which he exhibits together with Mr. Lysaght's reply. He notes that two reports were prepared by Mr. Lysaght in June 2019 and January 2020, the second upon receipt of the requisitions on title from the first defendant bank.

21. This affidavit was replied to by a supplemental affidavit of Mr. Dillon-Leetch. He expresses the view that it is unsatisfactory that the plaintiff averred in his replying affidavit that he does not require to amend his statement of claim notwithstanding the subsequent receipt of two expert reports from Mr. Lysaght. He says that the Firm is entitled to a pleading which sets out the case which is made against it by the plaintiff as founded on the report of Mr. Lysaght and it is precisely because he could not identify, after all these years, the case against the solicitors that the motion to dismiss was brought. He says that contrary to what the plaintiff avers as to this being a *"documents case"*, oral evidence will be required from the plaintiff which will then be challenged.

22. In particular, Mr. Dillon-Leetch refers to a number of passages from Mr. Lysaght's report in which the latter indicates that various issues will be a matter for evidence and it is clear in context that Mr. Lysaght is referring in this regard to oral evidence. Mr. Dillon-Leetch reiterates the fact that Mr. Potter-Cogan, who had dealt with the file at all times, is no longer in a position to give any such evidence. He says this irretrievably prejudices the

Firm's defence. He complains of the fact that Paul Kelly & Company continued to prosecute the action for over three years in the absence of any expert evidence which he says is an abuse of process.

23. This affidavit in turn was replied to by the plaintiff in his second affidavit. With regard to Mr. Dillon-Leetch's averment that the proceedings relate to matters that occurred over 15 years ago, he again reiterates that the Firm was still retained as his solicitors until 2013 and he relied on their assertions and reassurances that the Firm would resolve all issues. He says that he was not made aware of the full extent of difficulties by his former solicitor and that these difficulties were concealed from him. He says at no stage did the solicitor specifically inform him of the full extent of the difficulties or that he should consider taking independent legal advice. I pause here to note that insofar as these are allegations against Mr. Potter-Cogan, he is clearly not in a position to respond.

24. He again complains of delays brought about by the Firm in failing to accept service, delaying their defence and failing to comply with their discovery obligations. He questions the accuracy of Mr. Dillon-Leetch's statement that Mr. Potter-Cogan retired from practice in 2011 and exhibits a letter dated the 30th October, 2012 from a firm of solicitors concerning another land transaction involving the plaintiff to Mr. Potter-Cogan referring to a recent telephone conversation with the latter.

25. A few days before the hearing in the High Court, the plaintiff delivered another affidavit, confusingly also referred to as his second affidavit, essentially repeating much of what had gone before. In particular, he says that in the period from 2010 when he lost the potential bargain to sell the property to Mr. Smith, he had been led to believe that matters would be rectified by the Firm and it was not until he sought independent legal advice in

2013 that he appreciated the full significance of the difficulties with title and planning. Here again, this appears to be an allegation that only Mr. Potter-Cogan could respond to.

26. It is relevant to note that during the course of this appeal, counsel for the plaintiff suggested that it might well be possible for other members of the Firm to give evidence and it was by no means clear that Mr. Potter-Cogan was the only person in a position to do so. That submission however is plainly not supported by the evidence. In the first place, the plaintiff himself does not at any stage refer to dealing with any person other than Mr. Potter-Cogan. Further, Mr. Dillon-Leetch clearly avers in both his first and second affidavits that the plaintiff's file was at all times dealt with by Mr. Potter-Cogan, and no issue was taken by the plaintiff with that averment despite swearing three replying affidavits.

The Expert Reports

27. Mr. Lysaght provided two reports respectively dated the 12th June, 2019 and the 17th January, 2020. It would appear that in preparing his first report, Mr. Lysaght had access to the Firm's conveyancing file which did not include the requisitions on title. Mr. Lysaght refers to the involvement of Mr. Maloney regarding the planning issues and notes his correspondence, including that mentioned above. At para. 3.6 of his report, Mr. Lysaght observes:

> *"I have not seen any correspondence from the solicitors to the plaintiff forwarding copies of the Land Registry maps to the two folios concerned. The question what steps were taken to establish the identity of the lands in sale will be a matter for evidence of the parties and a matter for the court."*

28. It is not entirely clear if Mr. Lysaght is here referring to whether or not the Land Registry maps were forwarded to the plaintiff himself, or his architect, or perhaps both.

However, in relation to the central issue in the case, critically he observes that what steps were taken regarding the identity of the lands in sale and presumably whether they corresponded with the Folio maps would ultimately be a matter for evidence. *"Evidence"* in this context can only refer to oral evidence in circumstances where Mr. Lysaght had all the relevant documents in his possession when he expressed this view. The subsequent availability of the requisitions did not lead him to change that view.

29. In his conclusions, Mr. Lysaght observes that it is clear in relation to the planning application in 2008 that the extent of the lands for which planning permission was sought was more extensive than the lands registered on the Folios. He says it would have been reasonable for the Firm to have sought satisfactory evidence that the buildings in sale were within the confines of the Folios or alternatively, this was a matter the Firm ought to have advised their client to obtain from his own professional advisors. The plaintiff's affidavits herein are silent on whether Mr. Potter-Cogan gave the plaintiff copies of the Land Registry maps or drew his attention to them or advised him to seek professional advice about them. These are all matters about which Mr. Potter-Cogan can no longer give evidence but appear to be crucial to the case.

30. Mr. Lysaght goes on to note that Land Registry maps are not conclusive either as to area or extent and this is expressly provided for in the Registration of Title Act, 1964. He notes that the lands between the river and those delineated on the Folio maps appear to be unregistered. In saying this, Mr. Lysaght reiterates the point that it will be a matter for evidence whether the Firm provided the plaintiff with maps for the lands he was proposing to acquire so as to satisfy himself as to the extent thereof. Notably, Mr. Lysaght does not indicate in his report that the plaintiff instructed him that he either had or had not been given the Land Registry maps by Mr. Potter-Cogan. He offers the view that if the Land Registry

maps had been considered by the architects, they ought to have noted that part of the buildings were outside the boundaries but *"this is, however, a matter for the court on hearing the evidence of the parties."*

31. Finally, Mr. Lysaght notes in relation to the undertaking and certificate of title given to Bank of Ireland that these are matters between the solicitors and the bank.

32. In his second report, Mr. Lysaght makes brief reference to a couple of the requisitions on title but does not alter his overall conclusions. Again, with regard to the central issue of the identity of the properties, he says (at para. 4.2):

> *"It is a matter for the court, on the evidence, to be satisfied whether a full investigation of the planning issues was advised by the solicitors and also whether, had such advice been given, whether an inquiry ought to have revealed the apparent inaccuracy of the subsequent replies by the vendor's solicitors to the requisitions on title that: -*
>
> - *the boundaries belong to the property;*
> - *the property is sufficiently identified."*

33. It is clear that Mr. Lysaght is again referring to the oral evidence of the parties and whether Mr. Potter-Cogan had advised the plaintiff to undertake a full investigation of the planning issues. Here again, this is something that only the plaintiff and Mr. Potter-Cogan can give evidence about.

34. He repeats the conclusion to which I have referred from para. 4.5 of his first report concerning whether the Firm advised the plaintiff to instruct his own architect concerning the boundaries save that in his second report, Mr. Lysaght says the following in this respect (again at para. 4.5):

"It will be a matter for evidence whether this was sought and/or advised at pre-contract stage. It is clear that it was not raised as a closing requirement in the solicitor's requisitions on title raised on the 20th April, 2004."

35. At paragraph 4.6, he expresses the view that solicitors acting on behalf of a purchaser client should advise their client that the Land Registry map is not conclusive, that the Land Registry applies the *"general boundaries rule"* which means that extrinsic evidence can be called to establish the full and accurate extent of the registered land. In his reports, although Mr. Lysaght does not say so in terms, it is clear that whether this advice was given by Mr. Potter-Cogan to the plaintiff is a matter for evidence. Mr. Lysaght summarises the conclusions of his second report in the following way:

"5.1 In my opinion, the duty of a solicitor acting for a purchaser of land is to ensure that his client is aware of the boundaries and extent thereof to which the vendor is offering title. Accordingly, as a pre-contract matter, a purchaser's solicitor should provide his client with the maps and other means of identity (as furnished to him by the vendor) to enable the purchaser to satisfy himself as to the identity of the property being purchased. It will be a matter for evidence whether the solicitors did so in this case.

5.2 It is, in my experience, general practice to submit Land Registry maps to any architect or engineer who has been requested to carry out any survey and any planning search. It will be a matter for evidence whether the solicitors instructed the architects in this case or alternatively, had advised the plaintiff to instruct the architects in this case. In my opinion, in either event, the maps should have been provided either to the architects or to the plaintiff."

36. Again, this is the central and critical issue in the case and is one which, as Mr. Lysaght expressly caveats, can only be resolved by the oral evidence of the plaintiff and Mr. Potter-Cogan. Finally, Mr. Lysaght goes on to outline a number of other aspects of the matter that can only be resolved by oral evidence.

37. Another expert report obtained by the plaintiff also appears in the papers from an accountant, Mr. Brendan McLoughlin which is dated the 23rd January, 2020 and addressed to the plaintiff. This report was clearly obtained by the plaintiff for the purpose of quantifying his claimed losses for the first time in these proceedings, notably in the month following the issuing of the motion to dismiss. Mr. McLoughlin's report purports to suggest that losses in excess of €1.9m have been suffered by the plaintiff. This claim is exclusively premised on the instructions given to Mr. McLoughlin by the plaintiff that *"for my understanding you had an offer of €1,800,00 to buy the property in late 2008."*

38. This appears to be a reference to the proposed purchase by Mr. Smith which is also referenced in the plaintiff's statement of claim although in that document, the claim is said to have arisen in 2010. The plaintiff appears to have modified his position somewhat in that respect because Mr. McLoughlin's report is premised on *inter alia*, bank interest paid during 2009 and 2010 following the alleged failed sale which clearly suggests that the alleged loss arose in 2008. This also coincides with counsel for the plaintiff's submission on the appeal that the loss arose in 2008.

39. Its relevance in the context of this application is that the plaintiff, by his own account, was aware from 2008 that there were title and planning difficulties with the property of sufficient seriousness to lead Mr. Smith, on the plaintiff's account, to walk away from the deal. Despite that apparent knowledge, proceedings were not issued by the plaintiff until over five years later.

40. In his affidavits, the plaintiff seeks to explain this delay by saying that the full extent of the difficulties was concealed from him by Mr. Potter-Cogan. I find it somewhat difficult to understand how *"difficulties"* serious enough to cause the loss of a sale for €1.8m were, despite that knowledge, somehow *"concealed"* from the plaintiff. It is also somewhat difficult to understand how, as the plaintiff avers, on the one hand Mr. Potter-Cogan concealed the difficulties from him, and on the other he promised to rectify them.

41. Be that as it may, these are all clearly issues that go to the heart of this case, but are issues about which Mr. Potter-Cogan can no longer give evidence.

Judgment of the High Court

42. Following a brief introduction summarising the main facts, the judge considered the legal principles to be applied, which I understand not to be in dispute between the parties either in this Court or the High Court, and summarised these by reference to the judgment of this court (Irvine J. as she then was) in *Flynn v Minister for Justice* [2017] IECA 178. The judge then set out a chronology of the relevant events including those to which I have referred above. He finally turned to an application of the legal principles to the facts of the case. He noted that 10 years had elapsed between the transactions complained of and the issue of the plenary summons.

43. Given this lapse of time, it was, he said, clearly incumbent on the plaintiff to prosecute the proceedings without any further delay and this clearly did not happen. He noted that following the instruction of solicitors by the plaintiff in April, 2016, the plaintiff took no further steps for a period of nearly three years until February 2019 when there was a complaint about discovery. He expressed himself satisfied that the delay in prosecuting the proceedings was inordinate, all the more so given the delay in commencement. He

observed that one would have thought that given the absence of a supportive expert report that this would have been sought as a matter of urgency, but this was not the case.

44. He also considered the delay to be inexcusable. While the plaintiff commenced proceedings as a lay litigant and a lay litigant may be given some latitude by the court, this does not extend to applying different rules than would be applied where a litigant instructs solicitors. He was unwilling to accept the plaintiff's explanation for not instructing solicitors until March 2016 on the basis of difficulties finding one prepared to act. He said that he did not accept that this was a valid excuse as the Law Society of Ireland maintains a "negligence panel" in each county willing to sue other solicitors and there is no suggestion that solicitors on this panel would only act in circumstances where their fees are paid upfront. While this finding by the trial judge was criticised in the course of the appeal on the basis that there was no evidence to sustain it, it does appear to be the case that a written submission delivered by the Firm in the High Court referred to this fact which was canvassed in argument and was not contradicted.

45. Nor did the judge accept the plaintiff's medical report as an exculpatory factor in relation to the delay as the medical report suggested that any health issues suffered by the plaintiff since February 2014 were not at a level that would have prevented him from prosecuting the proceedings. Accordingly, he found that the delay was both inordinate and inexcusable and turned to consider the balance of justice. In this respect, the judge said that the medical evidence was clear that Mr. Potter-Cogan is no longer in a position to give evidence and thus can no longer defend the proceedings. The judge remarked, *"in my view, this is prejudice at the top end of the scale."*

46. He disagreed with the plaintiff's response that this is a *"documents"* case or that the evidence of Mr. Potter-Cogan is not required to defend the proceedings. The judge referred

to the fact that Mr. Lysaght's conclusions were conditioned on such evidence as might be given before the court, which showed that his opinion was not that this is a *"documents"* case.

47. He expressed the view that the solicitors had not contributed in any material way to the delay in the prosecution of the proceedings but that the opposite was the case. He was therefore satisfied that the solicitors were entitled to the relief claimed.

The Appeal

48. The first thing to be said about the plaintiff's notice of appeal is that it contains no less than 46 grounds of appeal in what is, by any fair measure, not an unduly complex motion. Such prolixity of pleading really does not assist this Court in determining the real issues in controversy between the parties and this is all the more obvious from the fact that in his written submissions, the plaintiff found it possible to distil his grounds of appeal to five points.

49. These can broadly be summarised as follows. The trial judge, it is said, determined that the period of delay between the transaction and the commencement of the proceedings *i.e.* between 2004 and 2014 was inordinate and that no good excuse had been offered for the inactivity during this period. It is said that the judge erred in this respect in failing to have regard to the fact that the solicitors had been acting for the plaintiff between 2004 and 2013 and had concealed from him the defect in the title and planning. When the plaintiff discovered this, it is said in 2013, he issued proceedings a year later.

50. At the hearing of the appeal, emphasis was laid by the plaintiff on an alleged failure by the judge to have regard to delays brought about solely by the Firm who sought to stymie and hamper the plaintiff progressing his claim first, by refusing to accept service, second by

failing to deliver a defence in a timely manner and third by failing to make proper discovery, all of which necessitated repeated motions being brought by the plaintiff.

51. It is said that the judge failed to have any or any sufficient regard to the fact that the plaintiff had trouble getting legal representation initially and when he did, then getting a solicitor to give an expert report. These, the plaintiff submits, render the delay highly excusable. In any event, the judge was wrong to regard the delay as inordinate. It is also submitted that the judge erred in assessing that the balance of justice required the proceedings to be dismissed. At the hearing, this submission was amplified by reference to an alleged failure on the part of the Firm to bring the motion to dismiss at an earlier juncture when they had sat on their hands and allowed the plaintiff to incur costs and expense in instructing solicitors and instructing experts before bringing their application. It is finally said that the solicitors failed to discharge the onus of proving prejudice.

Legal Principles

52. As already noted, there is no real dispute about the law in this case. There have been a multitude of decisions in delay cases in recent years and there is little to be gained by seeking to revisit that – for the most recent analysis of the law, see the judgment of this Court in *Cave Projects Limited v Gilhooley & Ors* [2022] IECA 245. As is by now well settled, there are two strands of jurisprudence in the context of delay. The first arises mainly by virtue of the judgment of the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459. This establishes the by now extremely well-known principle that for a claim to be dismissed on the grounds of delay, the defendant has to establish that the delay was first inordinate and if inordinate, that it was also inexcusable. If those two criteria are satisfied, the court must then consider where the balance of justice lies as between dismissing the claim or permitting it to proceed.

53. The second strand of jurisprudence is that arising under *O'Domhnaill v Merrick* [1984] IR 151. Under this strand, a defendant may seek to have the plaintiff's claim dismissed if he can establish prejudice of a sufficient magnitude to amount to a real risk that a fair trial can no longer be had. The onus of proof on a defendant is considerably higher under the *O'Domhnaill* strand which can result in a claim being dismissed even where there has been no blameworthy delay on the part of a plaintiff. By contrast, under the *Primor* strand, blameworthy delay by the plaintiff must be established and if it is, relatively moderate prejudice falling short of an established risk of an unfair trial may be sufficient to tip the balance of justice in favour of dismissal.

54. The relevant principles are very helpfully gathered together in the judgment of this court in *Flynn*, also cited by the High Court, but for convenience I propose to set them out again:

> *"1. The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so.*
>
> *2. The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to the hazard.*
>
> *3. It must in the first instance be established by the parties seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable.*
>
> *4. In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the*

proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter.

5. *Even when delay has been 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 case proceeding.*

6. *Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the plaintiff's delay or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Delay in this context must be culpable delay.*

7. *The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the plaintiff, a fair trial is no longer possible, it is distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.*

8. *In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.*

9. *Prejudice to the defendant may arise in many ways and be other than merely caused by the delay, including damage to the defendant's reputation and business.*

10. All else being equal, persons against whom serious allegations are made that affect their professional standing should not have to wait over a decade before being afforded the opportunity to clear their name …"

55. It is well established that the *Primor* strand is primarily concerned with post-commencement delay in the prosecution of the proceedings. Thus, beyond the fact that a late start means the case should be progressed with expedition, the court is not in general under this strand concerned with pre-commencement delay save to the extent that in weighing the balance of justice, the court is entitled to have regard to all the circumstances in considering the justice of allowing the case to proceed.

56. Under the *O'Domhnaill* strand on the other hand, the court is concerned with assessing the entire period of delay spanning the time from the occurrence of the relevant event to the likely date of trial. If having made that assessment the court is of the view that a fair trial is no longer likely to be possible, it may dismiss the case, irrespective of the fact that the plaintiff, for example often a person under a disability, may be entirely blameless in relation to the delay that has occurred.

Delay

57. The first criticism by the plaintiff of the trial judge's judgment is that it is said he found that the period of delay between the transactions occurring in 2004 and the proceedings issuing in 2014 was inordinate and inexcusable. I think however it is clear from a close reading of the trial judge's judgment that he did not make this finding and the criticism is misplaced. Rather, he simply noted that given the passage of a decade, it was incumbent on the plaintiff to prosecute the proceedings without further delay, and that is absolutely correct. What the judge found was that the delay in <u>prosecuting</u> these proceedings was inordinate

(para. 13 of the judgment) and this was all the more so given the initial delay in commencing the proceedings.

58. Criticism is also levelled at the judge on the basis that he did not properly analyse the various periods of delay and assess the respective parties', particularly the defendants', responsibility for those delays. I accept that there is some validity in this criticism. The proceedings were issued on the 13th February, 2014 and it does appear correct to say that there was a period of two or three months when the Firm refused to accept service. Thereafter, it took approximately 9 months for the solicitors to deliver their defence and then, only as a result of a motion in default.

59. Assuming that in the normal way, the solicitors ought to have delivered their defence within a period of say three months or so, then it would seem that there was a further delay of about six months again attributable to the solicitors. In the approximately two year period between the issuing of the proceedings and the delivery of the defence, I would be prepared to accept that about half of that period, or about one year, was attributable to culpable delay on the part of the Firm.

60. Thereafter however, it is less than clear that there was any culpable delay on the part of the Firm in progressing the case. Shortly after the defence was delivered, the Firm offered to discover their file and the plaintiff appears to have agreed to accept that offer. It is thus far from clear why the plaintiff issued a motion for discovery in January 2016 or whether this step was actually necessary. Although complaint is made about a delay in delivering an affidavit of discovery, the plaintiff does not explain whether he had the Firm's file from when it was made available and if the affidavit merely served to formally exhibit it. Again, the need for discovery at all is not explained when the plaintiff would have been entitled to

his file as of right in any event. Shortly after this motion was issued, the plaintiff instructed Paul Kelly & Company who entered an appearance on the 4th March, 2016.

61. For the same reasons as the trial judge, I have some difficulty in accepting the proposition that it was only at that point in time that the plaintiff was able to source a solicitor who would represent him. There is absolutely no evidence put forward by the plaintiff of any approaches made by him to solicitors for assistance between February 2014 and March 2016. The plaintiff has repeatedly averred that he was unable to source a solicitor to act for him or to give an expert report by virtue of his impecuniosity. That rather begs the question how he has since managed to secure representation by no less than four firms of solicitors and to instruct Mr. Lysaght as an expert.

62. As soon as Mr. Kelly came on record, Beauchamps acting for the Firm drew his attention to something of which he presumably was aware, namely that it was his professional obligation in acting in proceedings against another professional firm to obtain supportive expert evidence which would, undoubtedly, require amendment of the statement of claim drafted by the plaintiff himself. While the decision of the Supreme Court in *Cooke v Cronin* [1999] IESC 54 points to the ethical obligation of lawyers in obtaining supportive evidence before launching negligence proceedings against a professional person, it has long been the case that it is an abuse of process to institute professional negligence proceedings without such supportive evidence and a litigant in person cannot divest himself of that responsibility simply by the expedient of declining to instruct solicitors. As has often been said, and indeed remarked by the trial judge here, litigants in person are subject to the same rules as represented parties.

63. Reliance was placed by counsel for the plaintiff during the hearing of the appeal on the judgment of the Supreme Court in *Mangan v Dockeray* [2020] IESC 67 and in particular

the judgment of McKechnie J. These were complex medical negligence proceedings and one of the issues considered by McKechnie J. was whether a report is a prerequisite to the institution of proceedings. McKechnie J. doubted that it was necessary in every case to have a report in (at para. 97):

> *"It seems to me that the most appropriate way of expressing this requirement is to say that a reasonable basis must exist before any such proceedings are issued. Almost by definition therefore, there will be situations where it may not be necessary to insist upon the availability of an expert report before that takes place. ... In the vast majority of medical cases that will require a report, but there will be circumstances where such is not an essential precondition in all situations."*

64. In my view, the plaintiff has not demonstrated that there was any reasonable basis for the institution of these proceedings at the time they were instituted. This appears to me to fall within the majority of cases as described by McKechnie J. where an expert report was required. As counsel for the Firm submitted, the letter from Cormac McCarthy Solicitors quoted above could not form a reasonable basis for the institution of proceedings where the plaintiff had manifestly failed to properly instruct those solicitors as to all the relevant facts, and most pertinently, the fact that he instructed an architect to act on his behalf in relation, at a minimum, to the planning matters.

65. The Firm submits that unless and until an amended statement of claim was delivered following receipt of an expert report, they remained largely in the dark as to what the plaintiff's claim actually was. In his plenary summons, the plaintiff, apparently mirroring what was contained in the letter from Cormac McCarthy Solicitors, pleads that the Firm permitted him to purchase *"these properties"* without the benefit of any *"engineering supervision"* and in failing to resolve boundary issues and register the plaintiff as owner of

the entirety of the site in sale. It is also relevant to note that *"these properties"* according to the plaintiff included the lands comprised in Folios 41976, 56199 and 40857 County Galway. In other words, the plaintiff complains that the Firm was negligent in relation to the filling station property he already owned since 1993 as well as the Alpha Centre acquired in 2004.

66. However, in his statement of claim, the issue of *"engineering supervision"* disappears and it is alleged that the Firm was *"party to negligent or fraudulent misrepresentation in failing to qualify the certificate of title and in hiding from both the plaintiff and the first named defendant, the fact that the certificate of title did not begin to cover the entire property purchased by the plaintiff."*

67. The plaintiff claims to have suffered irreparable financial loss and damage as a result but gave no particulars of what this loss was. Nor did he particularise the very serious allegation against the Firm that they had been guilty of fraudulent misrepresentation and hid matters from him. He also complained in his statement of claim that the Firm's certificate of compliance did not deal with all planning issues, without specifying what these were, and in the knowledge that it was expressly subjected to the planning issue relating to the façade of the Alpha Building.

68. In response to the plaintiff's complaint at the appeal that the Firm ought to have moved in 2016 to dismiss the proceedings rather than allowing the plaintiff to incur further expense up to 2019, counsel for the Firm responded, not unreasonably in my view, that it would have been a futile exercise to seek to dismiss the claim of a litigant in person which was, at that stage, wholly unparticularised and vague in the extreme, when the plaintiff had just instructed solicitors whom it was assumed would put some shape on the pleadings. That never happened and indeed, on the contrary, in one of his replying affidavits, the plaintiff said he did not intend to amend his pleadings.

69. I am satisfied that from March 2015 when the solicitors delivered their defence, the plaintiff has not demonstrated that he took any, or any appropriate, steps to progress these proceedings up to the time that the motion to dismiss issued over four and a half years later. Even if one were to give the plaintiff the benefit of the doubt as a litigant in person on the question of the discovery motion, the delay that occurred from the appointment of Paul Kelly & Company in March 2016 until they wrote a letter complaining about discovery in December 2019, almost three years, is entirely unexplained. Although the plaintiff avers in his replying affidavits that during this period, Mr. Kelly was trying to obtain assistance from various expert solicitors, there is a dearth of information as to when any of this occurred or what the circumstances were. It is in my view of significance that no affidavit to explain this lapse of three years has been sworn by the person most intimately acquainted with the reasons for the delay, namely Mr. Kelly.

70. While the plaintiff suggests that things may have been happening with the other defendants during this three year period, that is entirely immaterial insofar as the Firm is concerned who was unaware of them. It is particularly striking that the only letter exhibited in the plaintiff's affidavits concerning seeking an expert report is that from Mr. Kelly to Mr. Lysaght dated the 4th December, 2018, over two and a half years after Mr. Kelly had been reminded by Beauchamps of his professional obligation in that regard. I hasten to add that I do not criticise Mr. Kelly in that respect because the court has simply not heard from him and there could be any number of reasons why this delay occurred which were not his fault.

71. However, his failure to reply in any shape or form to Beauchamps' correspondence to him dated the 5th April, 2016 is difficult to account for and when a response comes almost three years later, it is to complain about discovery and apparently the fact that the requisitions on title were missing. That in itself appears to be somewhat extraordinary. One assumes

that the moment that Mr. Kelly was instructed, he would have perused the Firm's file given to him by the plaintiff and immediately realised that the requisitions were absent. It can hardly have come as any surprise to him that Mr. Lysaght would seek the requisitions having been asked to write an expert report and yet that is what seems to have prompted him into action in February 2019. Given the fact that Mr. Kelly was instructed for the first time twelve years after the events in issue, one would have expected him to forge ahead with the case as a matter of considerable urgency at that stage. Instead, nothing happened as I have said for three years. I cannot see how this delay alone, if no other, could be classed as other than inordinate.

72. Further, no valid excuse has in my opinion been advanced for this delay. I have pointed to the deficiencies in the plaintiff's evidence regarding what was happening during this period. If in truth, the excuse for this inactivity was that the plaintiff was having difficulty getting an expert report, that cannot amount to an excusing factor in circumstances where such a report was in any event a prerequisite to the institution of the proceedings several years earlier. I am therefore satisfied that the trial judge was entirely correct in concluding that this delay period was inordinate and inexcusable. It is all the more so as the trial judge observed because of the very late start.

The Balance of Justice

73. Turning now to the balance of justice, Mr. Dillon-Leetch in his affidavits points to three matters of prejudice, the most significant of which is Mr. Potter-Cogan's health and his clear inability to defend himself in these proceedings. The second matter is the effect on his Mr. Dillon-Leetch's professional indemnity insurance premium for every renewal since the inception of the proceedings and the third, the effect on Mr. Dillon- Leetch personally both in terms of stress and damage to his reputation which has been hanging over him now

for many years. Many cases have commented on the fact that having claims of professional negligence and other wrongdoing hanging over the heads of professional persons over a protracted period of time is in itself a source of prejudice – see most recently the judgment of this court in *Darcy v AIB* [2022] IECA 230 at para. 35.

74. Of these factors, clearly that relating to Mr. Potter-Cogan's health is the most serious and I agree with the trial judge's characterisation of this prejudice as being *"at the top end of the scale".*

75. Counsel for the plaintiff in argument relied upon the judgment of this court in *William Connolly & Sons Ltd. Trading as Connolly's Red Mills v Torc Grain and Feed Limited* [2015] IECA 280. In that case, the plaintiff was a distributor of animal feeds to, *inter alia,* the owners of racehorses, the feed having been sourced from the defendant. It transpired to be contaminated with banned substances as a result of which a number of horses that had consumed the feed were disqualified from races in which they competed. The plaintiff incurred significant costs arising out of the fact that the feed was not fit for purpose and sought to recoup its losses from the defendant supplier.

76. The defendants brought a motion to dismiss the claim on *Primor* principles and this Court (Irvine J. as she then was) held that inordinate and inexcusable delay had been established. However, she held that the balance of justice favoured allowing the action to proceed and among the factors influencing that outcome were that the defendant had acted in a manner inconsistent with the position adopted in its defence and further, that the defendant had not established any causal connection between the asserted prejudice and the delay. As in this case, the defendant in its defence had pleaded that there had been inordinate and unconscionable delay in the commencement and prosecution of the proceedings.

77. However, the defendant was held to have acted in a manner inconsistent with this plea in that rather than bringing a motion to dismiss, it elected to engage with the proceedings in what was described as a *"relaxed and leisurely"* manner until notice of trial was served. Importantly however, the court had concluded that if the application had been brought at the time that the defence was delivered, it is difficult to see how the balance of justice would not have favoured dismissal of the claim. In other words, the defendant gained nothing by waiting but instead inappropriately, in the Court's view, engaged with the proceedings and allowed them to continue to the point of notice of trial.

78. The facts therefore are clearly far removed from those arising in the present case where, as the Firm submits, it is difficult to see how an application to dismiss might have been successful in 2016 just when solicitors had been appointed and Mr. Potter-Cogan's condition had not advanced to the stage it was at by 2019. On the contrary, in *Connolly's Redmills*, the defendant continued to engage throughout after delivering its defence with the case by bringing a motion seeking to compel replies to particulars which the court considered to be a form of acquiescence in the plaintiff's delay.

79. Further, the court held that the defendant by its conduct led the plaintiff to believe that it would meet the claim on the merits and caused the plaintiff to spend a great deal of time and money in engaging with litigation long past the point at which the application to dismiss ought to have been made. This was conduct relevant to the exercise of the court's discretion. Rather than acquiescing in any delay here, on the contrary, as soon as the plaintiff appointed a solicitor to act for him, Beauchamps immediately wrote seeking an expert report and an amended statement of claim and thereafter, simply nothing happened for three years. I am therefore satisfied that it cannot be said that, like the *Connolly's Redmills* case, the

defendants here had somehow acquiesced in the delay or led the plaintiff to believe that it would engage with the claim on the merits.

80. Indeed, the fact that *Connolly's Redmills* turned on its own particular facts is expressly recognised in the judgment of Irvine J.:

> *"45. Regardless of the fact that the plaintiff has been guilty of inordinate and inexcusable delay in the prosecution of these proceedings, in the special circumstances that exist at this point in time I am not satisfied that the balance of justice favours the dismissal of the action and, accordingly, I would dismiss the appeal.*
>
> *46. It should be said that this judgment is one which is particular to its own facts and rests on the fact that the defendant by engaging at length with the plaintiff since 2010 without complaint – and particularly by requesting particulars and engaging in the process of discovery – effectively represented that it had waived its earlier objection based on inordinate delay. Independently of these particular facts, this judgment should not be understood as heralding any softening in the approach which has been adopted by the courts in more recent times to ensure that the culture of delay in litigation that was so prevalent in this jurisdiction for so many years is brought to an end."*

81. With regard to there being a causal connection between the delay complained of and the prejudice suffered, the evidence of Mr. Dillon-Leetch and Mr. Potter-Cogan's doctor suggests that since Mr. Potter-Cogan retired in 2011, even though he may have been thereafter active up until certainly October, 2012, his cognitive deficit has increased *"recently"* to the point that he is now clearly unable to give any reliable evidence concerning his dealings and interaction with the plaintiff. I have given many instances of where

allegations have been made by the plaintiff that would be for Mr. Potter-Cogan, and him alone, to deal with as well as the many instances in Mr. Lysaght's reports suggesting that the critical issues require to be determined by the court by reference to oral evidence which clearly from the Firm's perspective could only have been given by Mr. Potter-Cogan. It seems clear that the delay in this case occurred during a period when Mr. Potter-Cogan was subject to significant and continuing cognitive decline and whilst it cannot be said with certainty that had these proceedings been prosecuted by the plaintiff with the expedition that the law requires, Mr. Potter-Cogan would have been able to defend himself, it is undoubtedly the case that the plaintiff's delay has at a minimum contributed to that inability.

Conclusions

82. Although reliance is placed by the Firm in the first instance on the *Primor* strand concerning post-commencement delay, as I have noted when it comes to weighing the balance of justice, the court is entitled to have regard to the overall circumstances in assessing that balance. In that context, it is relevant that from 2008, the plaintiff was undoubtedly on notice of the problems of which he now complains and had he moved with any reasonable alacrity at that stage, Mr. Potter-Cogan would in all likelihood have been able to meet the claim. I have already pointed to the fact that the plaintiff's allegations that Mr. Potter-Cogan on the one hand assured him he would rectify matters, and on the other concealed the matters from him, are mutually contradictory and do not in my view explain his failure to move for a further five years. Having regard to all the circumstances therefore, I am satisfied that the balance of justice falls firmly in favour of dismissing this claim.

83. However even were that not so, the solicitors would still be entitled to rely on the *O'Domhnaill* jurisprudence in circumstances such as the present where it is clear that there is a real risk that a fair trial can no longer be had. If this matter were now to proceed to trial,

the court would be faced with determining issues which would, by then, be the best part of two decades in the past. Given the undisputed evidence concerning Mr. Potter-Cogan, I cannot see how it could be said that there is anything other than a risk that a fair trial can no longer be had. To that extent, it seems to me that this case is in effect covered by both the *Primor* and *O'Domhnaill* lines of jurisprudence.

84. I am therefore satisfied that the trial judge correctly concluded that the proceedings should be dismissed as against the Firm. I would accordingly dismiss this appeal.

85. With regard to costs, my provisional view is that as the Firm has been entirely successful, it is entitled to the costs of the appeal. If the plaintiff wishes to contend for an alternative form of order, he will have liberty to deliver a written submission not exceeding 1,000 words within 14 days of the date of this judgment and in that event, the Firm will have the same period to reply likewise. In the absence of such submission being received, an order in the terms proposed will be made.

86. As this judgment is delivered remotely, Faherty and Pilkington JJ. have authorised me to record their agreement with it.