Neutral Citation [2013] IEHC 161

**THE HIGH COURT**

**COMMERCIAL**

**[2003 No. 7366P]**

**BETWEEN**

**PATRICK BARRETT**

**PLAINTIFF**

**AND**

**HYUP SUNG, M.C. PLANT SALES LIMITED, ACC BANK PLC AND PATRICK CHRISTIE**

**DEFENDANTS**

**Motion by ACC Bank Plc to dismiss proceedings for want of prosecution**
**Judgment of Mr. Justice Ryan delivered on the 19th April, 2013.**

This is an application brought by the third and only extant defendant in this action, ACC Bank plc, to dismiss the plaintiffs claim because of inordinate and inexcusable delay. Ms Neasa Bird, Barrister, appeared for the moving party and Ms Jennifer Goode, Barrister for the plaintiff.

The plaintiffs claim herein is for damages and/or recission of a leasing agreement for the supply to him of rock breaking machine that he alleges was so defective that it amounted to breach of contact and a variety of other civil wrongs. In a word, the machine was so defective that he is entitled to rescind the agreement and to recover damages. The facts as set out in the statement of claim, so far as relevant to the issues in this motion, are as follows. The plaintiff is a building contractor who entered into a leasing agreement on the 17th June, 1999 for a rock breaking machine that was manufactured by the first defendant, which is a company based in South Korea. The second defendant is MC Plant Sales Limited - now in liquidation - that supplied the machine. ACC Bank plc is the third defendant and the applicant in this motion to dismiss the plaintiffs claim for want of prosecution and it was the other party to the leasing agreement entered into by the plaintiff Mr Barrett. The fourth defendant was a director of the second defendant, MC Plant Sales Limited, which supplied the rock breaking machine. He is alleged to have made representations and warranties to the plaintiff that the machine was suitable, fit for purpose and of merchantable quality. The date of the leasing agreement is the 1ih June, 1999.

The statement of claim pleads that the second and fourth defendants are bound by a collateral contact that included terms and conditions that the rock breaker was suitable and fit for purpose and of merchantable quality. It is pleaded as against ACC that in breach of the terms and conditions of the leasing agreement and of the alleged collateral contract, the rock breaker was grossly defective and unfit for normal use and there has accordingly been a total failure of consideration in respect of the leasing agreement and the collateral contract and there was a fundamental breach of contract. The particulars of defects as pleaded in the statement of claim are relevant:-

> "The rock breaker broke down on the 29th July, 1999. It was returned to the second named defendant premises for repairs. It was subsequently put back into commission by the plaintiff on the 19th October, 1999. It only worked for 39 days. It was again returned to the second named defendant's premises for repairs. It was back to work on the 5th May, 2000, and then only managed to work for two days. It was again returned to the second named defendant's premises and on its return it managed to work until the 21st June, 2000. It remains at the second named defendant's premises."

The statement of claim was delivered on the 30th January, 2008 and claims damages for negligence and breach of contract, inter alia, and it seeks rescission of the leasing agreement and damages.

The following are the relevant dates in this application: -

> 17th June, 1999 The plaintiff entered into a leasing agreement with ACC for the supply to him of a rock breaking machine.
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> 29th July, 1999 -21st June, 2000 The plaintiff alleges that between these dates the machine repeatedly broke down and effectively was useless from the latter date.
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> 19th June, 2003 Plenary summons issued and also a concurrent summons were issued. The plenary summons was not served at the registered office of ACC but instead was served or- purported to be served- at the ACC office in Ballina by being served on the manager.
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> 9th June, 2006 The plaintiff’s solicitors issued a twenty one day warning letter for a motion for judgment in default of appearance.
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> 19th June, 2006 ACC entered appearance. On this date also the ACC solicitors wrote to the plaintiff’s solicitors pointing out that the address of the summons was wrong and requesting copy pleadings in respect of the other defendants.
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> 30th January, 2008 The plaintiff served notice of intention to proceed.
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> 30th January, 2008 The plaintiff served a statement of claim on ACC.
>
> 19th March, 2008 The plaintiff served notice of intention to proceed.

17th May, 2011 The plaintiff sent a twenty one day warning letter –but no notice of intention to proceed.

27th February, 2012 The plaintiff served notice of intention to proceed.

11th April, 2012 The plaintiff sent a twenty one day warning letter.

19th April, 2012 Letter from ACC solicitors advising of intention to bring this motion.

The Applicant's case is grounded on the affidavits of Ms Tara Glynn, who describes the history of the proceedings and the various periods of delay, which she asserts are more than sufficient to constitute inordinate and inexcusable delay and that the balance of justice is in favour of dismissal. She avers in her first affidavit that the bank was unaware of the whereabouts of the machine because repeated queries in correspondence remained unanswered. She complains that the plaintiff had not furnished information about his proceedings against the other defendants. She says that the delay of 12 to 13 years since the alleged breakdown of the machine and the delay of nearly nine years since the proceedings commenced is sufficient basis for the application.

The plaintiff Mr. Barrett says that his solicitors went to great lengths to serve all four defendants in the period between the 1ih May, 2003 and December 2004. The first defendant ignored all the correspondence. The second defendant on whom service was actually affected was dissolved on the 1st October, 2004. The third defendant, ACC Bank, was in default of entering an appearance, according to Mr. Barrett, for approximately three years until it finally did so on the 19th June, 2006. He says that the concurrent summons was served by Stephen Ward by hand on Noel O'Dowd, the manager of the ACC Bank Branch at Pearse St., Ballina, Co. Mayo on the 24th June, 2003. However, that was not the registered office of the defendant. As for the fourth defendant, Mr. Barrett says that four attempts were made including one by way of substituted service but they were all unsuccessful.

Mr. Barrett says that ACC Bank is currently in default of a defence and has been for over four years, since approximately the 2ih February, 2008. Although the solicitors for ACC Bank had corresponded with his solicitors since the 15th February, 2008, they did not give any progress report on the defence and neither did they say that it was impossible to deliver one pending responses to their queries. Indeed, Mr. Barrett says that his solicitor sent two warning letters to the defendant for their defence on the 17th Mat, 2011 and the 11th April, 2012. In the circumstances, he claims that there is no reasonable excuse for the third defendant's dilatoriness in the delivery of its defence. Mr. Barrett's reference to solicitors' correspondence is in reply to the grounding affidavit for the motion that is sworn by Ms. Tara Glynn and which I will refer to below. Mr. Barrett says that ACC Bank has delayed almost six years in bringing it motion, having threatened to do so on the 10th November, 2006. He says that the solicitors for ACC Bank have never actually denied liability. In respect of the delay relied on by Ms. Glynn, he says that he instituted proceedings "comfortably within the six year statutory time limit".

Dealing with the question of prejudice, Mr. Barrett says that apart from making inquiries regarding the machine, ACC Bank took no action to secure access to it, so that "even if the third defendant is prejudiced by the absence of the machine, that prejudice is of its own making". He goes on to that any potential prejudice that ACC Bank may suffer from will be acutely felt by him as the plaintiff in the prosecution of his case, in that he has not been able to access the machine or commission a report on it since it finally broke down in June 2001. As to the fate of the rock breaking machine, Mr. Barrett says that his brother and nephew travelled to the fourth defendant's premises on a number of occasions prior to the 24th October, 2001 to try to retrieve the machine from him but they were unsuccessful. "I understand that, while Paddy Joe Barrett took several photographs at the scene, they could not gain access to the premises to retrieve".

Ms. Glynn returns to that question and says that that was the very thing that the ACC Bank had been trying to find out about in their correspondence beginning in 2008 and which the plaintiffs solicitors did not reveal and which only came to light with the swearing of this replying affidavit by Mr. Barrett.

In another long affidavit by Mr. Barrett dated the 251h July, 2012, he sets out to rebut Ms. Glynn's riposte in her second affidavit. A good deal of this is argument about what Ms. Glynn did or did not include.

Mr. Barrett addresses the question of prejudice, making the following points.

(a) He denies that ACC bank is prejudice because it cannot examine the machine, but he does not say why that is so, relying instead on the simple statement that he does not accept this argument.

b) He says that he as the plaintiff is in the same position as ACC Bank; he has not inspected the machine and does not have an engineer's report on it. Accordingly, "the lack of access to the machine will be felt as much, if not more, by me in the prosecution of my claim".

(c) ACC Bank did not issue a motion to inspect the machine and cannot have believed that it needed it in order to file its defence. It follows that any prejudice is of ACC Bank's own making.

The first obvious reaction one has is that this is a very long delay indeed in a case involving a defective machine. The machine was supplied in 1999 and it broke down on a number of occasions between supply and June 2000. From that time on it was not used. It was taken apart in 2001 and has not been seen since; Mr. Barrett's brother and nephew went to the premises of the second defendant and could see the bits of the machine laid out or strewn on the ground but could not gain access. That is the last time the machine or its parts were seen.

If the case is permitted to go ahead, it will be based on evidence about a defective rock breaking machine that has never been examined by an expert on behalf of either the plaintiff or the defendants. On the face of it, it suggests that the third defendant is hopelessly prejudiced. Mr Barrett responds to this point by saying that ACC in this respect is in no better or worse a situation than he is. He has the burden of proof and he suffers as much from the machine not being available, if not more so, as compared with the defendants.

**The Law**

Ms Neasa Bird, Barrister for the moving party and Ms Jennifer Goode, Barrister for the plaintiff were agreed that the relevant law was that the defendants had to establish in the first place that the plaintiffs delay in proceeding with his claim was inordinate and inexcusable. Finlay P. was of the view in *Rainsford v. Limerick Corporation* that there was no basis for an application to dismiss unless the delay was inordinate and inexcusable. Secondly, is it in the interest of justice that the case should be dismissed?

In *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, the Supreme Court focused on whether the delay resulted in prejudice to the

defendant in meeting the claim. The Court set the bar high for a defendant applying for a dismiss, holding that the question of particular prejudice was central to the exercise of discretion and it also endorsed and emphasised the importance of the role of the defendant in relation to the plaintiffs delay. The Supreme Court held that the principles of law relevant to an application to dismiss an action for want of prosecution were:-

> 1. that the courts had an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice so required;
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> 2. that the party who sought the dismissal on the ground of delay in the prosecution of the action must establish that the delay had been inordinate and inexcusable;
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> 3. that even where the delay had been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice was in favour of or against the case proceeding;
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> 4. that when considering this obligation the court was entitled to take into consideration and have regard to -
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> (a) the implied constitutional principles of basic fairness of procedures,
>
> (b) whether the delay and consequent prejudice in the special facts of the case were such that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action,
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> (c) any delay on the part of the defendant, because litigation was a two party operation and the conduct of both parties should be looked at,
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> (d) whether any delay or conduct of the defendant amounted to acquiescence on the part of the defendant in the plaintiffs delay,
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> (e) the fact that conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action did not, in law, constitute an absolute bar preventing the defendant from obtaining a dismissal but was a relevant factor to be taken into account by the court in exercising its discretion whether or not to dismiss, the weight to be attached to such conduct depending on all the circumstances of the particular case,
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> (f) whether the delay had given rise to a substantial risk that it was not possible to have a fair trial or it was likely to cause or had caused serious prejudice to the defendant,
>
> (g) the fact that the prejudice to the defendant referred to in (f) might arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.

O'Flaherty J. held that whilst the Court had inherent jurisdiction to dismiss a claim in the interests of justice where the delay in the proceedings was in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself, it was a jurisdiction which should not be frequently or lightly assumed. He also said that where a plaintiffs claim was as infirm as it was in the present case, that could be taken into account on a defendant's motion to dismiss for want of prosecution.

In *Sheehan v. Amond* [1982] I.R. 235, Henchy J. said:

> "After eight years of silence, after the infant plaintiff had grown from childhood to manhood, when memories of the circumstances of the accident had inevitably become dulled or distorted with the passing years, when the scene of the accident may possibly have changed, when medical and other evidence may have lost sharpness or reality, when money values had changed out of all recognition, when the many other changes that are the inevitable consequences of the fading of events into the distant past must have taken place, is it any wonder that in those circumstances the response of the defendant to the belated effort of the plaintiffs solicitor to resuscitate this seemingly entombed action was to bring a motion to have it struck out? That is what the defendant did."

While there is broad if not universal consensus on the first parts of the test, in respect of the second limb of the test, whether it is in the interest of justice that the plaintiff's action should be dismissed, the decided cases reveal differences of approach. The traditional mode focuses on the conduct of the defendant and the impact of the delay on his position: see *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.

The second approach looks at the plaintiffs conduct and circumstances, on the basis that the case ought to be dismissed if there is inordinate and inexcusable delay unless the plaintiff is able to adduce some exceptional countervailing argument or circumstances to avert that consequence: In *Ó Dómhnaill v. Merrick* [1984] I.R. 151, Henchy J said:

> Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a case. However, where as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant, or the inability on the part of an infant plaintiff to control or terminate the delay of his or her agent."

More recently, the Court itself has expressed concern in the public interest to see to the efficient dispatch of litigation. This has at its heart a conception of the court's function in litigation that is to ensure that cases are brought to expeditious conclusion. Litigation is not simply a matter for the parties and "the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time." Per Hardiman J. in *Gilroy v. Flynn* [2005] LL.R.M. 290 at 293/4. This proposition has its source in Article 6(1) of the European Convention on human rights.

In this court in *Stevens v Paul Flynn Limited* [2008] 4 I.R. 31, Clarke J. expressed the view that a radical re-appraisal might now be necessary in determining the balance of justice and it might even extend to the appraisal of the elements of inordinacy and inexcusability.

In his dissenting judgment in *Desmond v. M.G.N Limited* [2009] 1 I.R. 737, Kearns J. endorsed this new approach. He said that the delay in that case was so long that it "almost certainly gave them [the defendants] reasonable grounds to believe that this litigation

had simply 'gone away' and would never be brought before a court." Kearns J. in addition to addressing the function of the court having regard to Article 6 of the Convention, cited the review by Fennelly J. of the authorities in his judgment in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510 at 519 where he concluded that in striking the balance of justice, a court

> "... will need to find something weighty to cancel out the effects of the plaintiff's behaviour. It will attach weight to the character of the claim and to the character of the plaintiffs. When considering any allegation of delay or acquiescence by the defendants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiff's case dismissed."

Fennelly J in the same case added a further endorsement of the passage quoted above from Henchy J in *Ó Dómhnaill v. Merrick*, saying:

> "That statement of the law indicates that the author of delay which is found to be both inordinate and inexcusable will not be absolved of fault unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess the third consideration in the cited passage from the judgment of Hamilton C.J., namely whether "*on the facts the balance of justice is in favour of or against the proceeding of the case.* " As I have already suggested, the respondents were unable to point to any disadvantage or disability affecting them. Nor was there any delay or acquiescence of the appellants, which might redress the balance of fault.
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> "In such circumstances, when the courts comes to strike that "*balance of justice*" in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J., it will need to find something weighty to cancel out the effects of the respondents' behaviour. It will attach weight to the character of the claim and to the character of the respondents. When considering any allegation of delay or acquiescence by the appellants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the respondents' claim dismissed. O'Dalaigh C.J. Said in *Dowd v. Kerry County Council* at p. 41:
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> > *"... in weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution ... the adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances, it is acted upon by a defendant in the hope that he will 'get by' without having to face the peril of being decreed. Litigation is a two party operation and the conduct of both parties should be looked at. "*
>
> "In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something "*akin to acquiescence*" as indicated in the judgment of Henchy J cited above."

A variant of this doctrine derives an obligation on the courts to achieve efficient disposal of court proceedings. On this analysis, the courts have a duty and they also have an interest independent of the concerns of the litigants. This is a public interest which is different from the private interests of the litigants. Peart J. said in *Byrne v Minister for Defence* [2005] 1 I.R. 577: --

> "... there is a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up the valuable and important time of the courts, and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their relegation, as well is increase the cost to the Courts service, and through that body to the taxpayers, are providing a service of access to the courts which serves best the public interest."

Hogan J. cited that passage with approval in *Quinn v. Francis Faulkner trading as Faulkner's Garage and M.M.C. Commercials Limited* [2011] I.E.H.C. 103, in which he held that article 34.1 of the Constitution presupposed an obligation on the courts to ensure the timely administration of justice.

Geoghegan J. in *Desmond v. M.G.N Limited* [2009] 1 I.R. 737 did not agree that the jurisprudence in relation to when an action should be struck out for delay needed to be modified having regard to the incorporation into domestic law of the European Convention on Human Rights by the Act of2003. The views of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 were *obiter dicta*. The basic principles in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 represent the law.

The latest occasion on which this topic was considered by the Supreme Court was in Comcast International Holdings Inc v Minister for Public Enterprise [2012] 10 JIC 1701, in which there are dicta espousing respectively retention of the existing *Primor* rule and advocating a tightening up of the rule on delay.

This discussion illustrates that there is probably no universal test. There may be circumstances that are outside the existing jurisprudence in which the courts will nevertheless accede to dismissal applications. There may be cases in which the stated criteria in the legal authorities are not met but in which the court may nevertheless exercise its discretion in order to achieve justice. As with other common law rules, the general principles as laid down in the cases are not to be considered as exhaustive and comprehensive expositions of the circumstances in which long delay cases may be rejected as if the rules were contained in legislation.

**Discussion**

In regard to the most recent period of delay, namely, 2008-2011, the question is whether ACC was in default as Ms. Goode submits because it had not put in its defence. She says that writing letters seeking information is no substitute for doing what is required under the Rules. There was nothing to stop ACC's solicitors from serving notice for particulars if that was what they thought appropriate. Alternatively, they could have sought inspection or examination facilities formally by way of court application. Instead, they wrote three letters seeking information about the machine and whether there had been an engineer's inspection and the plaintiff's solicitors avoided answering the queries about the machine. They responded with different facts or information or demands without making any reference to the unavailability of the machine or any report as to its condition. I do not think that was an accident and it cannot be explained by saying that different solicitors have different styles of correspondence. The correspondence did not, however, say that ACC needed the information in order to put in their defence and Ms. Goode makes as much of that as she can.

The plaintiff cannot avoid responsibility for this period of delay. He allowed it to happen and it came after other long years of inactivity, also the result of the plaintiff's lethargy. It is troubling that the story of the machine was not revealed. The plaintiff's

solicitors' reticence in this regard may be criticised but it is at one level understandable because of the significance of the information and its potential impact on the plaintiff's position.

The previous periods of delay that are relevant are first between 2003 - 2006,from the issuing of the plenary summons and its purported service on ACC at its office in Ballina and the time when ACC's solicitors filed an appearance and pointed out that the service was bad. I should mention in this regard that there was some discussion about whether the service was actually defective. Ms. Goode suggested that there might be some doubt about the matter and her point was that the Companies Act says that service may be effected at the registered office of a company and she points out that it does not say "shall". I do not think there is anything in this point.

The fact is that the way to serve a company is at its registered office and there is no doubt about that. It is not served by picking a branch office and serving it there. It is true that one can say looking at the merits of the situation that it is relevant that ACC knew of the existence of proceedings against it even if they had not been properly served and it does appear that ACC was able to produce a summons that it must have had somewhere, either in Head Office or in the Ballina branch. However, although Mr Barrett would not have known that his summons had not been properly served, he still did nothing after the purported service for some three years and that delay is his responsibility. It is not clear how the defendant is to be faulted for waiting to see what was going to happen in the case.

The lapse of time between the appearance and the service of a statement of claim is from 2006 to 2008. There is not much to be said about this period except that it represents another significant delay by the plaintiff.

In addition to the consideration of the discrete periods of delay, it is also relevant to take account of the overall situation, which is that a case about a defective rock breaking machine that was supplied in 1999 and that went out of order finally in 2000 has still not been heard or brought to trial thirteen years later. The machine itself has not been seen since 2001 and has long since disappeared, so the case will have to proceed without any evidence as to the condition of the allegedly defective machine now some twelve and more years after it was disposed. The company that supplied it has been out of business for many years. And none of the other defendants is before the Court.

The plaintiff acquired this machine in a commercial transaction and the fact that it was allegedly not fit for purpose and of merchantable quality had commercial implications for the plaintiff. He can be expected to behave in a businesslike fashion. His solicitors can be expected to operate with a minimal knowledge of law such as how to serve a summons on a limited company.

Ms Bird submits that it would be a gross breach of fair procedures to permit the case to proceed in circumstances in which neither party had inspected the allegedly defective machine or had obtained a report on its condition, where the supplier had been dissolved eight years ago and where neither of the other defendants was served. Ms Goode argues that any prejudice is of the bank's own making and that the problem is at least as big for the plaintiff.

The fact that the machine is no longer available is of critical importance in the case. It seems to have been returned to the premises of the second defendant and the plaintiff deposes in his replying affidavit to the motion that it was dismantled and lying around in pieces at the second defendant's premises in or about October, 2001.

It is obvious that the question of prejudice looms large because of the unavailability of the machine and its absence over the past twelve years or so. The machine is and has long been unavailable and incapable of being inspected and that represents a serious disadvantage to each of the parties, the plaintiff as well as ACC. But the plaintiff was in a position to take steps to secure and preserve the machine and I am not, therefore, concerned with the problems that may present themselves to him but rather with the prejudice that arises for the moving party in this motion. In the circumstances, it seems to me that this defendant has established significant prejudice in that its capacity to defend the action is irretrievably impaired. The reluctance of the plaintiff's advisers to divulge the history of the machine is a tacit admission of its importance.

I think that the plaintiff was under a particular obligation to bring on his proceedings as speedily as possible in circumstances where the machine was no longer intact and he was also under an obligation to preserve it for use and examination in the course of the proceedings and to afford the defendants the opportunity of examining it as best they could.

Applying the legal principles to this case, I find that the plaintiff's delay was inordinate and inexcusable and that the balance of justice requires dismissal. The applicant has suffered prejudice by the plaintiff's default. In so far as there are variations of approach in the legal authorities, on any of the tests adopted by the courts, the outcome is the same.