

THE HIGH COURT

[2022] IEHC 241
[2013 No. 11339 P.]

BETWEEN

MARGARET CAMPBELL

PLAINTIFF

AND

PAUL GERAGHTY, EXECUTOR OF MARGARET AHERN, DECEASED

DEFENDANT

JUDGMENT of Ms. Justice Nuala Butler delivered on the 27th day of April, 2022

Introduction

1. This judgment deals with an application by the defendant to strike out the plaintiff's proceedings for delay and/or for want of prosecution. The proceedings, which concern an agreement allegedly reached in 2007, were instituted in October, 2013. At the time this motion was issued in January, 2021, no step had been taken in the proceedings since May, 2018. This is a period in excess of the two-year period specified in O. 122, r. 11, the expiration of which triggers an entitlement on the part of the defendant to apply to have proceedings dismissed for want of prosecution. The application is opposed by the plaintiff.

Background

2. The defendant is the personal representative of the estate of Margaret Ahern who was the plaintiff's mother. The plaintiff alleges that in 2007 she and her husband, David Campbell, reached an oral agreement with Margaret Ahern that in consideration of the plaintiff and her husband arranging (and paying) for the design and construction of an extension to Margaret Ahern's home at 164 Greencastle Road in Coolock and making a balancing payment of €170,000, Margaret Ahern would transfer the property to them subject to a right of residence for her lifetime. The plaintiff claims that in part performance of this agreement, she and David Campbell organised the construction of an extension to Margaret Ahern's house at a cost to them of €154,000 and paid €10,000 as a deposit on the balancing payment of €170,000. The plaintiff's claim is for specific performance of this agreement or, alternatively, a declaration that she is entitled to a 50% beneficial interest in the property. This 50% reflects the fact that approximately half of the full value of the agreement (i.e. some €164,000) has already been expended or paid by the plaintiff. David Campbell died in 2012 and the plaintiff's claim includes his interest in the alleged agreement which vested in her on his death.
3. It seems that by the time of David Campbell's death in 2012, relations between the plaintiff and her mother had become strained. The plaintiff's marriage to David Campbell had broken some time previously – perhaps as early as 2007 – and the plaintiff and her adult children moved in with Margaret Ahern at 164 Greencastle Road. There is a dispute between the parties as to whether the plaintiff remained living in Greencastle Road after her separation or moved out to live with another partner and as to how long her adult children remained at that address. In any event, by May, 2013, it was clear that the plaintiff had concerns about the money she had already expended and whether her mother was in fact going to sell the house to her. She consulted a solicitor who wrote to

Margaret Ahern in May, 2013. When that did not produce a satisfactory outcome, the plaintiff commenced proceedings and issued a plenary summons on 17th October, 2013.

4. An appearance was entered on behalf of Margaret Ahern on 12th June, 2014. It appears that Margaret Ahern took extensive legal advice at this time. On 10th September, 2014, Margaret Ahern made a new will under which the defendant, her son-in-law, was appointed executor. The contents of this will were clearly influenced by her attitude to the litigation. She left her estate to be divided equally between seven of her eight children and one of her grandchildren. The plaintiff was not included in the list of beneficiaries and the grandchild in question is not either of the plaintiff's children. Instead, the will records the testator's view that she had made proper provision for the plaintiff by virtue of the fact that the plaintiff was allowed to reside at 164 Greencastle Road for two years between 2007 and 2009 without paying rent or discharging utility bills and her two children "*have had full use*" of the house for five years between 2008 and 2013 on a similar basis. The details of this were disputed by the plaintiff who claims to have lived at that address until she fell out with her mother after her husband's death due to Margaret Ahern's unwillingness to transfer the property to her. The will also recites the fact that the plaintiff had issued proceedings which Margaret Ahern was "*defending in full and counterclaiming against her*".
5. In addition, a survey of the works done by the plaintiff and David Campbell at 164 Greencastle Road was carried out on behalf of the plaintiff in the Spring of 2014. The defendant alleges that this survey showed that the works were "*wholly defective*" – although it seems to be accepted that some of the "*defects*" pleaded may have arisen due to wear and tear since the time the works were completed. The fact the solicitors on record for the defendant instructed a surveyor shows that the defendant was actively engaged in defending the proceedings notwithstanding that she had not yet entered an appearance.
6. The plaintiff served a statement of claim on 3rd February, 2015. Unfortunately, some days later, on 19th February, 2015, Margaret Ahern died. This necessarily meant that the proceedings as then constituted could not proceed. A grant of probate to the estate of Margaret Ahern issued to the defendant on 4th May, 2016 and an order was made by the Master of the High Court amending the title to the proceedings on 28th July, 2016. Thereafter, a defence and counterclaim was served by the defendant on 6th February, 2017.
7. The defence as filed does not deny the existence of the oral agreement alleged by the plaintiff but pleads that the agreement is "*not accepted*" and puts the plaintiff on formal proof of its existence. However, it is denied that Margaret Ahern made the representations on which the plaintiff relies in her statement of claim. It is also denied that the plaintiff and David Campbell arranged for the construction of an extension or paid €154,000 in respect of this. There is a specific plea that the plaintiff had misrepresented her relationship with David Campbell in suggesting that the alleged transfer of the property would be for the benefit of herself and David Campbell at a time when she had

ceased to be in a relationship with him. Further, it is pleaded that she had expressly informed Margaret Ahern that she could not pay the balance in sum of €160,000 after cessation of her relationship with her husband. The defence includes a counterclaim on the basis that the works were "*wholly defective*" and either require repair or have led to a diminution in the value of the property. Extensive particulars are provided, presumably reflecting the contents of the surveyor's report from 2014.

8. Formally, the last steps in the proceedings were the raising of a notice for particulars by the plaintiff in February, 2018 and the furnishing of replies by the defendant on 23rd May, 2018. However, parallel with these steps, communications took place between the solicitors for the parties in respect of a possible mediation. Mediation was first proposed by the solicitors for the plaintiff on 30th January, 2017. An issue arose between the parties as to whether the plaintiff had unfairly failed to disclose correspondence from the defendant's solicitors in response to this request or whether that reply was issued on a "*without prejudice*" basis. This dispute is not material to the issues I have to decide as it is clear that the response from the defendant's solicitors was broadly positive and both solicitors proceeded to exchange correspondence in respect of the identity of a potential mediator. A measure of agreement was reached on this issue, hampered only by the non-availability of the first-choice mediator leading to further correspondence before agreement was reached on a second mediator. Despite provisional agreement being reached in these matters, by late 2019 it had become apparent that the mediation was not progressing. The plaintiff attributes this to a view taken by the defendant that, as executor, he could not attend mediation without the co-operation of all of the family members who were beneficiaries under the will and that there was disagreement between family members as to how they should deal with the litigation. In fact, one family member has issued proceedings against the defendant seeking to compel him to administer the deceased's estate, something which he has been unable to do because of the existence of these proceedings which concern the ownership of the main asset in that estate.
9. The defendant goes even further than this on affidavit saying that he had been advised that there is a legal obligation on both parties "*to ensure all beneficiaries be involved in any proposed mediation*". I do not think that this is correct. Certainly, there can be no obligation on the plaintiff as the person suing an estate to ensure that all beneficiaries under the will are involved in any mediation of the issues raised by her proceedings. Whilst it may well be advisable for an executor to seek the support or co-operation of beneficiaries under a will to the settlement of proceedings that will have a material bearing on the value of the assets that remain in an estate, this is not and could not be a legal obligation. To treat it as such would effectively give each beneficiary a veto over steps proposed by an executor in the *bona fide* exercise of his duties and could potentially frustrate the administration of the estate for the benefit of all beneficiaries.
10. In any event, it seems that by late 2019 or early 2020, it had become clear that the proposed mediation was not going to materialise. The plaintiff remains willing to engage in mediation and asks the court to make an order under s. 16 of the Mediation Act, 2017 inviting the parties to the proceedings to consider mediation as a means of attempting to

resolve the dispute the subject of the proceedings and then adjourning the proceedings to allow for such mediation to take place.

11. The plaintiff accepts that, from the point at which it became apparent that mediation was not going to proceed, she could – and presumably should – have progressed the litigation. However, she says that, very shortly after this in March, 2020, the country went into lockdown as a result of restrictions imposed on public health grounds to deal with the Covid-19 pandemic. Consequently, she says she was not able to deal with these matters at that time. This motion was issued about nine months later in January 2021 but does not appear to have been filed until April 2021. Thereafter, there was an exchange of affidavits between the parties which continued to November, 2021. I was advised by counsel for the defendant that a notice of intention to proceed had been served by the plaintiff in 2021 but despite this the action was not moved on.

Allegations of Delay

12. In moving the application on behalf of the defendant, counsel identified three discrete periods of delay. The first of these is a period of approximately six years between the date of the alleged agreement in 2007 and the issuing of the proceedings in October, 2013. Both the defence filed on behalf of the defendant and the defendant's affidavits proceed on the basis that the cause of action accrued in 2007 being the time of the alleged agreement. The plaintiff however, argues that the cause of action only accrued in 2012/2013 when her mother indicated an intention to breach the agreement and refused to transfer the property to her. Although counsel for the defendant queried the reality of six years having been allowed to elapse before Margaret Ahern was asked to complete the transfer, he acknowledged that as this is an issue in dispute between the parties which will have to be determined on evidence, for the purposes of this motion the court has to take the plaintiff's case at its height. Consequently, although it remains a disputed matter, he accepted that for the purposes of this judgment the plaintiff's cause of action will be treated as having accrued, at the earliest, in 2012.
13. The second period of delay identified by counsel for the defendant is the fifteen and a half months between service of the plenary summons in October, 2013 and of the statement of claim in February, 2015. The plaintiff's response to this is twofold. Firstly, she points out that an appearance was not entered by the defendant until June, 2014 some eight months after the plenary summons had been served. Secondly, she states that the form of appearance used did not expressly require the delivery of a statement of claim but, when it became apparent that a statement of claim was required, this was delivered in February, 2015. The defendant argues that the period before an appearance was entered does not represent a culpable delay on the part of the defendant and, as the non-entry of an appearance does not act as an impediment to service of a statement of claim, the plaintiff remained under an obligation to do so. Whilst it is correct that a plaintiff does not have to await the entry of an appearance before serving a statement of claim and can indeed serve a plenary summons and statement of claim simultaneously, I am hesitant to be overly critical of a plaintiff who does not file a statement of claim before an appearance has been entered. I am particularly hesitant in proceedings reflecting a dispute between

family members where the prospects of an amicable resolution of the dispute may well reduce on the formal filing of pleadings.

14. The period from the death of Margaret Ahern in February, 2015 to the reconstitution of the proceedings in July, 2016 is a period of some seventeen months for which, clearly, neither party is culpable. On affidavit, the plaintiff makes the case that her solicitors were actively pursuing this matter and went so far as to threaten to seek an *ad litem* grant of administration pursuant to s. 27(4) of the Succession Act, 1965 in order to progress matters. In response, the defendant states, and I accept, that each of the steps he was required to take as executor necessarily took some time and there was no unwarranted delay in the application for a grant of probate nor in the progression of matters by the reconstitution of the proceedings once that grant had issued. I do not regard the period between the death of Margaret Ahern and the reconstitution of the proceedings as a period of delay for which the defendant is responsible.
15. The third and last period of delay relied on by the defendant is the period from May, 2018 to the issuing of the motion, being a period of two years and seven months. It is acknowledged that affidavits were still being exchanged between the parties during 2021 as a result of which there was a delay in getting a date for the hearing of this matter. As regards this period of delay, the plaintiff argues that it coincides with the efforts that were being made, particularly she claims on her part, to organise a mediation. Whilst there is a significant overlap in that mediation was being discussed from 2017 to late 2019/early 2020, there is still a period of a year during which it was apparent that mediation was not going to proceed and yet no steps were taken by the plaintiff to advance the proceedings before this motion was brought.

Legal Principles

16. The legal principles applicable to applications to strike out proceedings for delay are well known and well understood. There are three different routes through which a court can reach the conclusion that delay or inaction on the part of a litigant warrants the dismissal or striking out of some or all of the proceedings.
17. The first two of these are based on the court's inherent jurisdiction to strike out proceedings for delay and reflect separate but overlapping strands of jurisprudence. Firstly, the test set out by the Supreme Court (Hamilton C.J.) in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459 requires the court to consider whether there has been inordinate and inexcusable delay on the part of the plaintiff in prosecuting the proceedings. The onus of proof that the delay is both inordinate and inexcusable lies on the defendant. "*Inordinate*" refers to the length of the delay, the acceptability of which has to be assessed in light of the nature of the proceedings and all of the circumstances of the case. The "*inexcusable*" element of the test allows a plaintiff to explain and justify the delay which has occurred. Where an acceptable excuse for the delay is established, the court does not go further as the *Primor* test deals only with circumstances where there has been a culpable delay on the part of the plaintiff. If, on the other hand, the court is satisfied that the delay is both inordinate and inexcusable, then it must then consider whether the balance of justice lies in favour of or against the dismissal of the

proceedings. The plaintiff bears the onus of establishing that, notwithstanding culpable delay on her part, the balance of justice nonetheless requires that she be permitted to continue her litigation. In his judgment in *Primor*, Hamilton C.J. set out a number of factors which may be relevant to where the balance of justice might lie. These include delay on the part of the defendant; whether delay or other conduct on the part of the defendant amounts to acquiescence in the plaintiff's delay; and whether the delay is such that it is no longer possible to have a fair trial and whether serious prejudice has been caused to the defendant. That prejudice is not necessarily limited to prejudice in the defence of the proceedings but in fact that is the only prejudice raised by the defendant in this case.

18. The second of the two strands of jurisprudence was first considered in detail by the Supreme Court in *O Domhnaill v. Merrick* [1984] IR 51 and more recently in *McBrearty v. North Western Health Board* [2010] IESC 27. This jurisdiction is exercisable in circumstances where there has been no culpable delay on the part of the plaintiff (i.e. the delay is either not inordinate or is excusable in *Primor* terms) but the interests of justice nonetheless require that the proceedings be struck out. This is generally because it will not be possible for the court to conduct a fair trial or because the degree of prejudice to the defendant is such that it would be contrary to the interests of justice to require him to defend the case. Usually this is due to the length of the interval between the events the subject matter of the proceedings and the initiation of the litigation resulting in essential witnesses or other evidence no longer being available or the memory of available witnesses being impaired to the extent that their evidence will no longer be reliable.
19. The difference between these two strands of jurisprudence was considered by Irvine J. in *Cassidy v. The Provincialate* [2015] IECA 74. That case concerned an allegation of historic sexual abuse alleged to have taken place more than 30 years before the proceedings were instituted. Having considered how a number of recent, similar cases had considered the application of the two tests, Irvine J. concluded that the third leg of the *Primor* test did not require a defendant to establish the same degree of prejudice that must be established in order to have a claim dismissed as that required under the *O Domhnaill* test. She explained the matter as follows at para. 37 of her judgment:-

"Clearly a defendant, such as the defendant in the present case, can seek to invoke both the Primor and the O'Domhnaill jurisprudence. If they fail the Primor test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the Primor test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or an unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceedings if

the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend the claim?

Considering its jurisdiction having regard to the test in O'Domhnaill, a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result."

20. A few other points arising from the jurisprudence might be noted in light of the arguments made by the parties. Firstly, the question of whether the length of a delay is inordinate will depend on the nature of the case and all of the relevant circumstances (see Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206 at para. 18). The type of factors which may be relevant include whether the proceedings are instituted close to the expiration of a statutory time limit, thus imposing on the plaintiff "*an additional onus to pursue his proceedings with all due diligence*" and whether the proceedings themselves are relatively routine or, alternatively, legally complex, such that there may be additional difficulty in locating expert witnesses and other evidence (see Baker J. in *Sweeney v. Keating* [2019] IECA 43).
21. Here, the defendant argues that there was a duty on the plaintiff to proceed with alacrity because of the date of the agreement, the age of the defendant and the lack of complexity of the legal issues. Unfortunately, neither party has placed evidence of the late Margaret Ahern's age before the court nor evidence of whether it was known that she suffered from any health condition which might have had a bearing on her life expectancy. Whilst a person seeking to sue someone in their 90s can reasonably be expected to appreciate the need to proceed with expedition, it is less clear in this day and age that the same considerations apply when suing somebody in their 70s. There is simply no evidence before the court to suggest that the death of Margaret Ahern some eighteen months after the proceedings were instituted was something that should have been anticipated by the plaintiff. Indeed, I note that not only was there a delay of eight months before Margaret Ahern filed an appearance to the proceedings, no effort was made on her behalf to move matters on or to seek an early hearing date in light of her advanced age or of any health concerns.
22. Further, there was some dispute as to whether the restrictions imposed on public health grounds to deal with the Covid-19 pandemic could be relied on by the plaintiff as excusing at least part of her delay. This issue was considered by Stack J. in a similar application to strike out proceedings, albeit that she addressed the point when dealing with the question

of whether the delay was inordinate rather than inexcusable. In *Darcy v. AIB* [2021] IEHC 763, she stated at para. 8:-

"In saying this, I am not overlooking the difficulties caused by the pandemic, but on the facts of this case, these have not been particularly material as there was nothing to stop the parties from progressing the pleadings, particulars, and discovery, during the pandemic. The pandemic cannot be said, therefore, to have interfered with the progress of the proceedings as might occur if a hearing date were cancelled, for example."

23. This passage was relied on by the defendant to argue that the occurrence of the pandemic does not excuse delay. In broad terms, I acknowledge that this is so but I note that Stack J.'s comments are somewhat more nuanced. Firstly, she acknowledges that the pandemic (and presumably the public health restrictions imposed as a result) did create difficulties including difficulties for litigants seeking to progress their litigation. Certainly, the lockdown imposed in March, 2020 was unprecedented and it took some time before those involved in litigation – court staff, judges, lawyers and litigants – had re-positioned themselves to conduct their business remotely. As the pandemic progressed, the initial difficulties were significantly reduced, even when restrictions were re-introduced, because of the extent to which electronic processes and remote platforms had been adopted by all concerned. Secondly, she reached her conclusion on the facts of the particular case before her which may or may not differ materially from those in this and other cases. In this case, the plaintiff does not rely on the pandemic restrictions as justifying the delay *simpliciter* but, rather, she argues that they partially excuse her delay between February, 2020 when it became clear that mediation was not going to occur and January, 2021 when the defendant issued this motion. I accept for some of that period – around two months from mid-March to mid-May, 2020 – it would have been very difficult for the plaintiff to progress her proceedings in any meaningful way. Thereafter, in the absence of some special factor – and none has been asserted here - I do not think the existence of the pandemic *simpliciter* nor the restrictions imposed on public health grounds in consequence of the pandemic can be relied on to excuse delay.
24. The other basis upon which the defendant has brought this application is O. 122, r. 11 of the Rules of the Superior Courts. This provides, firstly, that in any case where there has been no proceeding for one year from the last proceeding, a notice of intention to proceed must be served by whichever party wishes to take a further step in the proceedings. The rule then goes on to provide *"In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just"*. In this case, the last proceeding (i.e. a step with the requisite degree of formality within the context of the litigation) is the replies to particulars furnished by the defendant on 23rd May, 2018.

25. The jurisdiction conferred upon the High Court under O. 122, r. 11 is discretionary. In considering whether to exercise that discretion, many of the same factors which fall to be considered under both the *Primor* and the *O Domhnaill* lines of jurisprudence will be relevant. Whilst a gap of two years from the last proceeding is a precondition to a defendant making an application under this rule, the length of the overall delay and the extent to which there is an excuse proffered for it will undoubtedly be relevant to the exercise of the court's discretion. As is frequently the case in applications of this nature, the defendant did not make a discrete argument under O. 122, r. 11 as to why the court's jurisdiction under that order might be exercised in his favour if the court were not minded to make an order under its inherent jurisdiction applying either the *Primor* or the *O Domhnaill* tests. Perhaps because of the existence of the court's inherent jurisdiction, the fact that delays complained often include a significant element of pre-commencement delay which is not caught by O. 122, r. 11 and that delays complained of are often significantly longer than the two years mentioned in the rule, the jurisprudence under O.122, r.11 is not as well developed as that in relation to the court's inherent jurisdiction.

Inordinate Delay

26. The first task in any application based on delay is to ascertain the length of the delay in issue. Only then can a court consider whether a delay of that period is inordinate in light of the nature of the proceedings and all of the relevant circumstances. In cases where there has been a single period of very extensive delay – for example, in historical sexual abuse cases – the task can be relatively straightforward. When the delay is being calculated in years, it is not always crucial to be exact about the months or weeks. However, in a case such as this the overall delay reflects the slow and intermittent progress of the proceedings with some element of delay on both sides. Consequently, the exercise of breaking the overall time taken down to its component parts in order to identify exactly how much of it is due to inaction on the part of the plaintiff is an important one. It is also quite often a difficult exercise as the progress of litigation will always take time and each step usually takes somewhat more time than the rules provide for the taking of it. A slippage in compliance with the time periods fixed by the rules will rarely, of itself, constitute inordinate delay.
27. In this case, the defendant initially relied on three periods of delay which have been set out in detail above. The longest of these was a period of pre-commencement delay from the making of the agreement in 2007 to the institution of the proceedings in 2013 (six years). However, the plaintiff argued, in my view correctly, that the date on which the contract was made could not be treated as the starting point for the calculations as the cause of action did not accrue until the contract was breached by Margaret Ahern. The plaintiff asserted that this was after the death of David Campbell when she sought the transfer of the property to her, in particular, by way of formal demand in a solicitor's letter in May, 2013. Consequently there is a dispute between the parties as to the date of accrual of the cause of action which is a matter that can only be determined having heard the relevant evidence at the substantive trial. The defendant acknowledged that the court had to take the plaintiff's case at its height and therefore must assume that she will be able to establish that the cause of action accrued in 2012 or 2013. I do not regard the

period between the death of David Campbell in September, 2012 and the institution of proceedings a year later in October, 2013 (with formal solicitor's correspondence in the intervening period) as an inordinate delay. In this regard, I accept that, on the plaintiff's case, the refusal by Margaret Ahern to transfer the property to her occurred after the death itself and, of course, whatever their differences, this was still the death of the plaintiff's husband and the father of her children. Therefore, I do not think that any period of pre-commencement delay should be taken into account or considered inordinate.

28. The other two periods of delay comprise a period of fifteen and a half months between the service of the plenary summons in October, 2013 and the service of the statement of claim in February, 2015 and the period since the defendant's replies to particulars in May, 2018. At the time the motion issued, this stood at over two and a half years (31 months). The total delay in issue between these two periods is 46 and a half months or just under four years. By the time of the hearing, the period since the replies to particulars were filed was nearer four years, although for the latter two of those years, the plaintiff was under threat that her proceedings would be struck out on foot of this motion. If the period since issuing the motion is included, then the overall period is closer to six years but I am not inclined to include this. I think it would be unfair to a litigant, and certainly to a personal as distinct from a commercial litigant, to expect them to continue to incur costs by proactively taking steps in litigation when facing a motion to strike out their proceedings because of delay which has already occurred.
29. As noted above, it can be a difficult exercise to assess whether a cumulative period of delay is inordinate in circumstances where the taking of various steps in litigation tends to entail some deviation from the prescribed time limits even when the litigation is being pursued diligently. Fortunately, I am spared that task in this case because the plaintiff accepted that the length of the delay in issue could be considered inordinate and focused her argument on whether it was excusable and where the balance of justice lay. The plaintiff also noted that the period in question is by some measure shorter than those in issue in much of the decided case law. This is so but more recently courts, mindful of their obligations under Article 6 of the European Convention on Human Rights to ensure the efficient conduct of litigation, have tended to take a more exacting view of the duty on litigants to prosecute proceedings expeditiously and, consequently, on what constitutes inordinate delay (see Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290). This has also had consequences for the weight to be attached to the various factors listed in the *Primor* test which will be of some relevance to the discussion below.
30. In conclusion, I am satisfied that the delay in this case is inordinate but acknowledge that on a scale or spectrum of inordinate delay, it lies at the more moderate end (if this is not a contradiction in terms). This factor will be relevant both to the ease with which the plaintiff can excuse the delay and to the balance of justice between the parties but does not alter the fundamental character of the delay as being inordinate.

Is The Delay Excusable?

31. The application of the *Primor* test on this issue is always awkward as the onus rests on the defendant to prove a negative (i.e. inexcusable) in respect of matters largely within

the plaintiff's exclusive knowledge. As a result, in the absence of an obvious reason which would justify the delay, courts tend to accept a *prima facie* assertion that an inordinate delay is also inexcusable unless the evidence suggests otherwise. This implicitly shifts the onus onto the plaintiff to advance an excuse for the delay. That onus can be discharged by the plaintiff making out a *prima facie* case which the defendant must then disprove in order to establish that the delay is inexcusable. There is also a significant overlap between this element of the test and the subsequent weighing of the balance of justice if the delay is found to be inexcusable. Many of the factors on which a plaintiff has unsuccessfully relied to contend that delay was excusable may be recycled as part of the subsequent argument as they may still be relevant to a consideration of where the balance of justice lies.

32. The excuse proffered by the plaintiff in respect of the first of these two periods of delay is an eight-month delay on the defendant's part in filing an appearance after service of the plenary summons and the fact that the form of appearance used did not, on its face, require delivery of a statement of claim. Although I initially regarded the second limb of that argument as unattractive, to be fair to the plaintiff it is technically correct to say that unless a defendant formally requests delivery of a statement of claim in their appearance, there is no obligation on the plaintiff to deliver one (see O. 12, r. 9 and form 1, appendix A, part II and O. 20, r. 3 of the Rules of the Superior Courts). That said, the plaintiff's entitlement to deliver a statement of claim is not dependent on the defendant requesting one (see O. 20, r. 2 and 4) and once an appearance has been entered even if it does not formally request delivery of a statement of claim, it is difficult to see how a plaintiff can prosecute their proceedings further without filing a statement of claim. I find this argument overly technical to constitute a reasonable excuse for an extended delay.
33. However, I am more sympathetic to the plaintiff's withholding service of a statement of claim due to the defendant's failure to enter an appearance for over eight months. In this regard, I think it relevant that, at the time they were issued, these proceedings related to a dispute between a daughter and her mother as regards property in which, until shortly beforehand, both were resident (again taking the plaintiff's case at its height). It is always preferable if family disputes of this nature can be resolved outside of the courts and, consequently, I am reluctant to be overly critical of the plaintiff for holding back at the outset when it was not clear what approach her mother was going to take to the litigation. Once an appearance was entered, then it should have been clear that her claim was going to be opposed and the plaintiff should have taken steps to serve her statement of claim more promptly. Therefore, I think that about half of this fifteen-month and a half period can be regarded as excusable.
34. The plaintiff's excuse in respect of the second period of delay centres on the fact that the solicitors on behalf of both parties were actively pursuing the possibility of mediation between January, 2017 and approximately December, 2019. The plaintiff states that her commitment to mediation is genuine and that the defendant has effectively withdrawn from the process because he has imposed a precondition (namely that all of the beneficiaries under the will co-operate in any mediation) with which he is unable to

comply. The defendant states that this was his position from the outset and that in any event the plaintiff's pursuit of mediation was lackadaisical with long intervals between the correspondence and little progress made.

35. More fundamentally, the defendant argues that the possibility of mediation cannot provide a justification for not progressing the litigation. I broadly accept this proposition as a matter of principle but nonetheless the circumstances of each case must be considered individually. Certainly, in commercial litigation the fact that some or all of the parties are exploring a possible mediation would not of itself absolve them from the need to pursue the litigation expeditiously. Equally, the mere fact that mediation is proposed by one party without the other party agreeing to it, even if it is not expressly rejected, does not justify the proposer sitting on their hands thereafter. However, this is not what occurred here. The possibility of a proposed mediation does not preclude progression of the proceedings and I note that despite the plaintiff having made the proposal in this case in 2017, she served a notice for particulars on the defendant in 2018.
36. Following the plaintiff's proposal of mediation, the defendant's solicitor wrote on a without prejudice basis in February, 2017 confirming the defendant's agreement (subject to a perceived need for the involvement of all family members) and both solicitors thereafter participated actively, albeit slowly, in agreeing the identity of a mediator. Further, both parties point to the fact that the estate of Margaret Ahern is limited and that the costs of litigation might well deprive not only the plaintiff but also the intended beneficiaries under her will of any benefit. In those circumstances, I think that not progressing the litigation while mediation was being actively pursued was a reasonable approach for the plaintiff to take. The benefit that mediation might be expected to provide in terms of reducing the cost of dealing with the dispute would be significantly undermined if the parties were expected to continue incurring litigation costs in parallel with the mediation. Again, this might not provide the same level of justification in a case where the value of the proceedings significantly outweighs the costs of litigating them and the additional costs of progressing mediation do not materially change this equation. However, the court has been informed that the valuation of the estate for Revenue purposes is €213,000 and, noting that in the current property market the actual value of an estate frequently exceeds the anticipated value, this is very much a case where any step taken by the parties has to be weighed carefully in terms of its potential benefit relative to the cost involved.
37. Consequently, I am prepared to treat the plaintiff's inaction during the period whilst mediation was being actively pursued as a reasonable excuse for her consequent delay in the proceedings. I note the defendant complains that even in terms of the mediation the plaintiff's engagement was slow and intermittent. This may be the case, but it does not appear that the defendant sought to move matters on any more quickly nor to set any deadline for action after which the defendant would consider the mediation proposal at an end. It seems to me in circumstances where both parties were moving at a desultory pace towards mediation - which is essentially a co-operative process - the defendant cannot ascribe greater blame to the plaintiff than he is prepared to shoulder himself. As it

happens, the plaintiff did serve a notice for particulars in February, 2018 as a result of which the excuse provided by the potential mediation only covers the period from February, 2018 through to the end of 2019 when it became apparent that that mediation was not going to take place. There is still a further period of a year in respect of which this excuse is not applicable before the defendant issued his motion.

38. The only explanation offered by the plaintiff for the last part of this period is the intervention of the Covid-19 pandemic and the restrictions imposed on public health grounds from March, 2020. Like Stack J. in *Darcy v. AIB*, I acknowledge that the pandemic did cause practical difficulties for people, particularly during the initial phase when both solicitors' offices and court offices were closed to the public. However, over time the impact of these restrictions were reduced as businesses and public services began to operate on digital platforms and indeed the restrictions themselves were lifted, although later re-imposed. Like *Darcy v. AIB*, this is not a case in which a hearing date had to be rescheduled due to the pandemic, so the only question is the extent to which the existence of the pandemic and the consequential restrictions precluded or delayed the plaintiff from filing a defence and counterclaim to the proceedings, which is the next step required. I am prepared to accept that it would have been difficult if not impossible for the plaintiff to have organised this in the early weeks of the first lockdown but not thereafter. Consequently, I will treat the Covid-19 restrictions as excusing about two months of the subsequent delay. This leaves a period of about ten months which is inexcusable.

Balance of Justice:

39. At this point in my analysis, it will be apparent that I have accepted that the excuses offered by the plaintiff justify some but not all of the delay complained of by the defendant which, in an overall sense, has been acknowledged by the plaintiff as being inordinate. On my calculation of the forty six and a half months which I held constituted the inordinate delay, a reasonable excuse has been proffered which would justify nearly twenty nine months of it leaving just under eighteen months of the delay which I originally held to be inordinate also being found to be inexcusable. This immediately begs the question as to whether I need to revisit the assessment of the plaintiff's delay as inordinate. My original view was that, on a spectrum of inordinate delay, four years was towards the moderate end of the scale and certainly eighteen months is more moderate still. The question as to whether it is nonetheless inordinate is a very borderline one. A delay of eighteen months is by no means unheard of in litigation, particularly when the eighteen-month period is a cumulative one rather than a single period of inactivity. On the other hand, in this case, that eighteen months arises in a broader context where, for various reasons, litigation which has been in existence for nearly a decade has moved very slowly. Some of this is due to the unfortunate death of Margaret Ahern and the procedural steps necessary to extract a grant of probate to her estate and to reconstitute the proceedings thereafter. Neither party can be faulted for this. Some of this is due to a delay on the defendant's part in entering an appearance and, at a later stage, in filing a defence and counterclaim. However significantly more of it is due to the plaintiff's inaction only some of which has been found to be excusable. Accepting that it is a rather fine line,

on balance I am of the view that the residual delay for which the plaintiff does not offer a reasonable excuse is not inordinate.

40. In circumstances where, for the reasons set out above, I have ultimately concluded that the residual delay is not inordinate, strictly speaking, the court is not required to proceed to analyse the balance of justice under the third limb of the *Primor* test. However, I am conscious that my conclusion on the delay not being inordinate is a finely judged one and, consequently, I propose to consider where the balance of justice lies lest I am wrong in my earlier conclusion or this matter be taken further.
41. There is an overlap between the balance of justice aspect of the *Primor* test and that part of the *O Domhnaill* test which requires the court to consider whether a fair trial is possible in the circumstances or whether the defendant has been prejudiced to such an extent that the matter should not be allowed proceed. Despite the fact that both of these tests deal with similar subject matter, they do so from materially different perspectives. Under the *Primor* test, the court is starting from the perspective that the plaintiff has been guilty of inordinate and inexcusable delay and, in normal course, the litigation should not be allowed to proceed unless there are special circumstances which warrant its continuance. Therefore, the level of prejudice that a defendant has to show is relatively slight. On the other hand, under the *O Domhnaill* test where the plaintiff has not been found guilty of any culpable delay, the court starts from the position that the plaintiff has a right of access to the court which should be vindicated unless it is impossible to conduct a fair trial or the defendant has been seriously prejudiced by virtue of the delay. The resulting onus on the defendant is a significantly higher one.
42. Usually, a court will not have to consider both the balance of justice aspect of the *Primor* test and the *O Domhnaill* test in the one judgment as the plaintiff's delay will have been found either to be culpable in which case the *Primor* test applies or not to be culpable in which case the *O Domhnaill* test applies. Here, in principle, it is the *O Domhnaill* test which should be applied as most the plaintiff's delay has been found to be excusable and the balance not to be inordinate so the *Primor* test is only being considered out of an abundance of caution. Logically, it makes sense to consider the *Primor* test first both because the plaintiff bears the onus of proof and because the threshold facing the defendant is considerably lower. If the court is not satisfied that the balance of justice favours the striking out of the proceedings under the *Primor* test, it seems highly unlikely that the defendant will be able to establish either that it would be impossible for the court to conduct a fair trial or the level of prejudice which would lead to the proceedings being struck out under the *O Domhnaill* test.
43. The test posited by Hamilton C.J. in *Primor* identifies a number of matters which a court is entitled to take into consideration in considering where the balance of justice lies. This is not an exhaustive list of factors which can be considered and not all of the factors discussed by Hamilton C.J. will be relevant in every case. In this case, it seems to me that the factors of potential relevance are the defendant's own delay, prejudice arising from

the delay and whether the delay gives rise to a substantial risk that it will not be possible to have a fair trial.

44. Looking at the first of these, the defendant (and I use this term to include Margaret Ahern before her death) has also been guilty of some delay. An appearance was not entered for eight months after the service of the plenary summons and a defence was not filed for seven months after the proceedings had been reconstituted following the death of Margaret Ahern. In addition, there were certain times during the plaintiff's periods of inactivity (especially when the parties were considering mediation) when the defendant could have sought to move the plaintiff along but did not do so. I accept that the jurisprudence has moved from a position where litigation was regarded as a two-way street in which the defendant could not simply treat the plaintiff as a sleeping dog which should be let lie (see O'Dálaigh C.J. in *Dowd v. Kerry County Council* [1970] IR 27). Courts now distinguish between active delay (i.e. the failure to take a step positively required) and inactive delay (i.e. the failure to intervene by taking a step requiring the plaintiff to act) on the part of a defendant. The rationale for the current approach is that after institution a considerable amount of litigation withers on the vine and simply never progresses. To require a defendant to take positive steps to prod a plaintiff into action in respect of proceedings which, in all likelihood, not going anywhere on pain of not being permitted to rely on the plaintiff's delay thereafter, would be counter-productive. That is not the position here. Notwithstanding the plaintiff's lassitude, the defendant could have been in no doubt during the period when both parties' solicitors were addressing mediation, that the plaintiff was pursuing her case and that it was not just going to go away if the defendant took no further action.
45. That said, I do not think that the level of delay for which the defendant is responsible in this case is of itself unreasonable nor could it be taken as amounting to acquiescence on his part in the plaintiff's delay. Equally, the plaintiff was not induced into taking additional steps or incurring additional expense because of the defendant's delay. Therefore, the defendant's delay is a factor which militates very slightly in favour of the plaintiff, but it is not one which tilts the balance decisively either way.
46. The issue of prejudice to the defendant is a more serious one. The defendant argues that the deaths of David Campbell and of Margaret Ahern mean that two of three parties to the alleged agreement are no longer available as witnesses and that this is inherently prejudicial. The defendant also points to a lack of vouchers and receipts evidencing the work done and to a difficulty at this remove of distinguishing between defective works and wear and tear. He states that his ability to discharge his duties as executor and to distribute the estate of Margaret Ahern is being frustrated by the existence of the litigation and indeed one of the beneficiaries (a sister of the plaintiff) has already instituted Circuit Court proceedings against him seeking orders requiring him to administer the estate. Finally, since the death of Margaret Ahern, one of the beneficiaries under the will, a son of the deceased and a brother of the plaintiff has also died but, apart from the fact that he will not be able to inherit personally, it is not suggested that any particular prejudice flows from this.

47. The plaintiff makes a number of arguments in response and also contends that she will suffer greater prejudice if her case is not allowed to proceed. In respect of the latter point, she argues that she and David Campbell expended €154,000 in respect of the works, the carrying out of which is not denied. Consequently, she argues that even if she does not succeed in her claim for specific performance she is entitled at least to a beneficial interest in the property reflecting the value of those works. If her case is struck out, she will lose all possibility of recovering that money.
48. The plaintiff accepts that the death of Margaret Ahern has caused prejudice to the defendant in the defence of the proceedings but argues that that death occurred at a relatively early stage in the proceedings and did not arise because of the delay now complained of. As I have accepted for the purposes of this application that I should treat the plaintiff's cause of action as having arisen in 2012 or 2013, I do not think that prejudice arising from Margaret Ahern's death sixteen months after proceedings were instituted can be fairly attributed delay on the part of the plaintiff. Any delay subsequent to the death of Margaret Ahern did not cause, and does not impact on, the prejudice caused by the death itself. Further, in response to the suggestion that she was under a heightened duty to act promptly because of Margaret Ahern's age, the plaintiff points out that Margaret Ahern had solicitors acting for her in 2014 but delayed in entering an appearance and did not take any steps thereafter seeking to expedite the proceedings in view of her age. I have already observed that there is no evidence of Margaret Ahern's age or state of health before the court, in the absence of which I am reluctant to treat the plaintiff as being under a heightened obligation due to these factors.
49. Finally, the plaintiff argues that the other matters pointed to by the defendant are more prejudicial to the plaintiff than to the defendant. This includes the death of David Campbell whom she contends would have been a witness against rather than for the estate. This seems likely since the plaintiff's claim is that the €164,000 was spent jointly by herself and David Campbell such that, notwithstanding the break-up of their marriage, he would likely have supported her claim in seeking to recoup the investment that he had made. Obviously, the extent to which David Campbell's death is potentially prejudicial to the defendant will also depend on the resolution of the dispute as to when the cause of action accrued. The plaintiff contends that Margaret Ahern did not breach the agreement by refusing to transfer the property to her until after the death of David Campbell in which case his death, although unfortunate, is less prejudicial to the defence of the proceedings since any evidence he could have given would go only to the making and not to the breach of the alleged agreement. The defendant, on the other hand, contends that the cause of action accrued somewhat earlier in which case the subsequent death of David Campbell could be regarded as prejudicial. In circumstances where the court cannot determine the dispute as to the date on which the cause of action accrued on this interlocutory application, I am reluctant to regard his death as having created any significant element of prejudice for the defendant in the defence of these proceedings. If anything, the non-availability of Mr. Campbell as a witness is likely to be more damaging to the plaintiff's case than to the defendant's. It is also difficult to see how the absence of vouchers and receipts for the works done is prejudicial to the defendant in circumstances

where the onus will lie on the plaintiff to prove both the carrying out of the work and the value of the works in order to succeed in her claim.

50. I accept that for as long as these proceedings are in being making a claim to the main asset in the estate of Margaret Ahern, it will not be possible for the defendant *qua* executor to distribute that estate. However, that inability arises not just because the existence of the litigation creates an impediment to distribution, but because the proceedings raise a fundamental issue as to whether a significant asset is properly regarded as part of the estate. Engagement in mediation at the time it was first suggested by the plaintiff could have provided a mechanism through which finality could have been achieved on the difficulties raised by the litigation. If the only reason the defendant has been unable to reach an agreement to mediate is the lack of co-operation of all family members, then the detriment to them by reason of the delay in administering the estate is not something which should be weighed in the balance against the plaintiff.
51. The final factor of potential relevance is whether the level of delay gives rise to a substantial risk that it is not possible to have a fair trial. Of the various factors identified by the defendant above, I think the only one of real relevance is the death of Margaret Ahern. Although the defendant frames his argument by saying that two out of the three parties to the alleged agreement are now deceased, in reality, both the plaintiff and David Campbell were on one side of the agreement. The other side, namely the defendant's side, faces a serious difficulty as a result of Margaret Ahern's death. However, I do not think that a motion of this nature could have been taken against the plaintiff at the time of the death of Margaret Ahern in 2015. At that stage, the proceedings had only been in being for some sixteen months and, on the plaintiff's case, they had been instituted within a year of the cause of action arising. In the context of that timeframe there had also been a relatively significant delay on the part of the defendant in entering an appearance. Further, before her death, the plaintiff instructed a solicitor in relation to these matters and a full survey of the property appears to have been carried out on her instructions. She stated clearly in her will that she intended defending the proceedings in full and counter-claiming against the plaintiff. Presumably, the instructions given by the late Margaret Ahern are still available to be acted upon by the estate. It goes without saying that the death of a party to litigation will always create problems for their estate in the subsequent continuance or defence of the proceedings but it cannot be the case that the other party's cause of action must be terminated because of those difficulties. Consequently, although I accept that the death of Margaret Ahern will cause difficulties for the defendant in the defence of these proceedings, I do not think that those difficulties can be attributed to delay on the part of the plaintiff nor do I think that they are so significant as to give rise to a substantial risk that it is not possible to have a fair trial.
52. To sum up, in looking at these factors under the *Primor* test, I think the balance of justice weighs in favour of allowing the plaintiff to continue with her case. If the proceedings are struck out, the plaintiff will lose all possibility of recovering the significant sum of €164,000 which she claims to have invested in this property on foot of an agreement which she made with her mother. Even if she is not entitled to specific performance of

that agreement and to the transfer of the property to her, she still has a claim based on the expenditure which she made to the benefit of the property. It would be extremely prejudicial to the plaintiff to deny her the opportunity of pursuing that claim. On the other hand, there is undoubtedly prejudice caused to the defendant by reason of the death of Margaret Ahern and her consequent non-availability as a witness in the proceedings. However, most of the delay which I have found to be inordinate (whether or not some of that delay is regarded as being excusable) occurred after the death of Margaret Ahern and, therefore, the delay did not create the prejudice caused by her death. The other factors relied on by the defendant are actually more likely to prejudice the plaintiff's ability to prosecute her case than the defendant's ability to defend it. Consequently, under the *Primor* test, had I not reached the conclusion set out in the previous section of this judgment, I would in any event have declined to strike out these proceedings on the basis that the balance of justice favoured allowing the plaintiff to pursue her claim.

53. On the assumption that the plaintiff's delay is not culpable delay (i.e. it is not inordinate or inexcusable), the test under the *O Domhnaill* jurisprudence is whether the passage of time has created a real or substantial risk of an unfair trial or an unjust result. The level of prejudice which the defendant is required to establish is significantly greater than under the equivalent leg of the *Primor* test because the plaintiff has not been found responsible for any culpable delay. It seems to me that in this case as I am not satisfied that there is a substantial risk that it will not be possible to have a fair trial for the purposes of the *Primor* test, it must follow that the defendant has also failed to reach the higher threshold of establishing a real risk of an unfair trial or an unjust result for the purposes of the *O Domhnaill* test. Consequently, I will dismiss the defendant's application to strike out the plaintiff's proceedings because of delay *simpliciter*.

Order 122 – Strike Out for Want of Prosecution

54. That leaves the defendant's application to strike out the plaintiff's case for want of prosecution in light of the failure of the plaintiff to take any step in the proceedings for more than two years after the furnishing of replies to particulars on 23rd May, 2018. As previously noted, the jurisprudence under this rule is somewhat less developed than might be expected, most probably because of the availability of an inherent jurisdiction to strike out proceedings for delay which is more commonly relied upon. It may be that the development of the jurisprudence under the court's inherent jurisdiction has led to a view being taken that a delay of two years will usually not suffice to have proceedings struck out and, as the jurisdiction under O. 122, r. 11 is discretionary, it will be difficult for a defendant to have proceedings struck out because of a delay of this length even where the formal requirements of the rule have been established.
55. Without delving too deeply into the jurisprudential differences between an application under O. 122, r. 11 and an application under the court's inherent jurisdiction, I note that in this case the period covered by the application under O. 122, r. 11 includes a substantial portion of the period I have already regarded as being excused for the court's inherent jurisdiction by reason of the fact that the parties' solicitors were actively considering mediation. It seems to me that this factor is also relevant to the exercise of

the court's discretion under O. 122, r. 11. Consequently, I will also refuse the application made under that rule.

Mediation

56. The final matter to address in this judgment is the question of mediation. Obviously, the fact that the parties considered mediation and took some steps to set mediation up has had a bearing on my attitude to the plaintiff's inaction during the period that mediation was being actively addressed. Mediation did not take place because, it seems, the defendant took the view that he could only engage in mediation if all of the beneficiaries under the will of Margaret Ahern were prepared to co-operate and that co-operation could not be achieved. There was some disagreement between the parties as to whether the defendant made this *proviso* known from the outset or whether it became a precondition to the defendant's participation at a later stage. This is not a matter which I have to resolve and I do not think that much turns on it. More significant is the fact that the defendant has taken the view, rightly or wrongly, that he can or will only engage in mediation if he has the support of all of the beneficiaries under the will in doing so. In my view, whilst there is obvious merit in an executor seeking to secure the general agreement of those entitled to inherit an estate to the steps he proposes to take in relation to it, he cannot make the exercise of his powers and duties as an executor subject to the agreement of all beneficiaries. At a very basic level, if it is not possible to secure the agreement of all of the beneficiaries, the executor will then be unable to administer the estate. On another level, each beneficiary will, naturally, be concerned to ensure the preservation of the interest which they have been left under the will and will not necessarily take an overall view as to what is the correct and most beneficial thing to be done on behalf of the estate as a whole. Apart from the inter-play of family relations, this is particularly so when litigation is taken against an estate which can only be compromised by an executor in a manner which reduces the assets available for distribution to other beneficiaries.
57. In this case, I share the concern expressed by counsel acting for both parties that the size of the estate is not sufficient to justify expensive High Court litigation. There is a real risk that if this case proceeds and costs are awarded from the estate (and possibly the costs of both parties), then there will be nothing left in the estate either for the plaintiff, if she succeeds, or for the beneficiaries under the will. Consequently, I think that this is a case in which mediation is not simply advisable, it is imperative. If the dispute between the parties can be resolved through mediation, then all of them will benefit although, it has to be acknowledged, that each of them might not benefit individually to the same extent that they would, on paper, were their side of the case to succeed. The important qualification here is "*on paper*" because if the costs of the litigation absorb the value of the estate, then success in the litigation will be a pyrrhic victory.
58. In those circumstances, I will exercise the power the court has under s. 16 of the Mediation Act, 2017 to invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute the subject of the proceedings. I should note that the oral submissions made by the plaintiff to the court invited me to consider

exercising this power although no formal application was made in that regard. For the sake of completeness, I should also bring the parties' attention to s. 21 of the 2017 Act under which any unreasonable refusal or failure by a party to the proceedings to consider using mediation subsequent to an invitation under s. 16 may be taken into account by the trial court in awarding the costs of these proceedings.