**THE HIGH COURT**

**[2009 No. 5942 P]**

**BETWEEN**

**DECLAN MURPHY AND DARREN O'DONOHOE**

**PLAINTIFFS**

**AND**

**MAGNET NETWORKS LIMITED**

**DEFENDANT**

**JUDGMENT of Mr. Justice MacGrath delivered on the 12th day of April, 2019.**

1. This is the defendant's application for an order pursuant to the inherent jurisdiction of this Court to dismiss the plaintiffs' claim for want of prosecution on the grounds of inordinate, inexcusable and/or unreasonable delay in the prosecution of the proceedings. The notice of motion issued on the 23rd April, 2018. This is the second such application brought by the defendant. The first proceeded before Hedigan J. on the 9th February, 2015 and he made an order dismissing the claim for want of prosecution. The plaintiffs appealed the order. The Court of Appeal allowed the appeal and the plaintiffs were directed to pay costs and a certain sum of money towards the expense of retention of a potential witness for the defence.

2. Immediately after the decision of the Court of Appeal, the plaintiff sought discovery of documents. The terms of discovery were agreed on the 13th November, 2015. On the 29th January, 2016, the plaintiffs' solicitor sought from the solicitor for the defendant, details of the appropriate bank account for the transfer of the sums due on foot of the order of the Court of Appeal. While the order was clear on its face, an element of confusion concerning the circumstances in which this money was to be paid arose as a result of subsequent correspondence, which confusion may be said to have persisted up to October, 2016. During part of this period, the process of discovery was ongoing and on the 25th May, 2016 a hard copy of discovered documentation was provided to the solicitor for the plaintiff. Thereafter communications between the parties primarily related to the payment of the sum of money and also in relation to payment of costs of the previous application until this motion issued.

3. This application is grounded on the affidavit of Ms. Corinne Molloy, solicitor, on behalf of the defendant, sworn on the 19th April, 2018. She avers that since the order of the Court of Appeal the plaintiffs have failed to take steps to comply with the conditions imposed by that order, and by which the claim was permitted to proceed. Ms. Molloy states that an unexplained period of three and a half years was considered on the previous application. She avers that the Court of Appeal in an *ex tempore* judgment, stated that the plaintiffs' conduct was such as to be on the verge of warranting a dismissal of the case at that time. As part of the terms of allowing the appeal, the plaintiffs were required within six months of that date to pay to the defendants' solicitors the sum of €15,000 on account, towards the cost that would be incurred in hiring a former employee to assist in the preparation of the case for trial. In this regard, a previous employee of the defendant, Mr. Hanrahan, had left employment in July, 2013 and it was submitted to the Court of Appeal on that occasion that there would be a cost involved in Mr. Hanrahan's assistance in the preparation of the defence.

4. Ms. Molloy avers that when the solicitor for the plaintiffs wrote in January, 2016 in connection with the payment that unfortunately the legal advisor who was temporarily handling the file replied on the 11th February, 2016 stating that the funds were not yet required and requesting that they be held by the plaintiffs' solicitors until required. Ms. Molloy states that this was not what was envisaged by the order of the Court of Appeal. The plaintiffs' solicitor replied on the 16th February, 2016 confirming that she would hold the funds pending resolution of this matter, something which accorded with neither order of the the Court of Appeal nor the erroneous letter from the defendants' advisor.

5. On the 14th September, 2016 the defendants' solicitors wrote to the plaintiffs' solicitors demanding payment of its costs which had by then been taxed. On the 14th October, 2016 the plaintiffs' solicitors wrote to the defendants' solicitors requesting that they be furnished with account details for the transfer of the €15,000 and these details were provided by letter of the 27th October, 2016. However, by letter of the 21st December, 2016 the plaintiffs' solicitor claimed that the Court of Appeal had directed them to hold the €15,000 until such time as discovery was completed, which was inconsistent with the terms of the order. The plaintiffs' solicitor also requested that Mr. Hanrahans' invoices be furnished but again Ms. Molloy points out that this was not envisaged by the order of the Court of Appeal. The purpose of those funds was to facilitate payment of the expense associated with the retention of services of Mr. Hanrahan for trial preparation, and solely for the purposes of completion of discovery. This led to further correspondence in January, 2017 and a reminder on the 21st March, 2017, to which a reply was received on the 24th March, 2017. It was therein claimed that the order of the Court of Appeal was connected with the process of discovery. That letter continued:-

> *"…the position was that the Court directed the Plaintiffs to provide a sum of €15,000 on account in respect of the involvement of Mr. Hanrahan regarding discovery. We have previously asked and it has not been made clear to us what involvement, if any, Mr. Hanrahan had and separately we have not been furnished a copy of his invoice to enable us to pay out on foot of same. You might please clarify this issue. Please note that we are holding the €15,000 at the request of your office."*

6. Ms. Molloy avers that it was difficult to understand how and why this change of attitude came about, particularly when the plaintiffs' solicitors had offered to transfer the money in January, 2016. By letter of the 12th April, 2017, Ms. Molloy threatened a motion in default. A reply was not received until the 28th February, 2018 when once again Ms. Martin suggested, incorrectly as it transpires and a mistake which she has since admitted, that the €15,000 was to some extent tied up with payment for Mr. Hanrahan's assistance in the preparation and compiling of discovery. This was not the case and the order of the Court of Appeal is quite clear in this regard. By letter of the 28th March, 2018, details of the bank account into which payment ought to be made were provided and Ms. Molloy cautioned:-

> *"Failing receipt of the above funds in our account within 14 days, we will proceed to issue a motion without further notice to you. We are in fact taking instructions whether to issue this motion regardless of what you do, as it is almost three years since the order of the Court of Appeal and it has not yet been complied with."*

7. Thus, it is not unreasonable to conclude, on the basis of the correspondence, that the primary focus of the defence as of 28th March, 2018, was the plaintiff's failure to comply with the order of the Court of Appeal. On the following day, 29th March, 2018, funds were transferred into the defendant's account.

8. By the time the application came on for hearing, the costs of the application had been paid. Ms. Molloy avers to her belief that the payment of €15,000 within six months was a condition upon which the plaintiffs were permitted to proceed with their case. This was not satisfied and while there was some initial acquiescence in that delay, the funds had been repeatedly demanded since October, 2016 and were not provided. She also avers that pending receipt of those sums, Mr. Hanrahan had not been engaged save to deal with queries in respect of discovery and that in consequence two years and nine months of additional delay has occurred. She states that while the discharge of costs was not a condition on the continuation of the proceedings, non-payment of the costs had added to the prejudice suffered by the defendant. Ms. Molloy avers that the general prejudice that persuaded the High Court to dismiss the case in 2014 and the Court of Appeal to allow the appeal in 2015 on strict conditions *"has now been accentuated by over two and a half years' further delay"*. Ms. Molloy observes that the case concerns the interpretation and rectification of a commercial agreement entered into over 10 years ago and almost nine years has passed since the institution of the proceedings. She states that the only substantive event in the proceedings which had occurred within the last six years was the request, agreement and completion of the defendant's discovery and subsequent inspection of documents which took place over a 10 month period. She believes that the plaintiffs have shown contempt for the process, given the warnings of the Court of Appeal in 2015.

9. In a replying affidavit sworn on the 8th June, 2018, Ms. Martin, solicitor of the plaintiffs refutes the allegation that nothing of significance has occurred since the date of the decision of the Court of Appeal. Several matters of importance, including discovery took place. She sought counsel's advices because of the complex nature of the issues and data to be examined. She consulted with counsel in October 2016 but did not receive a response from him. Other counsel was engaged and matters progressed from there. Forensic accountants were engaged in November, 2017. Ultimately, a report was obtained from Messrs Grant Sugrue in June, 2018.

10. Ms. Martin avers that the allegation regarding "*additional*" delay is new. Until receipt of Ms. Molloy's affidavit it had not been suggested, either in correspondence or in pleadings, that any alleged delay in the payment of the said sum of €15,000 had hampered the preparation of the defence. She avers that the opposite appears to be the case, in that the defendants completed discovery in May, 2016 without reference to difficulties with payment to Mr. Hanrahan.

11. Further, it was not Ms. Martin's understanding of the order of the Court of Appeal that the payment of €15,000 was a condition of the case proceeding and she refers to her correspondence in January, 2016 regarding the offer of payment.

12. Ms. Martin outlines the nature of the dispute between the parties. An agreement was entered into on the 14th March, 2008 whereby the plaintiff agreed to transfer to the defendant their interests in a company named Webtalk. A disagreement arose about entitlement to remuneration under the agreement. The agreement made no distinction between business and non – business customers. The plaintiffs maintain that both types of customers were relevant to the determination of the amount of a particular stage payment known as "*Milestone 2 payment*" and also another type of payment, known as "*Earn Out one payment*". The defendant contends that only business customers were relevant. Ms. Martin also observes that in its defence and counterclaim of the 18th June, 2010, the defendants sought an order for rectification in certain circumstances. She avers that in the event of the claim being struck out, there is a serious risk that the defendant will be unjustly enriched.

13. Having obtained the discovered documentation and discussed it with counsel, Ms. Martin requested a forensic accountant to prepare a report. This was received on the 7th June, 2018. She exhibits a letter from the forensic accountants stating that they had received papers and copies of the pleadings on the 23rd November, 2017, thereafter they sent a letter to Ms. Martin on the 11th December, 2017 in which they outlined their terms of engagement and sought further information. This was received by them on 25th April, 2018. There were further discussions and a draft report was prepared. It was sent to Ms. Martin on the 25th May, 2018. The forensic accountants described this as *"a very complicated case that requires considerable review of spreadsheets, featuring a large volume of figures*". Ms. Martin states that the obtaining of discovery was essential and fundamental to the preparation of the claim. She states that once the defendant made discovery on 26th May, 2016, instructions were taken from the plaintiffs in relation to the contents of them. A brief was sent to counsel seeking assistance with the preparation of a letter of instruction to a forensic accountant. The plaintiffs met with counsel in November, 2016 but no further advices were received. Eventually in October, 2017, different counsel was engaged and drafted a letter which was sent to the accountants on the 8th November, 2017.

14. Ms. Martin accepts that it would have been better to have transferred the funds earlier than she did but she explains that this was a *bona fide* error made without any ill intention on her part. She states that she became confused on the issue of discovery and the payment of the sum and that she conflated the two items. She accepts that she was incorrect and takes full responsibility for this. Following the transfer of the funds on the 29th March, 2018, and a service of a notice of intent to proceed, the defendants issued this motion. Also, notice of change of solicitor was served on her office on the 3rd November, 2017. Ms. Martin contends that the defendants have failed to point to any specific prejudice in consequence of the delay and that there is nothing to suggest that Mr. Hanrahan is no longer available as a witness or that delay in payment of the sum of €15,000 was an obstacle to his cooperation in the discovery process.

15. Ms. Martin objects strenuously to the suggestion that she has shown contempt for the court process. She has been involved in the process from the beginning and always sought to do her best and to perform to the best of her ability.

16. Finally, Ms. Martin avers that the proceedings are now ready to be determined, that a reply and defence to counterclaim was delivered on the 8th June, 2018. The forensic accountant's report has also been furnished to the defendant. She wrote to the defendant's solicitors on 23rd May, 2018 informing them that she was in the process of seeking a date for hearing to which a reply was received in June, 2018 advising her that she was risking the incurring of increased costs if the matter was set down for hearing. A certificate of readiness has since been prepared by senior counsel. The proceedings, therefore, from the plaintiffs' perspective are ready for hearing.

17. Mr. Robert Dunne was the solicitor who wrote the letter on behalf of the defendant on the 11th February, 2016. He did not have a recollection of speaking with Ms. Martin. He was aware of the purpose of the funds, namely to discharge in part, or in full, the fees due to Mr. Hanrahan for his assistance in preparing for trial.

**Submissions of the Defendant/Applicant**

18. Mr. O'Connell S.C., referring to the test to be applied as enunciated in *Primor v Stokes Kennedy Crowley* [1996] 2 I.R. 459 and developed in subsequent cases, submits on behalf of the defendant, that the delay on the part of the plaintiffs is inordinate and inexcusable; and that a consideration of the balance of justice should result in their dismissal. The court, it is submitted, must consider not only the delay from the date of the order of the Court of Appeal to the date of the issuing of the motion but that earlier delays, considered on the previous application, must be considered. Thus, that the Court of Appeal may have allowed the appeal did not result in a *resetting of the clock*. He further submits that the fact that a previous motion was brought, even though it was ultimately unsuccessful, is nevertheless a factor to be weighed against the plaintiff. This is particularly so given the clear indication of the Court of Appeal that the case ought to be expedited. Counsel contends that the court must take a global view of the delay.

Thus, it took eight months for delivery of the statement of claim and there was a delay of three and a half years thereafter between March, 2011 and September, 2014, which Hedigan J. found to be inordinate and inexcusable. There has now been a further lapse of time of 22 months from May, 2016, when discovery was completed, after which there can be no question of acquiescence on the part of the defendant in respect of any period of delay. Post October, 2016 there was 18 months of a delay until forensic accountants were instructed and delay in the payment of the €15,000. He further submits that if the court is satisfied that there has been inordinate and inexcusable delay, then he does not have to point to any specific prejudice and that general prejudice will suffice. Mr. O'Connell S.C. also points to the lateness of the delivery of a reply and defence to counterclaim, the updating of the particulars of loss and the supplying of the report of the forensic accountants. The defendant will have to obtain reports and there will be a further lapse of time before a trial will take place, even assuming that it is progressed with all due diligence. He argues that if an applicant in an application such as this is required to establish specific prejudice such as failing memory, he or she is left in a very invidious position. On the one hand, he or she may be criticised for not advancing such evidence on affidavit, and on the other hand, if the motion is not successful, may be left in a position where the affidavit used on the motion is used as ammunition by the opposition to challenge the veracity of reliability of such testimony.

19. It is submitted that there are two aspects to the significance of the non-payment of the sum of €15,000. First, the order of the Court of Appeal was clear. The plaintiff was well aware of the importance of the payment. Second, the purpose of the order was to ensure that Mr. Hanrahan would be reimbursed as matters progressed and also to ensure that the defendant would not be exposed to additional expense and costs. There is little doubt that the order was not contingent upon an invoice being produced and counsel states that it is difficult to understand the attitude taken by the plaintiff in this regard. He notes that while Ms. Martin explains that confusion had arisen in her mind, she does not explain what she understood the replies from the solicitor for the plaintiff to mean. It is also suggested that Ms. Martin is casting considerable blame on counsel, and that this is the second occasion on which she has done so.

20. Counsel submits that no explanation is given of the degree of knowledge which the plaintiffs themselves may have. The plaintiffs knew that they were "*let out of jail*" by the Court of Appeal and the onus was on them to ensure that their solicitor move matters on in a prompt fashion. It is submitted that if there were considerable delays on Ms. Martin's part, it was incumbent upon the plaintiffs to retain a new solicitor and to progress the claim.

21. Referring to decisions where disparity of resources is described as being an important consideration in the determination of where the balance of justice might lie, he submits that no statement of resources has been put forward, there is no evidence of inequality of arms and that while the standard to be applied is that of the average client and the average lawyer and that there is no evidence of such disparity.

22. Mr. O'Connell S.C. contends that while solicitors were involved at the commencement of the contractual negotiations and provided an initial draft of the agreement, the agreement was concluded in the absence of legal representation. They were led and coordinated on the defendants' side by Mr. Hanrahan. Thus, the defendant will require his assistance at trial. The categories of discovery sought and made bears testimony to the complexity of the issues required to be considered. An additional source of prejudice, he claims, is the requirement placed upon the defendants to make provision for the costs of litigation in their accounts.

23. Reliance is placed on *dicta* in *Millerick v Minister for Finance* [2016] IECA 206, where Irvine J. stated at para. 32 on p. 12:-

> *"32. In light of the submissions made by Mr. McGovern concerning the defendant's failure to identify any specific prejudice arising from the delay, a further point needs to be made concerning the approach of the Court to the third leg of the Primor test. It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. (See Cassidy v. The Provincialate [2015] IECA 74 ). That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The Court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. which are conveniently summarised in the head note of the Primor decision."*

24. In considering the question of the balance of justice, he submits that one must look prospectively and that general prejudice must be weighed against the plaintiffs and may be inferred where the court is satisfied that there has been inordinate and inexcusable delay.

**Submissions of the Plaintiffs**

25. Mr. Mulcahy S.C. submits that analysis of the period post 25th July, 2015 indicates three periods of delay. The first is the period between the decision of the Court of Appeal on the 23rd July, 2015 and the making of discovery in May, 2016. The second period, which he describes as problematic for the plaintiff, concerns a period from May, 2016 to November, 2017. The third is from November, 2017 to the bringing of this application on 23rd April, 2018.

26. With regard to the first period, he submits that no fault can be attributed to the plaintiff. A letter for discovery issued immediately. Discovery was ultimately agreed between the parties. Addressing the categories of discovery sought, and although this is an argument more directed toward prejudice, he points out that a considerable number of categories relate to quantum. The central issue in the case is the meaning to be ascribed to the word "customer" under the contract. The affidavit of discovery identifies Mr. Hanrahan under almost all categories and there is no evidence of prejudice regarding the availability of Mr. Hanrahan.

27. The second period is between May, 2016 and November, 2017. Mr. Mulcahy S.C. submits that it is not the case that his instructing solicitor did not take any steps during this period. She took instructions from her client following receipt of discovery, she prepared a brief for counsel to advise and although she had difficulty in receiving a response from counsel, other counsel was engaged in October, 2017. The case was thereafter pursued following this necessary step.

28. While Mr. Mulcahy S.C. accepts that this second period is a considerable period of time he does not accept that such delay, as a matter of law, is inordinate. He submits that Ms. Martin was justified in seeking the input of counsel in the drafting of the appropriate letter to be addressed to the accountants. He states that genuine efforts were made by Ms. Martin to progress matters and that the plaintiffs should not be penalised.

29. In the third period from November, 2017 to April, 2018, it is submitted that neither the plaintiff nor their instructing solicitor had control over this because the matter was complex and that significant data required analysis. Mr. Mulcahy S.C. also accepts that the plaintiffs were unaware that this process was ongoing during this period and it may have looked to them as though nothing was happening.

30. Counsel accepts that all periods of delay must be taken into account but that the order of the Court of Appeal could not be

ignored. This is not a case in which proceedings issued close to the expiration of the limitation period and where a greater onus might be on a plaintiff to progress the case. He also accepts, however, that where proceedings are issued with alacrity, it does not necessarily follow that greater latitude will be afforded in their prosecution. It is, however, a factor to which the court should attach some weight.

31. Counsel submits that the respective resources of the parties should be considered. Ms. Martin is a sole practitioner in a small firm of solicitors. The defendant is a multi-national telecommunications company with a dedicated in-house solicitor. The plaintiffs themselves are what he described as young entrepreneurs.

32. It is submitted that no specific prejudice is alleged, and that the court should not infer prejudice. Insofar as reliance is placed on the decision of Irvine J. in *Millerick v Minister for Finance* [2016] IECA 206, where she stated that "*even marginal prejudice may justify dismissal"* of proceedings (emphasis added). Mr. Mulcahy S.C. stresses that the court has a discretion. Further, if he is incorrect about this, and if it is permissible to infer general prejudice where delay has been inordinate and inexcusable, such inference is rebuttable in this case by reason of the nature of the case, which, it is submitted is essentially a *'documents'* case. The dispute concerns the meaning of customers within the contract. Mr. Hanrahan led the negotiations on behalf of the defendant and nothing suggests that he will not be available to give evidence. He relies upon the decision of Clarke J. (as he then was) in *Comcast International Holding Incorporated & others v. Minister for Public Expenditure & others* [2012] IESC 50 where he categorised the prejudice as being mild because the case was largely documentary based. While it is accepted that this case is not purely a documents case, nevertheless it is one where the construction of a commercial contract will be central to the determination of the dispute between the parties. He therefore submits that oral testimony is of marginal relevance.

33. *Collins v. Minister for Justice* [2015] IECA 27 it is submitted is distinguishable. Here, the plaintiff had made an allegation of Garda mistreatment. A key medical professional had died. There had been a six-year delay between the service of the plenary summons and the statement of claim. Counsel further places reliance on the decision of Murphy J. in *Hughes v. Cusack* [2016] IEHC 34, a professional negligence action. There was a significant delay between the delivery of the defence in May, 2006 and the subsequent reply to the defence in February, 2011. The court was satisfied that the applicant's right to a fair trial had not been jeopardised. All documents were available and the consideration of the documents was at the core of the case.

34. Counsel submits that *O'Riordan v. Maher* [2012] IEHC 274 is authority for the proposition that central to the determination of where the balance of justice lies is whether the ability of the defendant to defend the case has been prejudiced by the delay, and that there is no such evidence here. It is not claimed that there was delay or acquiescence by the defendant. With regard to the defendant's counter claim, it is submitted that, again, the core dispute concerns the meaning of "*customer*".

35. In reply, Mr. O'Connell S.C. submits that the first issue which the court must identify is the nature of the dispute and that this is how the court will engage the question of prejudice. He submits that the plaintiff in its submissions, fails to engage with the principles of interpretation outlined by Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 All ER 98, that one must construe the words of the contract by reference to the factual matrix in which it is made and the shared knowledge of the parties which bears on this.

36. Counsel also submits that there has been a finding in these proceedings by the High Court that the delay on the part of the plaintiff is inordinate and inexcusable, and that this must also be inferred from the order made by the Court of Appeal. The first two legs of the *Primor* test, therefore, have already been determined. The only issue for determination now is the third limb of the test – the balance of justice. If he is incorrect in this submission, and if he has to engage in analysis of the inordinate and inexcusable nature of the delay, he submits that there is sufficient evidence on these aspects of the test.

37. I should also address one aspect of the controversy which I consider to have been resolved. Ms. Molloy averred that the failure to transfer funds over such a period of time "*raises the question whether in fact the funds were ever in the plaintiffs' solicitors' client account, or whether they were held and then withdrawn*". Ms. Martin has taken particular objection to this and has exhibited copies of bank statements which confirm that the monies were in her account as of January, 2016. While it was suggested in submissions to the court that the statements do not confirm that the money continued to be in the account and were not withdrawn, this is not a matter that was strongly pursued. To the extent that Ms. Molloy in her affidavit of the 19th April, 2018, at para. 23 thereof, may be said to have implied that there was either an inaccuracy or misrepresentation in Ms. Martins' letter of January 2016, I am sure that Ms. Molloy did not intend to cause offence to Ms. Martin in this regard. In any event, I am satisfied on the evidence that the money was present in her account when required.

**Decision**

38. The test applicable on this application is that which was enunciated in *Primor*. It involves a three stage analysis. First, the onus of proof is on the moving party to establish on the balance of probabilities that the delay on the part of the other party and in respect of which complaint is made, is inordinate. If the delay is not inordinate, then the application cannot succeed. If the delay is found to be inordinate, the next inquiry is whether the inordinate delay is excusable. Again, the onus of proof is on the moving party to establish that, on the balance of probabilities, the delay is inexcusable. If the court concludes that the delay is excusable, then the application fails. Finally, if the court concludes that the delay is both inordinate and inexcusable, then it must proceed to consider where the balance of justice lies and in so doing, may take into account a number of factors considered to be relevant including the conduct of both parties to the proceedings, the number and complexity of the events and transactions required to be recalled, whether it is a so called documents case; and any other matter which may bear on the case, or its future conduct including prejudice, established, presumed or to be inferred. The position was succinctly summarise by the Court of Appeal in Millerick as follows:-

> *"17. The principles which apply on an application brought to dismiss proceedings for inordinate and inexcusable delay are fully explored in the written submissions that have been delivered by the parties. The most oft cited decision is that of the Supreme Court in Primor plc v. Stokes Kennedy Crowley [1996] 2 I.R. 459 where guidance is given concerning the proper approach to be adopted by the court when met with such an application.*
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> *18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.*
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> *19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant*

*circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay."*

39. An issue arises whether the application of this test applies in full where there have been previous similar applications in the same case. It seems to me, however, in the context of the circumstances in this case that it is proper and appropriate in the first instance to consider whether the delay is inordinate and inexcusable, but that this should be viewed through the prism of previous applications to, and directions made by the court. Therefore, before determining whether it is necessary to address the proposition contended for by Mr. O'Connell S.C. as to the effect of previous court orders, I propose to consider the periods of delay and the reasons therefore to establish whether, on the application of the *Primor* test and without reference to the proposition advanced, the delay is inordinate and inexcusable.

40. Breaking down the periods of delay following the decision of the Court of Appeal, as Mr. Mulcahy S.C. suggests that the court should, and in so far as that is permissible in the context of the previous rulings of the court, I accept that there was no effective delay on the part of the plaintiff between the date of the order of the Court of Appeal in July, 2015 and the completion of the discovery process in May, 2016. In my view, the period of delay thereafter falls into a different category. While communication took place between the parties in relation to the payment of the sum of €15,000 referred to in the court order and also in respect of the payment of taxed costs, no outward or visible step was taken by the plaintiff to progress substantive aspects of the proceedings until after the issuing of the motion on this application. Despite the fact that matters may have been progressing behind the scenes, particularly between November, 2017 and the date upon which Messrs Grant Sugrue's report was obtained at the end of May/early June, 2018, in my view and particularly in the context of the earlier delays up to the time of the making of order of the Court of Appeal, that the delay since then on the part of the plaintiffs is inordinate. This is so even excluding the period from July, 2015 to May, 2016 when the discovery process was completed.

41. As to whether the delay is excusable, the matters which have been advanced by the plaintiff to excuse delay concern first, the stated difficulty in obtaining the return of papers from counsel, which is said to explain a delay of almost twelve months and, second, that the report of an accountant had to be obtained, given the nature and complexity of the case.

42. It is somewhat unfortunate that, during this period, the defendants were not kept abreast of developments and any encountered difficulties. While it may be that certain period of delay between May, 2016 and the date of this motion might be excusable, particularly in view of the necessity to obtain the report of the forensic accountant, nevertheless, and taking into account *dicta* of Barrett J. in *Padden v. Ireland* [2016] IEHC 700, I am not satisfied that the inordinate delay which has been established has been properly explained and in the circumstances, I am satisfied that the defendant has discharged the onus of proof of establishing that the delay in this case is inexcusable. Although, as O'Flaherty J. stated in *Primor*, the courts do not exist for the sake of discipline but to do justice, in sporting parlance, the plaintiffs were shown a yellow card by the Court of Appeal and when such a warning is given in any context, but particularly in the context of litigation, it is unwise in the extreme to test the patience of opponents or decision makers by repetition of the transgression. Where this occurs it seems to me that the threshold of excusability must be considered to be elevated and the delay requires cogent, reasonable and substantiated explanation. The reasons advanced in this case, when viewed through the prism of the previous applications, orders and directions of the court, in my view, cannot be considered to excuse the delay, as a matter of law.

43. In the circumstances, therefore, I do not believe that it is necessary for the court to consider whether earlier court rulings and finding on a previous applications precludes further consideration of the first two legs of the *Primor* test. I am satisfied that the defendant has discharged the onus of establishing that the delay in this case is inordinate and inexcusable.

44. Having concluded that the plaintiff's delay is both inordinate and inexcusable, it now falls to the court to consider where the balance of justice lies. In this context, *dicta* of Irvine J. in *Collins* is to be recalled where she observed that the first matter to be addressed by a court when considering where the balance of justice lies is the extent to which the defendants would likely be prejudiced if the proceedings were allowed to continue. She stated at para. 107 as follows:-

*"Of significant relevance to that issue must be the nature of the claim being advanced by the plaintiff in the proceedings."*

45. In *Collins*, the court considered that the plaintiff was making substantial allegations of wrongdoing against those charged with upholding the rights of citizens in the State. The court was satisfied that the defendants had established that they would have been significantly prejudiced in their ability to defend the claims had the action been permitted to proceed to trial, particularly in the light of the death of a potential witness. Thus, Irvine J. stated:-

*"Insofar as the plaintiff complains that the internal examination was carried out negligently, clearly the absence of Dr. Moloney, who carried out that examination, would leave the defendants, who elect to be vicariously liable for his absence, tremendously exposed."*

46. No such particular prejudice is advanced in this case. However, it is submitted by Mr O'Connell S.C. that the court is entitled to infer a general prejudice where there is a finding of inordinate and inexcusable delay and in a number of decisions have been relied upon in this regard. Thus, in *Reynolds and Sons Limited v. ACC Bank Plc & Ors*. [2016] IEHC 510, White J. stated at para. 21:-

*"In exercising its discretion, the court has to consider a number of factors –*

*(i) General prejudice;*

*(ii) Specific prejudice.*

*22. The court also considers it relevant to take into consideration the nature of the proceedings and also some of the other factors in respect of the plaintiff's knowledge.*

*23. The court is entitled to infer some general prejudice to the defendants in these proceedings due to the delay. The accident occurred on the 14th February, 2005, ten years and five months prior to the issue of the third defendant's motion to dismiss. The court is entitled to imply some restriction on the ability of relevant witnesses to recall events exactly at such a distance in time."*

The plaintiff in *Reynolds* had compromised a claim brought against it by an injured party who then sought contribution pursuant to ss.

22 and 31 of the Civil Liability Act, 1961 in respect of damages and costs to the injured party. By the time the motion to dismiss was brought, the injured party had died. There was controversy as to whether his death had caused specific prejudice. White J. did not agree that the death caused no prejudice to the defendant. He was a relevant witness as to how the accident occurred and while the extent of the prejudice was difficult to quantify, it could not be ruled out.

47. White J. also noted that the plaintiffs as insurers of a defendant compromised prior to the issuing of proceedings and without the defendants having been joined as third parties and that this deprived the defendants of the opportunity to participate in the defence and settlement of that claim. The court also took into account the obligation imposed under s. 27(1)(b) of the Act of 1961 to issue a third party notice against an alleged contributor as soon as reasonably possible.

48. Also of note is the decision in *Carroll v. Kerrigan & Ors*. [2017] IECA 66, where at para. 26, Irvine J. stated: -

> *"While the respondent has not asserted any particular prejudice, it would be wrong in my view, for this Court not to infer some prejudice as a result of the appellant's delay in prosecuting his claim against the respondent. First, the court will have to make findings of fact concerning the circumstances in which the appellant was allegedly injured over fifteen years ago and in circumstance where neither his employer, nor the person who allegedly perpetrated the assault remain a party to the proceedings. Second, having regard to the pleadings where Mr. Carroll maintains he instructed the respondent to institute proceedings within a very short period of time after the assault on the 25th of January, 2001 – facts denied by the respondent – the court will have to make findings of fact as to what, if any, instructions were given by the appellant to his solicitors over fifteen years ago."*

49. In *Primor* by Hamilton C.J., he observed at p. 497:-

> *"As stated by me, when dealing with the SKC case, if prejudice to a defendant's capacity to defend a case brought against them is caused by inordinate and inexcusable delay on the part of a plaintiff and as a result thereof a fair trial cannot now be held, a defendant should not be further prejudiced by the further delay which would inevitably be caused by a long and difficult hearing of the action.*
>
> *The nature, extent and effect of such prejudice should be considered at the time of the application to dismiss the proceedings for want of prosecution.*
>
> *Having regard to the delay which has elapsed since the carrying out of the audit by Oliver Freeney of the accounts for the plaintiff for the year ended the 31st of December 1978, which the plaintiffs allege was negligently carried out; and the subsequent audits, in respect of which the negligence was alleged to have been continued to date – a period of at least sixteen years, prejudice to the defendants caused by such delay could be presumed."*

Hamilton C. J. concluded that the defendant had been prejudiced in their capacity to defend the proceedings by reason of the death of several important witnesses. He was satisfied that the prejudice caused to the defendants by the inordinate and inexcusable delay on the part of the plaintiff was such as to place an inexcusable and unfair burden on their defence of the proceedings. The prejudice was such as to make it impossible for a fair trial to be had. Therefore, the interests of justice required that the proceedings be dismissed.

50. Thus, it appears as a matter of general principle, that the court is entitled to presume prejudice, particularly in relation to witness memories, where there is a considerable lapse of time between the events said to give rise to the cause of action, and the date upon which the motion for dismissal is brought. In this regard, the court is entitled to look at the matter prospectively and to include a consideration of time periods which may inevitably arise between the date of the application to dismiss and potential hearing date. Clearly, where actual prejudice is shown, the position of the moving party on such application is stronger.

51. Prejudice must also be considered and assessed in the context of the issues in the case and the nature of the dispute – and this may be dependent on whether proof or defence of the claim is based, or largely based, on the consideration of documentary evidence.

52. In this regard. Clarke J. (as he then was) stated in *Comcast* at para. 6.3 at p. 30:-

> *"While one should not become overly enmeshed in terminology on degree such as mild moderate severe or extreme, I would, respectfully, disagree with Gilligan J. and would instead characterise a prejudice established on behalf of the Minister in this case as being mild. A number of factors need to be taken into account. At least so far as many of the issues which are likely to arise in these proceedings at trial are concerned, this case can be regarded as a so-called documents case, where there are contemporary records of much of the matters which will require to be addressed in evidence. It is, of course, the case that this is not a pure documents case where the issues turn on the construction of documents and where old testimony is likely to be only of marginal relevance. In such cases prejudice caused by delay would be non-existent or extremely remote. However, the availability of contemporary records will, in my view, at least so far as a lot of the issues likely to arise are concerned, minimise any risk to prejudice."*

53. It seems clear, therefore, when one is addressing the question of prejudice, and particularly presumed prejudice, there is an obligation on the court to consider the nature of the case and whether it might be regarded as a "*documents*" type case. Mr. Mulcahy S.C. lays particular emphasis on the fact that this case will primarily be concerned with the interpretation of documents. He also points to the fact that discovery has been made of documents and records and that the author of those documents, under most categories, is Mr. Hanrahan. Mr. O'Connell S.C. on the other hand submits that Mr. Mulcahy S.C. has failed to engage with the legal principles applicable in the context of the construction of documents and the necessity of witnesses to assist in their proper construction and in particular in relation to the question of rectification.

54. Mr O'Connell S.C. submits that this is not solely a documents case and in this regard relies on the decision in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 All ER 98, which has been adopted in this jurisdiction on several occasions since, including in *Analogue Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 275. In the *Investors Compensation Scheme* case, Lord Hoffmann stated as follows at p. 114:-

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

*(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

*(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

*(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749. D*

*(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.""*

55. It is submitted that while the meaning of a written contract is primarily determined by the words used in the contract, the factual matrix in which a contract is made will inform the required analysis as *per* the *dicta* of Lord Hoffmann. Further, it is submitted that if the plaintiffs' case is not determined on a particular basis, an issue arises on the defendant's counterclaim for rectification. In this context the recollection of witnesses becomes even more important. The claim for rectification requires proof of a meeting of minds as to the subject matter of the terms sought to be rectified. The defendant will be obliged to establish that either prior to or at the time of execution of the agreement, the parties were *ad idem* that the incentive payments related to business voice telephony customers and not to customers in other sectors of the respondents' business. In this regard, counsel also refers to oft cited *dicta* of Griffin J. in *Irish Life Assurance Company Ltd. v. Dublin Land Securities Ltd*. [1989] I.R. 253 where he stated that:-

*"the question to be addressed is whether there was convincing proof, reflected in some outward expression of accord, that the contract in writing did not represent the common continuing intention of the parties on which the court can act, and whether the plaintiff can positively show what that common intention was in relation to the provisions which the appellant says were intended to [have the effect contended for in that case]".*

While solicitors may have been involved at the beginning of the contractual and negotiation process and may have provided the initial draft agreement, it was concluded without legal representation and negotiation.

56. There are other factors which must also be borne in mind. First, in *Primor*, the court held, *inter alia*, that while there is an inherent jurisdiction to dismiss a claim in the interests of justice where delay in proceedings is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself, this is a jurisdiction which should not be frequently or lightly assumed. It is true that since that decision there has been a tightening up of the courts' attitude to delay, particularly since the decision in Comcast, but the court should also not lose sight of another fundamental principle which was reiterated in Collins by Irvine J. at para. 34 where she stated:-

*"It is also important to note, in the context of the Draconian nature of the type of relief claimed, that the use of this jurisdiction is not intended to be a punishment for a plaintiff's delay but rather to ensure that justice is done, as was advised by O'Flaherty J. in Primor where he stated at p.516 that:- 'Courts do not exist for the sake of discipline but rather to deal with the essential justice of the case before them.'"*

She also observed that the rationale behind the courts' jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay was as stated by Diplock L. J. in *Allen v. Sir Alfred McAlpine & Sons Limited* [1968] 2 Q.B. 229 at p. 254:-

*"The chances of the courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard".*

57. The decision of Murphy J. in *Hughes* is of relevance, particularly where she stated at para. 72 that:-

*"The purpose of the Court's discretion to dismiss for want of prosecution is to safeguard a defendant's right to a fair trial. Delay can defeat that right. Delay can hamper or inhibit a defendant in his defence. Witnesses who might have been available at an earlier time might no longer be available. Even if available, their memory of the events, may be compromised. Evidence previously available may now be irretrievably lost. These are some instances of the many ways in which delay may adversely impact on fair trial rights".*

Referring to the *Primor* test, Murphy J. stated that the list of factors to be considered in weighing the balance of justice outlined in that case were not exhaustive and different considerations may apply on the facts of any particular case. She continued at para. 78:-

*"What does not change however, is the overarching requirement that a trial be fair, as guaranteed by the Constitution. Thus, if by reason of the inordinate and inexcusable delay, a defendant cannot get a fair trial then the Court should exercise its discretion to dismiss".*

58. In *Hughes* the applicant's rights were deemed not to have been impaired by the inordinate and inexcusable delay of the respondents. The core of the case related to the title of property. All of the documents upon which the title was based dated back to the 1930's and were available for consideration. The determination of liability would largely depend on expert testimony and legal

argument as to the effect of those documents and whether a proper investigation of title had taken place.

59. In considering the application of the *Primor* test, the court should also take into account the conduct of the defendant, but with less emphasis being placed thereon. While there may have been a period when discovery was being made, it is accepted that there is no delay or culpability on the part of the defendant in this case. It seems to me, however, that this does not preclude the court, when considering where the balance of justice lies, from considering as a factor the circumstances in which an application such as this comes before the court. While the defendant is entitled to make this application at any appropriate stage, I do not believe that it would be fair to consider the balance of justice without reference to the circumstances in which it arose and the fact that communications were ongoing in relation to other aspects of the parties' dealings. The first intimation that an application might be brought was by letter dated 12th April, 2017, but this was in the context of the dispute concerning the obligation of the plaintiff to pay the €15,000 sum of money. There was in fact little correspondence exchanged between the parties thereafter until the letter of the 28th March, 2018, which was in response to the solicitors for the plaintiffs letter of 28th February, 2018 (concerning the issues of costs of discovery and cost of the motion and appeal), before this application was brought. The solicitor for the defendant cautioned:-

> *"Failing receipt of the above funds in our account within 14 days, we will proceed to issue a motion without further notice to you. We are in fact taking instructions whether to issue this motion regardless of what you do, as it is almost three years since the order of the Court of Appeal and it has not yet been complied with."*

The order has now been complied with, albeit in a less than satisfactory manner and late.

60. The nature of the claim is also a significant factor, and while I am satisfied that it is likely that certain oral evidence of witnesses will be required, it seems to me that considerable focus is likely to be placed at trial on the contents of contractual documents. There is no suggestion that the person who led the contractual negotiation from the defendants' perspective, and who's name arises repeatedly in the context of discovered documentation, is not or will not be available to assist in the defence of the action. In these circumstances, taking into account all of the circumstances, including the principles in *Investors Compensation Scheme*, and that the court should view the matter in a prospective way, I am not satisfied that any presumed or inferred prejudice, be it mild or moderate, which may arise in relation to the recollection of relevant witnesses concerning background matters and the context in which the agreement was concluded is such as to tip the balance in favour of dismissal of the proceedings. The relief sought by the defendant has been described as draconian and a jurisdiction to be exercised sparingly. Murphy J. emphasised the overarching requirement that a trial be fair, as guaranteed by the Constitution.

61. Taking all of these matters in to account, I am not satisfied that the balance of justice is, or has been shown to be such as to justify the court in exercising its jurisdiction to dismiss the claim for want of prosecution.

62. In the circumstances, I must refuse the reliefs sought.