THE HIGH COURT

[2010 No. 8234P]

BETWEEN

BRIAN MAXWELL

PLAINTIFF

AND

IRISH LIFE ASSURANCE Plc

AND

JOHN FALLON

DEFENDANTS

Judgment of Mr. Justice Keane delivered on the 7th March 2018

Introduction

1. This is the defendants' application for an order, pursuant to the inherent jurisdiction of the court, dismissing these proceedings for want of prosecution on grounds of inordinate and inexcusable delay.

2. It has been brought by notice of motion issued on 17 July 2015.

Nature of the claim

3. In the underlying action, the plaintiff ('Mr Maxwell') seeks an order directing specific performance of the payment obligations of the first named defendant ('Irish Life') under a serious illness insurance policy ('the contract'). In the alternative, Mr Maxwell seeks damages against Irish Life for breach of that contract or for negligence, or damages for negligence against the second named defendant ('Mr Fallon') as an insurance broker and agent of Irish Life, or such damages against both defendants.

4. It is common case that Mr Maxwell and his wife, Helena Heffernan ('Ms Heffernan'), entered into the contract with Irish Life in or about June 2004 and that it was a term of the contract that Irish Life would pay Mr Maxwell the sum of €50,000 should he be diagnosed with any one of a list of specified serious illnesses, including a heart attack.

5. The defendants plead that the contract was one of the utmost good faith, imposing a duty on Mr Maxwell to disclose all material facts to them. The defendants allege that Mr Maxwell breached that duty by failing to disclose in answer to direct questions, first, that he was a smoker and, second, that his mother had died of a heart attack at 45 years of age. The defendants contend that, in those circumstances, the contract is voidable and they are entitled to avoid it.

6. The defendants assert that Mr Maxwell signed a declaration on 27 May 2004 confirming his understanding that the said declaration, together with others contained in both the booklet provided by Irish Life setting out the terms of the contract and in his online application form, constituted his application for the relevant insurance cover and confirming that he had read and understood a note provided of his obligation to disclose to Irish Life all facts material to his application, failing which the contract could be void, before declaring that all statements recorded in answer to the questions in his online application form were true and complete.

7. The parties agree that Irish Life wrote to Mr Maxwell and Ms Heffernan on 25 June 2004, confirming the details of their cover. A section of that letter is headed 'Your health details' and states:

> 'Our decision to accept you for cover is based on the information you provided in either your paper or online application form. It is important you take note of the following:
>
> • It is important that you have told us all relevant information that is likely to influence the assessment and acceptance of your application.
>
> • You must carefully review you answers to the health questions and make sure they are correct.
>
> • If any recorded details are incorrect…, you must let us know immediately.
>
> • We have noted in our records that Brian Maxwell is a non-smoker….'

8. A copy of the health questions Irish Life had raised and the answers that Mr Maxwell had given were enclosed with the said letter. The questions and answers material to the defence are:

> '…
>
> 5. Have you smoked tobacco of any kind in the past 12 months or do you intend to smoke in the future? No
>
> 6. How much tobacco do you smoke, on average, each day? [blank]
>
> …
>
> 26. Have your parents …suffered or died from heart disease…or other hereditary disorder before age 60? No
>
> …'

9. Although not expressly pleaded on either side, it appears to be common case that Mr Fallon went through the Irish Life health questions with Mr Maxwell and that Mr Maxwell's answers were recorded by Mr Fallon on his notebook computer for onward transmission to Irish Life. In his statement of claim, Mr Maxwell does not clarify whether he is making the case that Mr Fallon or, perhaps later, Irish Life erroneously recorded the answers that he gave to those questions or is acknowledging that he did initially

provide erroneous information.

10. Mr Maxwell does plead that, on reviewing the documentation provided by Irish Life, he noticed an error concerning his smoking of cigarettes and contacted Mr Fallon to inform him of it. In replies to particulars, Mr Maxwell elucidated upon that claim by confirming: that the error he discovered was the notation that he was a non-smoker in the fourth bullet point quoted from the Irish Life letter of 25th June 2004; that he made that discovery at some point in September 2004; and that his wife Ms Heffernan telephoned Mr Fallon immediately afterwards to inform him of the error and to clarify that Mr Maxwell was, in fact, a smoker. The defendants deny that they were ever so advised.

11. Mr Maxwell pleads that Mr Fallon advised and assured him, through Ms Heffernan, that the error noted would be rectified immediately in a manner that would not affect his rights and liabilities under the policy. The defendants deny that they ever gave any such advice or assurance.

12. Mr Maxwell pleads that, in or about June 2006, he suffered a heart attack within the meaning of that term under the policy. In their defence, the defendants deny that the medical episode concerned comes within that definition.

13. Mr Maxwell submitted a claim form dated 27 September 2006. After various enquiries, Irish Life wrote to Mr Maxwell on 13 September 2007, declining his claim, voiding the contract, and cancelling the policy on the ground of material non-disclosure, specifically Mr Maxwell's failure to disclose that he was a smoker and that his mother had suffered a heart attack at 45 years of age. While noting that it was not obliged to do so where material non-disclosure had rendered the policy void, Irish Life indicated that it was prepared to refund Mr Maxwell's premium payments on an ex gratia basis.

14. It appears to be common case that, contrary to the express plea in the defence to that effect, Mr Maxwell's mother did not die when she suffered that heart attack in 1982 but, rather, was still alive when Mr Maxwell made his claim under the policy in 2006. The printed claim form contained the question: 'Has any blood relative suffered from an illness similar to the one for which you are submitting this claim? If yes, please state relationship, nature of illness and date first diagnosed.' Mr Maxwell replied: 'Mother – heart attack – (about 10 years ago).'

15. The printed claim form also contained the request: 'Please give details of your tobacco consumption 1 year ago, 3 years ago and 6 years ago.'. Mr Maxwell left the space beside that request blank.

16. Mr Maxwell pleads that, through Mr Fallon as its agent, Irish Life was, or should have been, in possession of the relevant information concerning his mother's medical history and his status as a smoker. In particular, Mr Maxwell pleads that Mr Fallon knew all the relevant details about his mother's medical history because a number of members of Mr Maxwell's family had taken out policies of insurance with Irish Life through Mr Fallon previously. The defendants deny that Mr Fallon was in possession of the relevant information and, in the alternative, plead that, even if he was, it could not relieve Mr Maxwell of the obligation to disclose those facts as a matter of the utmost good faith in seeking and obtaining the relevant cover.

17. Mr Maxwell claims specific performance of the contract or damages for breach of contract or negligence. The defendants deny that Mr Maxwell is entitled to the relief he claims and counterclaim for a declaration that Irish Life was entitled to avoid the contract and has lawfully done so.

History of the proceedings

18. Mr Maxwell's solicitors wrote a letter before action to Irish Life on 5 October 2007, to which Irish Life replied on 7 December 2007. The letter before action contains the assertion that 'all information' relevant to the policy had been furnished to Mr Fallon and goes on to state:

> 'Furthermore when the documentation subsequently came to our client, our client telephoned your Mr. Fallon to correct certain information that was incorrect in the answers and was advised by Mr. Fallon "that it would be sorted".'

19. In its reply of 7 December 2007, Irish Life asserted that the defendants were satisfied that Mr Fallon was not made aware of any information beyond what was noted on Mr Maxwell and Ms Heffernan's application form. The replying letter then points to the material disclosure requirements of the policy and the declarations that had been made by Mr Fallon before continuing 'had the information regarding smoking and family history been disclosed to Irish Life, as it should have been, Irish Life would not have been in a position to offer Mr Brian Maxwell the cover he applied for.' Mr Maxwell's attention was drawn to his statutory right of complaint to the Financial Services Ombudsman. It seems to be common case that Mr Maxwell chose not to exercise that right.

20. Instead, a plenary summons issued almost three years later on 1 September 2010 and a statement of claim was delivered on 6 September 2010. Both defendants entered an appearance on 23 September 2010. They raised a notice for particulars on 1 February 2011 and delivered a defence and counterclaim on 8 February 2011.

21. A new firm of solicitors on behalf of Mr Maxwell filed a notice of change of solicitor on 14 February 2012. Mr Maxwell delivered replies to particulars on 4 December 2012.

22. On 18 April 2013, Mr Maxwell's solicitors wrote to the defendants calling on them to deliver their defence and threatening a motion for judgment in default of their doing so. The defendants replied the following day, pointing out that they had delivered a defence and counterclaim under cover of a letter dated 8 February 2011 and enclosing copies of those documents.

23. Mr Maxwell's solicitors wrote seeking voluntary discovery on 4 December 2014. The discovery sought was of all documents 'containing medical evidence concerning [Mr Maxwell's] mother.' The defendants first replied with a holding letter of 7 January 2015, indicating that they were taking Counsel's advice on that discovery request, before providing a substantive reply, dated 2 February 2015, refusing it on the basis that the heart attack suffered by Mr Maxwell's mother - which he had disclosed in claiming under the policy, though not in seeking cover – is not in dispute between the parties. In that letter, the defendants indicated their intention to bring the present application.

24. In keeping with that statement of intention, the present motion issued on 17 July 2015.

Governing principles

25. The broad or fundamental test under which the court exercises its inherent jurisdiction to dismiss a claim for delay is that set forth by Finlay P in *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 and approved by the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459.

26. In *Rainsford*, a judgment delivered on 31 July 1979 though not reported until 1995, Finlay P identified the legal principles governing the dismissal of an action for want of prosecution (at 567):

> '(1) Inquiry should be made as to whether the delay on the part of the person seeking to proceed has been firstly inordinate and even if inordinate has it been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable would appear to be upon the party seeking a dismiss and opposing a continuance of the proceedings.
>
> (2) Where a delay has not been both inordinate and inexcusable it would appear that there are no real grounds for dismissing the proceedings.
>
> (3) Even where the delay has been both inordinate and inexcusable the court must further proceed to exercise a judgment on whether in its discretion on the facts the balance of justice is in favour of or against the proceeding of the case. Delay on the part of a defendant seeking a dismiss of the action, and to some extent a failure on his part to exercise his right to apply at any given time for the dismiss of an action for want of prosecution, may be an ingredient in the exercise by the court of its discretion.
>
> (4) Whilst the party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is mater to the exercise of the court's discretion.'

27. In *Primor*, Hamilton CJ summarised the relevant principles of law as follows (at 476):-

> '(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interest of justice require them to do so;
>
> (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
>
> (i) the implied constitutional principles of basic fairness of procedures,
>
> (ii) whether the delay and consequent prejudice in the special facts of the case are such to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
>
> (iii) any delay on the part of the defendant – because litigation is a two party operation, the conduct of both parties should be looked at,
>
> (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
>
> (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
>
> (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to have caused serious prejudice to the defendant,
>
> (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.'

28. Despite the primacy of the *Primor* test, as Hogan J observed in *Donnellan v Westport Textiles* [2011] IEHC 11, a broader jurisdiction exists to dismiss proceedings. In McBrearty v North Western Health Board [2010] IESC 27, the Supreme Court (*per* Geoghegan J; Murray CJ, Denham, Hardiman, Fennelly JJ concurring) pointed to the important and partly overlapping train of jurisprudence represented by *O'Domhnaill v Merrick* [1984] IR 151, *Toal v Duignan (No. 1)* [1991] ILRM 135 and *Toal v Duignan (No. 2)* [1991] ILRM 140, which demonstrates that, even where there has been no fault on the part of a plaintiff, circumstances may arise in which, nonetheless, it is in the interests of justice to strike proceedings out. This is because of the inherent duty of the courts, under the Constitution, to put an end to stale claims to ensure basic fairness of procedures and the effective administration of justice; *McGarry v Minister for Defence* [2016] IESC 5.

29. In *Comcast International Holdings Inc v Minister for Public Enter*prise [2012] IESC 50 McKechnie J (at paras. 42-43) endorsed the view expressed by Hogan J in *Donnellan* that such cases must be exceptional and Clarke J (at para. 4.3) observed that the threshold to be surmounted to justify the dismissal of proceedings where there is no culpable delay on the part of the plaintiff must necessarily be more onerous than that which applies in the case of culpable delay.

The delay

30. In the grounding affidavit sworn by their solicitor on 16 July 2015, the defendants identify what, they say, are three very significant unexplained periods of delay on the part of Mr Maxwell.

31. The first period is that between 13 September 2007, when Irish Life wrote to Mr Maxwell declining his claim, and 1 September 2010, when proceedings issued, amounting to one of almost three years.

32. The second period is one of just over 22 months, between the delivery of a notice for particulars, dated 1 February 2011, and the provision of replies to particulars, dated 4 December 2012.

33. The third period is one of two years between 4 December 2012, when replies to particulars were delivered, and 4 December 2014, when a letter was sent on behalf of Mr Maxwell seeking voluntary discovery from the defendants in the terms already described.

34. Thus, the defendants submit, Mr Maxwell has delayed in the prosecution of these proceedings for almost four years, having already delayed for almost three years from the date of the accrual of a cause of action before commencing them.

The arguments
35. I am grateful to Mr Devlin S.C., on behalf of the defendants, and to Mr Ó Dúlacháin S.C., on behalf of Mr Maxwell, for the clarity and concision of their arguments. They do not disagree on the relevant legal principles but rather on matters of emphasis in the application of them.

i. inordinate delay?

36. There is no strict chronological or arithmetical answer to the question: what constitutes an inordinate delay in the prosecution of proceedings? As McCarthy J explained in *NC v PMcG* [2009] IEHC 438 (at para. 17), whether inordinate delay arises is a mixed question of fact and law dependent upon the circumstances of each case.

37. The defendants suggest that the entitlement under O. 122, r. 11 of the Rules of the Superior Courts ('RSC') to apply to the court to dismiss a cause or matter 'in which there has been no proceeding for two years from the last proceeding had' provides a useful benchmark for what might be considered an inordinate delay.

38. In *O'Carroll & Anor v EBS Building Society & Anor* [2013] IEHC 30 (at para. 35), O'Malley J considered whether the delay at issue there was inordinate by reference to the ordinary standards of litigation. I adopt that as the correct approach.

39. Finlay Geoghegan J explained in *Manning v Benson and Hedges Ltd* [2004] 3 IR 556 at 562 that, having regard to the earlier decisions of the Supreme Court in Primor and *O'Domhnaill v Merrick*, the court should, in general, consider the period starting with the accrual of the cause of action in determining whether there has been a delay by the plaintiff. There is a separate strand of jurisprudence, most notably illustrated by the decision of Murphy J in *Hogan v Jones* [1994] 1 ILRM 512 and that of Clarke J in *Stephens v Paul Flynn Ltd* [2005] IEHC 148, which endorses the principle identified by Lord Diplock in *Birkett v James* [1977] 2 All ER 801 (at 808) that appropriate deference towards statutes of limitation precludes taking into account any lapse of time before the issue of proceedings in assessing whether there has been inordinate delay, however much the defendant may have been prejudiced by lack of early notice of the claim against him, or the fading recollections or unavailability of his potential witnesses, or the unavailability of evidence, though subject to the following significant qualification:

> 'A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued.'

40. In this case, little seems to turn on whether the period of almost three years that Mr Maxwell allowed to elapse before issuing his proceedings is added to his subsequent delay of almost four years in prosecuting them or is treated instead as rendering that delay less excusable to that extent. Certainly, no explanation has been offered for the passage of almost three years between the repudiation of cover by Irish Life and the issue of proceedings on behalf of Mr Maxwell.

41. In any event, I am satisfied that the post-commencement delay of just over 22 months between the delivery of a notice for particulars and the provision of replies by Mr Maxwell, together with that of two years thereafter until Mr Maxwell sought voluntary discovery, do amount to an inordinate delay by the ordinary standards of litigation.

ii. inexcusable delay?

42. In the case of *O'Connor v John Player & Sons Ltd* [2004] 2 I.L.R.M 321, Quirke J. stated as follows (at p. 332 of the report):

> 'Although the onus of establishing that the delay complained of has been inexcusable clearly rests upon the party so alleging, the onus may be discharged by way of evidence and argument demonstrating that no reasonable or credible explanation has been offered, or can reasonably be said to exist, which would account for, or excuse, the delay.'

43. Mr Maxwell's solicitor, Patricia Cranny, swore an affidavit on 6 November 2015 in opposition to the present application. In it, Ms Cranny avers that the notice of change of solicitor, whereby she came on record for Mr Maxwell, was filed on 14 February 2012 after his former solicitor ceased practice before emigrating. Ms Cranny worked in that solicitor's practice and later took over many of its files after commencing her own practice. Mr Maxwell's file was one of those, although Ms Cranny had not dealt with it previously. Those events occurred during the 22-month period between the delivery of the defendants' notice for particulars, dated 1 February 2011, and the provision of Mr Maxwell's replies to particulars, dated 4 December 2012. No explanation is offered for Mr Maxwell's failure to deliver those replies through his former solicitor during the twelve months before the latter ceased practice.

44. Ms Cranny deposes that, over the following nine-month period between March and December 2012, she took instructions from Mr Maxwell and prepared draft replies to particulars, which she then furnished to counsel, who immediately settled them so that they could be delivered in the same month. Those replies run to just seven paragraphs over two pages and the information they contain is entirely straightforward. Hence, I do not accept that this explanation amounts to a reasonable excuse for that period of delay.

45. Ms Cranny avers that her letter of 18 April 2013, warning of a motion for judgment in default of defence, although a defence and counterclaim dated 8 February 2011 had already been delivered, was a genuine error that occurred because that pleading had been mislaid. While there is no reason to doubt that explanation, it does not amount to a reasonable or adequate excuse for the failure to progress the case.

46. Ms Cranny further avers that the period of more than 18 months between April 2013 and November 2014 was spent taking further instructions from Mr Maxwell and awaiting an advice on proofs from counsel. That advice was received on 5 November 2014 and, in consequence, Ms Cranny wrote to the defendants requesting voluntary discovery on 4 December 2014. That explanation does not amount to a reasonable excuse for that further significant period of delay.

47. Mr Maxwell complains that, before issuing the present motion, the defendants did not respond substantively to his request for discovery of any documents in their possession containing medical information about his mother. Yet, in their warning letter dated 2 February 2015, the defendants stated:

> '[W]e do not believe that your letter of 4th December makes any case for discovery. The fact that the plaintiff's mother had a heart attack is not, on the pleadings, in dispute; indeed, it was expressly referred to by your client in his claim form.'

48. Ms Cranny deposes that, on 23 March 2015, she sought an updated advice on proofs from counsel concerning the erroneous plea in the defence and counterclaim, delivered over four years earlier, that the heart attack suffered by Mr Maxwell's mother had been fatal. No explanation is offered concerning why that advice was not sought earlier.

49. Ms Cranny avers that a notice of intention to proceed was drafted on 17 July 2015 (the day on which the present motion issued) but, 'due to staff holidays', was not issued and served until 22 September 2015.

50. Insofar as it is suggested, if not expressly stated, that the delay at issue here was caused by Mr Maxwell's legal representatives and, in particular, his former solicitor, rather than by Mr Maxwell personally, two observations must be made. First, this is not in that category of cases identified by Macken J in *Brennan v Western Health Board* [1999] IEHC 162 (Unreported, High Court, 18th May, 1999), such as those involving infant plaintiffs, where delay caused by a servant or agent of a party may not be taken into account; Mr Maxwell's legal representatives must be viewed as under his control. Second, as Hardiman J observed in *Gilroy v Flynn* [2005] 1 ILRM 290 at 294, 'the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of a plaintiff personally, but of a professional adviser, may prove an unreliable one.'

51. Having considered the evidence presented on this application, I am satisfied that the post-commencement delay that has occurred in this case cannot be excused, particularly in view of the period of almost three years that Mr Maxwell allowed to elapse from the date of the breach of contract that he alleges to the date of commencement of these proceedings, amounting to a late start that made it all the more incumbent on him to proceed with all due speed.

iii. the balance of justice

52. Under this heading, two specific issues arise. The first is whether there is anything in the defendants' conduct that militates against the exercise of the court's discretion to dismiss the proceedings against them. The second is whether Mr Maxwell's inordinate and inexcusable delay has prejudiced the defendants' capacity to defend the action to the point that a fair trial cannot now be held. I propose to address each of those issues in turn.

53. Through Ms Cranny, Mr Maxwell alleges that the defendants have also delayed the progress of the proceedings and, further, that they have acquiesced in his delay in the conduct of them to the extent that they have been complicit in that delay.

54. In identifying the defendants' delay, Ms Cranny first points to the lapse of time between the delivery of the statement of claim on 6 September 2010 and that of the defence and counterclaim on 8 February 2011, a period of just over five months. However, while I note that, under O. 21, r. 1 of the RSC, a defendant is required to deliver his defence and counterclaim within twenty eight days from the date of delivery of the statement of claim, in the circumstances of this case I do not think that the relevant period of delay of just over four months after that, though obviously undesirable, is sufficient to amount to inordinate delay by the ordinary standards of litigation.

55. The only other period of delay identified by Ms Cranny as directly attributable to the defendants is that between 4 December 2014, the date of Mr Maxwell's request for voluntary discovery, and 16 July 2015, the date of issue of the present motion. I do not think that the characterisation of that period as one of delay attributable to the defendants is correct. First, it overlooks the defendants' letter of 2 February 2015, refusing to make the discovery sought and threatening the present motion. Second, it suggests that the timeliness (or tardiness) of the issue of the present motion to dismiss the proceedings falls to be considered by reference to the date upon which Mr Maxwell made his belated request for voluntary discovery, which I do not think is right. Third, it ignores Mr Maxwell's ongoing default at the material time in failing to deliver a notice of intention to proceed.

56. Mr Maxwell's other complaint in this context is that the defendants acquiesced in the periods of delay on his part that form the basis of the present application. The defendants' motion issued on 16 July 2015 and was preceded by an appropriate warning letter dated 2 February 2015. Bearing in mind the requirement upon an applicant to establish inordinate delay, some margin must be afforded between the period when an application to dismiss will be deemed premature, on the one hand, and the point after which it will be considered late to the point of acquiescence in the plaintiff's delay, on the other.

57. While in *Hogan v Jones*, already cited, Murphy J pointed to the requirement in the exercise of the court's discretion on an application to dismiss for want of prosecution to have due regard both to any delay on the part of a defendant and to any failure by the defendant to exercise the right to apply to dismiss at an earlier stage, that was a case in which four years elapsed between the delivery of the statement of claim and the delivery of the defence, and over ten years elapsed between the commencement of the proceedings and the issue of the defendant's motion to dismiss. Moreover, it was a case in which the relevant defendant expressly acknowledged that its delay in issuing a motion to dismiss was the result of its deliberate election to 'let sleeping dogs lie' rather than take that step.

58. *Dunne v ESB* [1999] IEHC 199 (Unreported, High Court, 19th October, 1999), was a case in which Laffoy J held that the defendant's inaction during the four and a half years after the close of pleadings and completion of discovery was sufficient to tilt the balance of justice against its application to dismiss, but that was very different from the situation here where, while the pleadings closed on 8 February 2011, Mr Maxwell first requested voluntary discovery in December 2014 and the defendants then moved reasonably promptly to refuse that request in February 2015, while at the same time warning of the present application, which issued a few months after that in July 2015.

59. In *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510 at 519, Fennelly J observed that, when considering any allegation of delay or acquiescence by the defendants in the context of an application to dismiss proceedings on grounds of delay, the court will be careful to distinguish between any culpable delay in taking any step in the action and a mere failure to apply to have the plaintiff's claim dismissed.

60. In *Rogers v Michelin Tyre plc & Anor* [2005] IEHC 294 (Unreported, High Court, 28th June, 2005) Clarke J, having noted the comment of Ó Dalaigh CJ in *Dowd v Kerry County Council* [1970] IR 27 at 42 that litigation is a two party operation, drew a distinction between what he termed 'active delay' on the part of a defendant, such as failing to file a pleading, reply to particulars, address discovery or the like, and 'inactive delay', meaning a failure to move an application to dismiss proceedings that have become dormant, a factor to which much less weight attaches.

61. Thus, while the defendants' moderate delay in delivering their defence and counterclaim and their limited acquiescence in Mr Maxwell's delay in the conduct of these proceedings are each factors that must be taken into account in considering the balance of justice, little weight attaches to them.

62. The second specific issue to be weighed in considering the balance of justice is that of the prejudice to the defence of the action attributable to Mr Maxwell's delay in prosecuting it.

63. In the affidavit sworn on 16 July 2015 that grounds the present application, Gillian Fitzgibbon, the defendants' solicitor identifies what are likely to be the three main controversies at trial, if Mr Maxwell's action is permitted to proceed.

64. The first is whether Mr Maxwell's wife, Ms Heffernan, contacted Mr Fallon to advise the defendants that their record that Mr Maxwell was a non-smoker was incorrect. Ms Fitzgibbon avers that the telephone contact at issue is alleged to have occurred in June 2004 and, remarkably, in her replying affidavit on behalf of Mr Maxwell, Ms Cranny agrees. I say 'remarkably' because, while Mr Maxwell gave no date for the alleged contact in his statement of claim, at paragraph 2(d) of his replies to particulars he asserts that it occurred 'immediately after discovery of the error in September 2004.'

65. Thus a key controversy, if not the key controversy at trial, if it is permitted to proceed, will be whether Ms Heffernan telephoned Mr Fallon on an unspecified date in September 2004 to inform him of the relevant error and, if so, whether in the course of that call Mr Fallon on behalf of the defendants gave Mr Maxwell an assurance through Ms Heffernan 'that the error noted would be rectified immediately and in such a way as would not affect the rights and liabilities of [Mr Maxwell] pursuant to that policy.' When the present motion issued, more than ten years had already elapsed since September 2004.

66. The second obvious controversy at trial will be the extent, if any, to which Mr Fallon as agent for Irish Life was aware of Mr Maxwell's family medical history (and, in particular, his mother's prior heart attack) when the policy was taken out in June 2004. Of course, that will only arise if Mr Maxwell can establish as a matter of fact or law that he was absolved of his obligation to make material disclosure to the extent that the defendants were, or ought reasonably to have been, aware of the information that he failed to disclose. Mr Maxwell pleads that the defendants were, or ought reasonably to have been, aware of the relevant family medical history because Mr Fallon 'had acted in relation to a number of policies of insurance taken out by members of [Mr Maxwell's] family.' In his replies to particulars, dated 4 December 2012, Mr Maxwell elucidates that for several years, Mr Fallon, as insurance broker, had dealt with the house insurance and, perhaps more pertinently, life insurance requirements of Mr Maxwell's sister and three brothers. To be material, those dealings must necessarily have occurred prior to June 2004, more than a decade before the issue of the present motion.

67. The third inevitable controversy at trial, should Mr Maxwell prevail in the resolution of the other two, is whether the medical episode he suffered in or about June 2006 amounted to a heart attack within the meaning of that term under the policy.

68. To what extent, if any, have the defendants been prejudiced in their capacity to defend the action by addressing those controversies at trial?

69. The only point of specific prejudice averred to on behalf of the defendants is that Irish Life has experienced unspecified difficulties in communicating with Mr Fallon, who no longer works in his former role. That averment is too vague to be afforded any weight. The defendants did not attempt to suggest, much less assert, that Mr Fallon will not be available to give evidence at trial.

70. However, that is not the end of the matter. In *Primor*, already cited, O'Flaherty J stated (at 521) that 'once delay which is inordinate and inexcusable is established then the matter of prejudice would seem to follow almost inexorably.'

71. As McGuinness J made clear in *Carroll Shipping Ltd v Matthews Mulcahy & Sutherland Ltd* [1996] IEHC 46 (Unreported, High Court, 18 December 1996):

> 'Where in any trial the issues between the parties which fall to be decided by the court can clearly be established by documentary evidence only, it may well be that delay, however inordinate and inexcusable, will not in fact prevent the holding of a fair and just trial. However, where matters are at issue which are not, or are not fully, covered by documentary evidence, there is a greater likelihood of prejudice resulting from delay.'

72. Conscious of this problem, Mr Ó Dúlacháin submits on behalf of Mr Maxwell that full medical records of the diagnosis and treatment of the coronary episode that he experienced in June 2006 are likely to remain extant, albeit that no evidence was adduced on the point. It might also be suggested that some record of any family medical history disclosed to the defendants by any of Mr Maxwell's siblings prior to June 2004 might still be in existence, although again no evidence was adduced in that regard.

73. The fundamental difficulty for the defendants (and, hence, for Mr Maxwell in resisting the present application) is that the primary point of contention between the parties, namely whether a telephone conversation in the terms alleged took place between Ms Heffernan and Mr Fallon at an unspecified time on an unspecified date in September 2004, is one that is not covered or addressed by any documentary evidence. Thus, it is a controversy that can only be resolved by pitting the recollection of Ms Heffernan against that of Mr Fallon – that is to say, by purporting to adjudicate upon a 'swearing match' - at more than a decade's remove from the period at issue.

74. In addressing that difficulty, Mr Ó Dúlacháin submits that the potential prejudice to the defendants is much diminished because, in the words of Laffoy J in *Dunne v ESB*, the relevant claim did not come 'out of the blue' as it did in *Toal v Duignan (No. 1).* There is no doubt that the latter was an unusual case in which the plaintiff first intimated, and then issued, proceedings in 1984 in respect of professional negligence alleged to have occurred in connection with both the medical examination of him as a newly delivered infant in 1961 and a subsequent medical examination that he underwent while still a boy in 1971. In contrast, *Dunne v ESB* was an action commenced in 1989 to enforce an undertaking, allegedly given in 1963, to provide and maintain mooring and jetty facilities at a pier. Very significantly, in the judgment in that case, Laffoy J made the point that the rights asserted there had been in controversy between the parties from the mid-1960s onwards and that the dealings between them in that regard were extensively documented throughout the sixties, seventies and eighties. It was in that context that the claim had not come, as it were, 'out of the blue.'

75. The core issue in the present case is Mr Maxwell's contention that Irish Life was not entitled to void his serious illness policy in 2007 because, contrary to what the relevant documentation records, he had complied with the material disclosure requirements under that policy.

76. In the letter before action that Mr Maxwell, through his solicitor, sent to Irish Life on 5 October 2007, it was asserted that, when

he had received the policy, Mr Maxwell had telephoned Mr Fallon 'to correct certain information that was incorrect in the answers' and had been told by Mr Fallon that 'it would be sorted.' In his statement of claim delivered almost three years later on 6 September 2010, Mr Maxwell was only marginally more forthcoming in pleading that, on reviewing the documentation furnished with his statement of benefits, he had noted it contained the error that he was a non-smoker and had contacted Mr Fallon to inform him of it, receiving in response the advice and assurance that the error would be rectified immediately in a way that – remarkably, it might be thought – would not affect his rights or liabilities under the policy. In their defence and counterclaim delivered on 8 February 2011, the defendants expressly deny that Mr Maxwell contacted Mr Fallon to advise him of any such error or that Mr Fallon, or anyone else on behalf of the defendants, ever gave Mr Maxwell the advice or assurance alleged.

77. The defendants sought particulars of that plea on 1 February 2011. Mr Maxwell did not furnish those particulars until 4 December 2012. Only then did the following details of Mr Maxwell's case emerge: that he had not reviewed the relevant documentation and discovered the error concerning his status as a non-smoker until September 2004; that he had contacted Mr Fallon immediately after discovering it on an unspecified date during that month; that he had done so through his wife, Ms Heffernan, who telephoned Mr Fallon; and that, during that telephone call, he had received an assurance from Mr Fallon through Ms Heffernan that the error 'would be sorted out.' Accordingly, I do not think it can be said that the relevant claim was meaningfully documented before December 2012, or that it has ever been as clearly documented as the claims at issue in *Dunne v ESB* were.

78. Thus, while it might be correct to say that Mr Maxwell's claim - that the defendants were not entitled to void his serious illness policy in 2007 because he had made the necessary material disclosure at some time after it issued in 2004 - did not come entirely 'out of the blue' when he later issued proceedings in September 2010, it did remain impenetrably vague in its terms until replies to particulars were delivered on 4 December 2012, and still lacks the precision about when in the month of September 2004 the disputed telephone call is alleged to have been made that might have mitigated to some extent the inexorable prejudice caused by Mr Maxwell's delay.

79. Mr Ó Dúlacháin submits that there is no evidence that the delay in this case will prejudice a fair trial. He is specifically critical of the absence of any evidence from Mr Fallon concerning the nature and extent of his recollection of the relevant period. In my view, that criticism is misconceived for two reasons. The first is that requiring any person to address his or her recollection of an event that he or she contends did not occur is, at best, a rather peculiar conceptual exercise. The second and more fundamental difficulty is that the accuracy of any recollection falls to be considered objectively, rather than subjectively. Human experience and several past miscarriages of justice teach us that subjective assertions of clear recollection frequently fail to correlate with the objective facts, just as expressions of faint recollection are often found to be accurate. Shortly put, memory is fallible - whether a particular individual accepts that in relation to his or her personal recollection or not.

80. In *Superwood Holdings plc v Scully* [1998] IESC 37, the Supreme Court (*per* Murphy J; Flaherty and Lynch JJ concurring) acknowledged the general proposition that memories fade and become less reliable with time. In Robert McGregor *& Sons (Ireland) Ltd & Anor. v The Mining Board & Ors*. [2002] IESC 28 (Unreported, Supreme Court, 6th April, 2002), that Court (*per* Keane CJ; Murphy and Hardiman JJ concurring) identified the unarguable prejudice caused by delay, given the frailty of human memory. And in *Manning v Benson and Hedges Ltd*, Finlay Geoghegan J concluded (at 574) that delays of four to five years would, as a matter of probability, reduce the potential of persons to give meaningful assistance or act as witnesses. It need hardly be added that there was no suggestion of requiring those persons to aver to that fact to enable the court to take it into consideration.

81. *Stephens v. Paul Flynn Ltd* was a case in which, were it permitted to proceed, a minimum of ten years would have elapsed between the events in issue and any likely trial date, just as is the position here. Clarke J accepted that the difficulty in resolving issues of credibility between conflicting witness accounts would be all the more difficult to resolve where those witnesses were being asked to recollect matters that occurred so long ago. While that prejudice was mitigated by the fact that broadly contemporaneous witness statements had been taken, Clarke J was satisfied that it remained of some significance nonetheless. No such contemporaneous witness statements exist in this case.

82. The problem created by Mr Maxwell's delay in prosecuting an action that must hinge at trial on whether a phone call was made on an unspecified date more than ten years ago and, if it was, precisely what was said during it, is the one that Diplock LJ addressed in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 255:

> 'And where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard.'

83. Those word of Diplock LJ have been cited with approval in our courts many times and by several eminent jurists; see, for example, *Dowd v Kerry County Council* [1970] IR 27 (*per* Ó Dálaigh CJ), *Rainsford v Limerick City Council* (*per* Finlay P), and *O'Domhnaill v Merrick* (*per* Henchy J). In the case last mentioned, Hency J stated (at 158)

> 'While justice delayed may not always be justice denied, it usually means justice diminished.'

84. Hardiman J warned in *Gilroy v Flynn* [2005] 1 ILRM 290 at 294:

> '[T]he courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued.'

Conclusion

85. In *Sweeney v Horan's (Tralee) Ltd* [1987] ILRM 240 at 243, Finlay CJ pointed out:

> '[T]he courts have a consistent duty to try and convey both to litigants and lawyers, the necessity for the bringing of cases to trial with due expedition…'

86. The dismissal of proceedings prior to trial on grounds of delay is a draconian step that must not be taken lightly. Such an order cannot be made merely to punish dilatoriness in the prosecution of an action or to enforce procedural discipline. Nonetheless, it is an order that the court must not refrain from making when the essential justice of the case requires it. For the reasons I have given, I conclude that the delay in this case has given rise to a substantial risk that it is not possible to have a fair trial. For that reason, the balance of justice tilts in favour of the dismissal of the action and I will so order.