Neutral Citation Number: [2007] IEHC 297

THE HIGH COURT

[2001 No. 9288 P]

BETWEEN

COMCAST INTERNATIONAL HOLDINGS INC., DECLAN GANLEY, GANLEY INTERNATIONAL LIMITED AND GCI LIMITED

PLAINTIFFS

AND

THE MINISTER FOR PUBLIC ENTERPRISE, MICHAEL LOWRY, ESAT TELECOMMUNICATIONS LIMITED, DENIS O'BRIEN, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

THE HIGH COURT

[2001 No. 15119 P]

BETWEEN

COMCAST INTERNATIONAL HOLDINGS INC., DECLAN GANLEY, GANLEY INTERNATIONAL LIMITED AND GCI LIMITED

PLAINTIFFS

AND

THE MINISTER FOR PUBLIC ENTERPRISE, MICHAEL LOWRY, ESAT TELECOMMUNICATIONS LIMITED, DENIS O'BRIEN, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

THE HIGH COURT

[2001 No. 9223 P]

BETWEEN

PERSONA DIGITAL TELEPHONY LIMITED AND SIGMA WIRELESS NETWORKS LIMITED

PLAINTIFFS

AND

THE MINISTER FOR PUBLIC ENTERPRISE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment delivered on the 13th day of June, 2007, by Gilligan J.

1. These three sets of proceedings arise from the first named defendant's decision on October 25th, 1995, to award the second GSM mobile telephone licence to ESAT and involve serious allegations including corruption, misfeasance in public office, fraud, and deceit.

2. The background to all three sets of proceedings is such that, on or about the 2nd March, 1995, the then Minister for Public Enterprise, Michael Lowry (hereinafter referred to as 'the Minister'), announced a bid process for the award of the second GSM mobile phone licence (hereinafter referred to as 'the licence') in Ireland. The deadline for receipt of tenders was extended on 16th June, 1995, and the result of the competition was announced on 25th October, 1995, awarding the second GSM mobile telephone licence to ESAT Telecommunications Limited.

3. The first set of proceedings bearing Record No. 2001 No. 9288 P centre on the decision of the Minister as taken on 16th June, 1995, to extend the deadline of the 23rd June, 1995, for the receipt of tenders for the award of the second GSM mobile telephone licence and the proceedings seek a declaration that the decision is null and void and of no effect and, in addition, claim damages for breach of statutory duty, misfeasance in public office, breach of or procuring a breach of the Prevention of Corruption Act, 1906, fraud, deceit, breach of duty and breach of contract.

4. The plaintiffs in the first set of proceedings were party to a joint venture agreement entered into with Raidió Teilifís Éireann and Bord na Móna who submitted a tender for the licence on or about the 4th August, 2005, under the name "the Cellstar Group".

5. The plaintiffs issued these proceedings by way of a plenary summons on 15th June, 2001, but delayed in service of the plenary summons until 14th June, 2002. An appearance was entered on behalf of all defendants on 20th June, 2002, and a statement of claim was not delivered until the 3rd June, 2005.

6. In the second set of proceedings involving Comcast and bearing Record No. 2001 No. 15119 P the plaintiffs allege that the Minister compromised the integrity of the tender process by breaching the guidelines for communications with bidders, disclosed or caused to be disclosed confidential information in relation to the bid process to ESAT, modified the terms and unlawfully interfered with the tender process to favour ESAT and accepted improper payments made by Denis O'Brien and/or ESAT which payments were made to influence the outcome of the tender process and/or to reward the Minister for having intervened to ensure the awarding of the licence to ESAT.

7. The plaintiffs claim a declaration that the decision as announced on October 25th, 1995, to award the second GSM mobile telephone licence to ESAT is unlawful, null and void and of no effect and claim damages for breach of statutory duty, misfeasance in public office, breach of or procuring a breach of the Prevention of Corruption Act, 1906, fraud, deceit, breach of duty and breach of contract.

8. The second set of proceedings was commenced by way of the issue of a plenary summons on the 10th October, 2001, which was not served until 4th October, 2002. An appearance was entered on behalf of the defendants on 16th December, 2002, and a statement of claim was not served until 3rd June, 2005.

9. The third set of proceedings involve Persona Digital Telephony Limited and Sigma Wireless Networks Limited as plaintiffs and bear the Record No. 2001 No. 9223 P. The plaintiffs allege against the defendants, through the first named defendant, breach of contract, deceit, conspiracy, breach of duty of care, misfeasance in public office, and dishonest assistance. The plaintiffs claim damages including exemplary damages.

10. The third set of proceedings was commenced by way of the issue of a plenary summons on 15th June, 2001, which summons was not served until 10th June, 2002. An appearance was entered on behalf of the defendants on 20th June, 2002, and a statement of claim was delivered on 21st April, 2006.

11. The State defendants by way of a notice of motion as dated 26th May, 2006, bring this application which seeks:-

> 1. An Order pursuant to the inherent jurisdiction of this Honourable Court dismissing the within proceedings as against the State defendants for delay and/or want of prosecution.
>
> 2. An Order pursuant to the inherent jurisdiction of this Honourable Court dismissing the within proceedings as against the State defendants in the interests of justice.
>
> 3. Such further and ancillary orders as this Honourable Court may deem proper and appropriate.
>
> 4. The costs of this application.

12. There is no significant material difference in respect of the applications as brought on behalf of the State defendants before this Court and the grounds of defence as raised thereto by the various plaintiffs and, as all three motions were heard together I propose to deliver one judgment in respect of the three sets of proceedings and the application as brought before the Court.

13. In an affidavit sworn on the defendants' behalf on the 26th May, 2006, Matthew Shaw, a solicitor of the Office of the Chief State Solicitor, avers that this Court should dismiss the plaintiffs' claim as against the defendants for want of prosecution on the grounds of inordinate and inexcusable delay on the part of the plaintiffs in the commencement and prosecution of the proceedings, which delay has prejudiced the defendants such that the balance of justice requires that the claim be dismissed, that the periods of delay themselves are unacceptable and justify this Court exercising its discretion to order the dismissal of the plaintiffs' action as against the defendants and in the interests of justice, in defence of the defendants' rights under the Constitution, including the right to fair procedures and a fair trial, that the delay has infringed the requirement of having to have a hearing with reasonable expedition and within a reasonable period of time pursuant to Irish law and/or Article 6 of the European Convention for the Protection of Human Right and Fundamental Freedoms.

14. Mr. Shaw sets out the periods of delay as evidenced from the schedule of events as previously referred to herein.

15. Mr. Shaw emphasises that, in the Comcast proceedings, a statement of claim was not delivered until nine years after the events complained of and that in the *Persona* proceedings the statement of claim was not delivered for nearly eleven years after the events complained of.

16. Mr. Shaw, on behalf of the defendants, complains that the allegations which are set out in the statement of claim and which refer to events of some considerable time earlier, including allegations involving breach of statutory duty, misfeasance in public office, breach of or procuring a breach of the Prevention of Corruption Act, 1906, fraud, deceit, breach of duty and breach of contract, constitute the most serious of allegations which have not been properly particularised by the plaintiffs in the statement of claim as delivered herein.

17. Further, Mr. Shaw avers that the plaintiffs have been guilty of inordinate and inexcusable delay and prejudice has arisen, that, further arising from a consideration of the contents of the statement of claim and the delay in its delivery, the balance of justice can no longer favour the processing of the plaintiffs' claim.

18. Further, Mr. Shaw avers that, in assessing the balance of justice as between the parties, it is, in his view, wholly unacceptable for the plaintiffs to claim that they are unable to fully particularise the extent of the alleged wrongdoing of the Minister pending the investigation of the Tribunal of Inquiry established to enquire into payments to politicians and related matters under the sole member of the Tribunal, the Honourable Mr. Justice Michael Moriarty, and that furthermore, to the extent that the plaintiffs place reliance on the workings of the Tribunal of Inquiry as a purported explanation for the delay, the same is not referable to the conduct of these proceedings but rather on the information furnished to a Tribunal of Inquiry.

19. Insofar as particulars were furnished, Mr. Shaw avers that these particulars are based on what is described as information disclosed at the public hearings of the Moriarty Tribunal to date and that this Tribunal has yet to make a final report into the matters of substance concerning its inquiry into the awarding of the second GSM mobile telephony licence to ESAT.

20. In essence, Mr. Shaw avers that any happenings before the Moriarty Tribunal do not justify the plaintiffs in delaying these proceedings until those sessions are concluded and does not excuse and/or justify any further delay. Furthermore, he avers that dependence on the Moriarty Tribunal is no explanation for the periods of time which have in fact elapsed. He refers to the fact that the Moriarty Tribunal was appointed by instrument of An Taoiseach on 26th day of September, 1997, and, having regard to the plaintiffs' purported reliance on the happenings at the Moriarty Tribunal, it could be 12 to 15 years from the date on which the alleged events complained of occurred before the trial actually takes place. In this regard he refers to the fact that when the plaintiffs issued the plenary summons in 2001, the Moriarty Tribunal had not commenced its public sessions on the GSM competition and indeed it may never actually have decided so to do. The fact that the Moriarty Tribunal did subsequently have public sessions on the GSM licence does not justify the plaintiffs in delaying these proceedings until those sessions are concluded and does not excuse and/or justify any delay. Furthermore, Mr. Shaw avers that it is no explanation for the periods of time which have, in fact, elapsed. He avers that the plaintiffs on their own admission have simply selected discrete information given before the Moriarty Tribunal of Inquiry some 10 years after the alleged cause of action arose.

21. Mr. Shaw avers that it would be inimical to the interests of justice as between the parties to these proceedings to allow this claim to proceed in circumstances where over 10 years previously the plaintiffs allege without, in his view, any particularity, the most serious wrongdoings as against the defendants and effectively seek to postpone providing any evidential basis to the claims until information is provided at the Moriarty Tribunal or as a result of its final report.

22. Mr. Shaw avers that, by reason of the lapse of time between the alleged wrongful acts relied on by the plaintiffs and the probable date of the trial of the action, it would be in breach of the rights to fair procedures of the first named defendant and/or its servants or agents and contrary to the interests of justice to allow the plaintiffs' claim to proceed. He avers that, by reason of the lapse of time there was a real and serious risk of an unfair trial and also there is a clear and patent unfairness in asking the defendants to defend the plaintiffs' claim at this stage.

23. Damien Young, a solicitor in the firm of Philip Lee Solicitors, acting on behalf of the plaintiff in the Comcast proceedings, in a replying affidavit as sworn on the 23rd June, 2006, avers that it was, of course, public knowledge that the subject matter of these proceedings is also the subject of a Tribunal of Inquiry into payments to Mr. Charles Haughey and Mr. Michael Lowry, namely the Moriarty Tribunal, and that this tribunal was appointed by instrument of An Taoiseach on 26th day of September, 1997. He avers that

matters are dealt with by the Moriarty Tribunal on a modular basis and that it was anticipated that the Moriarty Tribunal would have completed its work in relation to the second GSM licence module within a one year period following the issuing of the plenary summons, i.e. by June, 2002 and unfortunately this has not been the case.

24. At the time of the issuing of these proceedings, Mr. Young avers that the plaintiffs believed that the award of the second GSM licence to ESAT Telecommunications Limited, the third named defendant, was wrongful. However, he avers that the plaintiffs were not in a position to know the detail of the manner, nature and extent of the breaches of the tender process and they hope that this detail will be clarified by the Moriarty Tribunal permitting delivery by the plaintiffs of a particularised statement of claim.

25. Mr. Young avers that, unfortunately, the second GSM licence module of the Moriarty Tribunal has not yet been completed and has been ongoing for a number of years and was recently suspended pending the outcome of an appeal to the Supreme Court as brought by Mr. Denis O'Brien.

26. Mr. Young confirms that a statement of claim delivered on 3rd June, 2005, was in response to an application to strike out the plaintiffs' proceedings as brought by the fourth named defendant and in the context of that application, Mr. Young swore an affidavit in which he indicated to the Court that the plaintiffs wished to await the outcome of the investigation of the Moriarty Tribunal but had nonetheless given instructions that a statement of claim be prepared on the basis of the facts as then known by virtue of the public hearings of the Moriarty Tribunal.

27. Mr. Young does not accept the criticism as made by Mr. Shaw of the particulars as delivered in the statement of claim and he avers that the statement of claim itself makes clear that the plaintiffs are unable to fully particularise the extent of the wrongdoing of the Minister pending the conclusion of the investigation of the Moriarty Tribunal. Nonetheless he avers that, on the basis of the information as disclosed at the public hearings, the plaintiff provided considerable detail in relation to the principal allegations made against the State defendants. He refers to the fact that no notice for particulars was raised by the State defendants since the delivery of the statement of claim in June, 2005.

28. Mr. Young accepts that there has been delay in this case but that this delay is excusable by reference to the fact that the subject matter of the proceedings is also the subject of continuing investigations by the Moriarty Tribunal. The complexity of the subject matter of these proceedings is evidenced from the time taken by the Moriarty Tribunal in investigating the matter. The plaintiffs who were of course also involved in tendering for the second mobile phone licence cannot have been expected to be aware of all the details of the improper payments and conduct which his client believes to have resulted in the award of the second mobile phone licence to ESAT. In the circumstances, he avers that it is reasonable for the plaintiffs to await the information provided by way of public hearings at the Moriarty Tribunal prior to the delivery of the statement of claim. Furthermore, he avers that the delay is excusable and that a consideration of the interests of justice does not arise. However, if the balance of justice were to be considered, he does not believe that it would favour the State defendants.

29. Mr. Young avers that the State defendants do not assert any particular prejudice arising from the delay in this case and that, indeed, it is difficult to see how the State defendants could have sought to make a claim of prejudice as they of course have been intimately involved in the hearings that have taken place before the Moriarty Tribunal and therefore, irrespective of their knowledge of the existence of this claim since 2002, the State defendants have presumably collated all the necessary documentation relating to the award of the second mobile licence and have given evidence in relation to same. Mr. Young avers to the fact that Mr. Shaw in his affidavit has not outlined the steps that have been taken by the State defendants to assist the Moriarty Tribunal with its investigation. In the absence of any clear lack of any particular prejudice as suffered by the State defendants, Mr. Young avers that it would be unfair to penalise the plaintiff by way of striking out the proceedings and in circumstances where they did not know and could not know of the details of the claim made by them until the Tribunal investigated these matters. Mr. Young avers that the allegations in respect of the interests of justice as advanced by Mr. Shaw are vague and unsubstantiated in nature and must be contrasted with the clear prejudice that would be suffered by the plaintiffs if the claim was to be struck out.

30. Mr. William Jolley, Solicitor, has sworn on 23rd June, 2006, a replying affidavit on behalf of the plaintiffs in the Persona bearing Record No. 2001/9223 P and he avers that, in his view, it is somewhat surprising that Mr. Shaw does not seek to set out the background and surrounding circumstances to these proceedings to enable the Court properly consider the motion that is before the Court.

31. He outlines the background circumstances leading into the granting of the second GSM mobile licence and avers that the first named plaintiff, Persona Digital Telephony Limited, was ranked second in the process, the licence itself ultimately being awarded to ESAT.

32. Mr. Jolley avers that the plaintiffs have always had serious and real misgivings about the manner in which the process was operated and from the announcement of the winner of the process on 25th October, 1995, had voiced concerns to the defendants. In particular, Mr. Jolley avers that the plaintiffs were of the view that the then Minister had deliberately interfered with the process with a view to ensuring that ESAT Digiphone was the ultimate grantee of the licence and that the interferences by the Minister as more particularly set out in the statement of claim represent a complete abuse by the Minister of his office, that these interferences were undertaken by the Minister knowingly and deceitfully and constituted a conspiracy between the Minister, his servants and agents and ESAT Digiphone and its servants and agents. Despite voicing these most serious concerns and misgivings, at the time the plaintiffs received constant assurances from the State that the process for the evaluation of the tenders and the ultimate grant of the licence were entirely beyond reproach. Mr. Jolley avers that in 1996 the plaintiffs made a complaint to the European Union in relation to the manner in which the competition for the grant of the licence was conducted but was told that the matter was essentially one for the Irish courts.

33. Faced with the constant and repeated assurances by the State that the process was above reproach, the plaintiffs did not pursue their complaints further but in or about the beginning of May, 2001, when advised that the Moriarty Tribunal was commencing investigations into the circumstances in which the then Minister granted the licence to ESAT Digiphone, a decision was taken by the plaintiffs to issue these proceedings and any delay in issuing the proceedings is directly attributable to the constant denials by the defendants of any wrongdoing on their part. Mr. Jolley avers that, having regard to the foregoing and bearing in mind that the proceedings relate to deliberate and deceitful conduct on the part of the first named defendant and his servants and agents, the defendants cannot seek to rely upon any delay in issuing the proceedings as a basis for having those proceedings dismissed against them. In June, 2002 the plaintiffs' then solicitor, J.G. Maloney, sought access to all records relating to the competition for the award of the licence both under the Freedom of Information Act 1997 and voluntarily and this request was denied.

34. Mr. Jolley avers that the Moriarty Tribunal went into public session in relation to the circumstances surrounding the grant of the second mobile licence in December, 2002 and that the defendants had been represented at the public hearings by Mr. Shaw on behalf

of the Chief State Solicitor's Office. The plaintiffs' former solicitors and, in particular, Mr. Maloney and Mr. O'Donovan have attended at more or less every public sitting of the Tribunal since 2001 and Mr. Maloney has informed Mr. Jolley that on a number of occasions casual conversations have taken place between him and Mr. Shaw and, in particular, Mr. Shaw had asked Mr. Maloney if he was going to deliver a statement of claim and Mr. Maloney advised Mr. Shaw that he would not be delivering it for the foreseeable future for the very reason that the plaintiffs would be following the evidence which was likely to unfold at the Tribunal. Mr. Maloney informed Mr. Jolley that at no stage did Mr. Shaw object to this proposed course of action and, indeed, if anything appeared to be relieved as his clients had more than enough to do in dealing with the Tribunal.

35. Having regard to the constant attendance by the plaintiffs' legal representatives at the Moriarty Tribunal and the conversation referred to, the defendants, Mr. Jolley avers, were well aware of the plaintiffs' intention to prosecute these proceedings and during the course of the Tribunal hearings a Mr. Boyle, a director of the plaintiffs in the third set of proceedings, had given evidence and had been subjected to cross examination by counsel for the first named defendants. No complaint was made about any delay in the pursuit of these proceedings.

36. Mr. Jolley avers that the proceedings herein are serious and complex and involve the assimilation of a large volume of information and evidence. Certain information and avenues of inquiry have been identified during the course of the public sittings of the Moriarty Tribunal which have assisted the plaintiffs in the preparation of their case and the assimilation of evidence outside of the Tribunal. The prosecution of the case is not, however, dependent upon any particular finding of the Moriarty Tribunal and it is the plaintiffs' intention to proceed with these proceedings irrespective of what conclusion the Moriarty Tribunal may come to.

37. Mr. Jolley avers that the module of the Moriarty Tribunal dealing with the granting of the second GSM mobile licence is ongoing and to his knowledge no complaint has ever been made by or on behalf of the defendants or on behalf of any officials of the Department of any prejudice due to the remove in time between the Tribunal hearings and the events under investigation dating back to 1995. Furthermore, it is apparent from the public hearings of the Tribunal that considerable documentation is available to assist the various Department officials in their recollection of events where such is necessary. Mr. Jolley avers that the timing of the issue of the notice of motion for the relief as claimed herein is of significance because no complaint was ever made between the issuing of the proceedings and entry of appearance and the eventual delivery of the statement of claim. In fact, what occurred, avers Mr. Jolley, is that on 23rd March, 2006, he served on the Chief State Solicitor's Office a notice of change of solicitor taking over, in effect, from Mr. Moloney, the previous solicitor. Within a week of receipt of that letter, Mr. Shaw wrote seeking delivery of a statement of claim and consenting to its delivery within 21 days. Nowhere in the letter did Mr. Shaw complain of any prejudice and, on the contrary, he invites the plaintiffs to proceed with the claim. Mr. Jolley avers that he, in fact, sought an extension of time and when this was not forthcoming he was, in fact, in a position to deliver the statement of claim within the 21-day period as requested by the defendants' solicitor. Mr. Jolley avers that he takes the view that the purpose behind the request for the immediate delivery of the statement of claim was done so as to "catch the plaintiffs on the hop".

38. Insofar as there may have been any delay in either the issue or prosecution of the proceedings herein, Mr. Jolley avers that there is a basis for excusing such delay, if any such delay exists. In these proceedings, he avers that the plaintiffs primarily allege misfeasance in public office which necessarily embraces the tort of deceit and corrupt practices on the part of the defendants, their servants and agents. It is the plaintiffs' case that the defendants embarked upon a deliberate deceit in declaring the winner of the competition in October, 1995 and, subsequent thereto, put in place elaborate measures to conceal their wrongdoing. Furthermore, Mr. Jolley avers that the compilation of the claim and its prosecution is extremely complex involving, as already indicated, the assimilation of an enormous amount of evidence and information and clearly the evidence identified at the hearing of the Moriarty Tribunal assists the plaintiffs in circumstances where the defendants have refused to furnish information to the plaintiffs. In that regard, Mr. Jolley avers that it is significant that the Moriarty Tribunal is, some five years after indicating its intention to commence an investigation into the circumstances in which the licence was granted, still continuing to investigate the matter. The Moriarty Tribunal has sat in public for approximately 333 days and the reality is that, had the plaintiffs sought to bring to trial these proceedings during the currency of the Moriarty Tribunal, he (Mr. Jolley) would have no doubt but that the defendants would have objected on the basis that they could not deal with the two issues at the one time. As more evidence is adduced at the public sittings of the Moriarty Tribunal, the more convinced the plaintiffs become as to the validity of their claim.

39. Mr. Jolley avers that it is in the interest of justice to refuse the reliefs as sought and that the plaintiffs have, as requested by the defendants, delivered their statement of claim which is a comprehensive document and Mr. Jolley does not accept that it lacks in detail as is asserted by Mr. Shaw or that the defendants have suffered any prejudice.

40. The Tribunal of Inquiry into Payments to Politicians and Related Matters has not yet issued a report with regard to the awarding of the second GSM mobile telephone licence and continues to sit in relation to this module.

41. There is no dispute between the parties that the delay herein has been inordinate and, accordingly, the first issue that arises for determination is as to whether or not the delay involved has been inexcusable.

42. The plaintiffs in the Comcast proceedings rely heavily on the fact that they were not in a position to know the detail of the manner, nature and extent of the breaches of the tender process and that they hoped that this detail would be clarified by the Moriarty Tribunal permitting the delivery by the plaintiffs of a particularised statement of claim. The Comcast plaintiffs do not accept that the statement of claim was not properly particularised but they do accept that they are unable to fully particularise the extent of the wrongdoing of the relevant minister pending the conclusion of the investigations of the Moriarty Tribunal. If the State defendants had required further particulars they could have raised a detailed notice for particulars following delivery of the statement of claim in June, 2005. These plaintiffs contend that the complexity of the subject matter of these proceedings is evident from the time taken by the Moriarty Tribunal to investigate and conclude its report into this matter relating to the award of the second mobile telephone licence.

43. The plaintiffs in the *Persona* proceedings rely on the constant denials of the State authorities that there was any wrongdoing on their part in the awarding of the licence. They say that they sought access to all records relating to the competition for the award of the licence both under the Freedom of Information Act, 1997 and voluntarily and this request was denied. They further say that they have been in attendance at all times at the Tribunal of Inquiry when the issue relating to the awarding of the second mobile licence was being dealt with and that there was contact between their then solicitor, Mr. Moloney, and Mr. Shaw of the Chief State Solicitor's Office and that, on an occasion when asked by Mr. Shaw if he was going to deliver a statement of claim, Mr. Moloney indicated that he would not be delivering it for the foreseeable future for the very reason that the plaintiffs would firstly be following the evidence which was likely to unfold at the Tribunal and that at no stage did Mr. Shaw object to this proposed course of action and, indeed, if anything, appeared to be relieved as his clients had more than enough to do in dealing with the Tribunal. The plaintiffs contend that the State defendants were at all times well aware of the fact that proceedings had been commenced but were not being prosecuted while the inquiry before the Moriarty Tribunal was continuing and no complaint was raised. They contend that the

within proceedings are serious and complex and that the inquiry before the Moriarty Tribunal has assisted them to identify and assimilate evidence outside of the Tribunal, but accept that the prosecution of these proceedings is not however, dependent upon any particular finding by the Moriarty Tribunal and it is the plaintiffs' intention to proceed with these proceedings irrespective of what conclusion the Moriarty Tribunal may come to. They say that clearly the evidence identified at the hearing of the Tribunal assists the plaintiffs in circumstances where the defendants have refused to furnish that information to the plaintiff and that, in any event, the defendants would have objected to the proceedings continuing at the same time as the Moriarty Tribunal as they could not deal with the two issues at the one time.

44. The inquisitorial inquiry before the Moriarty Tribunal can have no bearing on the outcome of these proceedings in the High Court and, accordingly, the several years of inquiry, the taking of evidence from large numbers of interested parties, the consideration of the voluminous documentation that necessarily must be involved and the final report are not relevant and play no role in the context of these proceedings which are adversarial before a court of law, whereas the Moriarty Tribunal involves, in essence, an expression of opinion in relation to matters considered by the Chairman of the Tribunal.

45. Moriarty J., in Part I of the Payments to Politicians and Related Matters Tribunal Report as issued in December, 2006, outlines the position succinctly in the following terms at para 1.40:-

> "Since the work of the Tribunal is inquisitorial and not adversarial, the essence of its operation is of necessity a fact-finding exercise. It does not concern itself with, or proceed from, allegations, and is not involved in the administration of justice. As was emphasised by the Supreme Court in *Lawlor v. Flood* [1999] 3 I.R. 107 at 137, a Tribunal hearing is neither a criminal trial nor a civil court trial, and findings of a Tribunal can impose no criminal sanctions or civil liabilities on any person; In essence, the findings of this or any other Tribunal are no more than an expression of opinion in relation to matters considered by it."

46. Murphy J. in *Lawlor v. Flood* [1999] 3 I.R. 107 at pp. 142 and 143 also emphasised the difference between a court of law and a tribunal of inquiry in the following terms:-

> "Clearly an inquiry may, as it did in In *re Haughey* [1971] I.R. 217, evolve into a charge by the investigative body against what should be a witness. On the other hand, it is to my mind, inconceivable that witnesses who are called before a tribunal to give such evidence as is available to them in relation to the subject matter of the tribunal should be treated as defendants in civil or criminal proceedings or afforded the rights which would be available to such parties. An inquiry as such does not constitute legal proceedings (whether civil or criminal) against any person: less still does it constitute a multiplicity of legal proceedings against each and every of the witnesses subpoenaed to appear before it. If such were the case it would be impossible to conduct any inquiry. In that event it would be necessary for each witness to cross-examine not only the witnesses who gave evidence before he did but also that he should have an opportunity of cross-examining those who gave evidence after he had been heard.
>
> It must be remembered that the report of the tribunal whilst it may be critical and highly critical of the conduct of a person or persons who give evidence before it is not determinative of their rights. The report is not even a stage in a process by which such rights are determined. The conclusions of the tribunal will not be evidence either conclusive or *prima facie* of the facts found by the tribunal.
>
> This is not to suggest for one moment that a party to adversarial proceedings has extensive natural and constitutional rights and that a witness before a tribunal has none. It is merely to recognise that the need for rights in determinative proceedings differs from those which have no such consequence and that some of the rights long associated with adversarial proceedings do not translate into those of an inquisitorial nature."

47. The cause of action in these proceedings can reasonably be identified as having taken place between the 2nd March, 1995, being the date upon which the Minister announced a bid process for the award of the second GSM mobile phone licence in Ireland and the 25th October, 1995, when ESAT was declared by the Minister to be the successful party and the winner of the competition for the licence.

48. The Statute of Limitations 1957, as amended, provides a six-year limitation period for the institution of proceedings and the plaintiffs waited for five years and eleven months to institute this claim. Notwithstanding an immediate entry of appearance on behalf of the State defendants, the *Comcast* statement of claim was not delivered until June, 2005 and the *Persona* statement of claim not until April, 2006. Accordingly, the delay between the issue of the plenary summons and the delivery of the statement of claim in the first *Comcast* proceedings bearing Record No. 2001 9288 P, was from the 15th June, 2001, until the 3rd June, 2005, a period of some four years; in the second *Comcast* proceedings bearing Record No. 2001 15119 P, from the 10th October, 2001, until the 3rd June, 2005, a period of some three and a half years; and in the *Persona* proceedings from the 15th June, 2001, until the 21st April, 2006, a period of some five years. However, the periods of time involved from the actual cause of action in 1995 is approximately some ten years in the *Comcast* proceedings and eleven years in the *Persona* proceedings. I am satisfied that the reality of the situation is that the plaintiffs in the within proceedings all adopted a wait and see approach, waiting until the eleventh hour within the six-year time limit as imposed by the Statute of Limitations 1957, as amended, to institute the proceedings, waited until the eleventh hour within the one-year period prescribed for the service of the plenary summons, and then failed to deliver a statement of claim within the time prescribed by the Rules of the Superior Courts, awaiting developments before the Moriarty Tribunal.

49. It is, in my view, of considerable significance that the Rules of the Superior Courts set out the rules governing the practice and procedure to be adopted by the parties to civil litigation which are to be contested on an adversarial basis before the courts in Ireland. The Rules, in the public interest and for the common good, set out various procedures for the delivery of pleadings between the parties within certain prescribed periods of time, for the raising of particulars and replies thereto, for the raising of interrogatories and replies thereto and for the seeking of discovery of documents and these procedures apply in the same manner to all litigants.

50. Insofar as Mr. Moloney, the previous solicitor to the plaintiffs in the *Persona* proceedings, had casual conversations with Mr. Shaw on behalf of the Chief State Solicitor's Office at public hearings before the Moriarty Tribunal, I take the view that the averments as contained in the affidavit of Mr. Jolley represent matters of hearsay and I am entitled to attach such weight to them as I consider appropriate. It does appear that there was a conversation in respect of the delivery of a statement of claim but, as described by Mr. Moloney to Mr. Jolley, this was apparently during the course of casual conversation and, while Mr. Moloney indicates that at no stage did Mr. Shaw object to the proposed course of action to be adopted by the plaintiffs that they would not be delivering a statement of claim for the foreseeable future, that is as far as the matter went.

51. I do not find favour with the averment by Mr. Jolley that the reality of the situation is that, had the plaintiffs sought to bring to

trial these proceedings during the currency of the Moriarty Tribunal, there is no doubt but that the defendants would have objected on the basis that they could not deal with the two issues at the one time. As previously referred to herein, the conduct of the inquiry before the Moriarty Tribunal and the final report on its outcome has no bearing on the conduct of these proceedings and their outcome and I doubt as a matter of judicial knowledge, that the offices of the Chief State Solicitor would not be in a position to have dealt with all the procedural matters that would arise within these proceedings or have had difficulty in instructing counsel to attend at any hearing of the matter and I do not regard this explanation as constituting a valid excuse for the delay in the prosecution of these proceedings.

52. I take the view that the plaintiffs could well have advanced their claim and sought discovery of documents pursuant to the Rules of the Superior Courts. I note that the plaintiffs in the *Persona* proceedings in June, 2002 made an application to access all records relating to the competition for the award of the relevant licence, both under the Freedom of Information Act, 1997 and voluntarily, and that this request was denied. The denial pursuant of the Freedom of Information Act, 1997 was capable of being appealed but this route was not pursued and, as previously indicated herein, the voluntary refusal was capable, with the advancement of the claim, of being dealt with by way of discovery of documents.

53. Insofar as the plaintiffs rely on the constant denials of the defendants that there was anything remiss arising on the awarding of the licence, I take the view that this step would be regarded as normal in adversarial litigation unless an admission was forthcoming which clearly was not the situation that pertained.

54. I note that no complaints were made on behalf of the State defendants to the Moriarty Tribunal of any prejudice due to the remove in time at which people were requested to participate by giving evidence and to referring to documents, but the issues involved and the consequences of being involved are clearly different in the matters under investigation before the Tribunal of Inquiry into Payments to Politicians and Related Matters from these proceedings in which damages for alleged wrongdoing are sought.

55. I take the view that the statements of claim as delivered herein are somewhat lacking in detail, but the general thrust of the allegations being made are clearly set out and I do not attach any significant importance to this aspect.

56. My overall conclusion is that I do not consider that the excuses offered by the plaintiffs and, in particular, that they were monitoring the hearings of the Moriarty Tribunal into the award of the second GSM mobile telephone licence and, hence, did not deliver a statement of claim, an explanation that constitutes a valid excuse and, accordingly, I come to the conclusion that the delay involved in the prosecution of all three claims herein is not only inordinate but also inexcusable. The delay, in my view, goes beyond the minimum which may be considered inordinate.

57. Accordingly, having come to the conclusion that the delay herein is both inordinate and inexcusable, the Court has 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.

58. The first aspect of the application is the order sought dismissing the proceedings on the balance of justice as against the State defendants for delay and/or want of prosecution.

59. The *locus classicus* is the decision of the Supreme Court in Pri*mor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 following on the ground as to some extent laid by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561.

60. In *Primor plc v. Stokes Kennedy Crowley Hamilton* C.J. at pp. 475 and 476 succinctly sets out the principles of law relevant to the consideration of the issues raised in an application to dismiss an action for want of prosecution and these were summarised as follows:-

> "(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests 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 as 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 cause or 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."

61. The principles as set out by Hamilton CJ in *Primor* were re-summarised by Hardiman J. in *J O'C v. The Director of Public*

Prosecutions [2000] 3 I.R. 478 wherein at pp. 499 and 500 he states:-

> "Examples of the application of these principles in civil cases can be multiplied. Enough, however, has been said to indicate that it has consistently being held
>
> > (a) that a lengthy lapse of time between an event giving rise to litigation, and a trial creates a risk of injustice: "the chances of the courts being able to find out what really happened are progressively reduced as time goes on";
> >
> > (b) that the lapse of time may be so great as to deprive the party against whom an allegation is made of his "capacity … to be effectively heard";
> >
> > (c) that such lapse of time may be so great as it would be "contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial in which (he or) she would have to try and to defeat an allegation of negligence on her part in an accident that would have taken place 24 years before the trial …";
> >
> > (d) that, having regard to the above matters the court may dismiss a claim against a defendant by reason of the delay in bringing it, "whether culpable or not", because a long lapse of time will "necessarily" create "inequity or injustice", amount to "an absolute and obvious injustice" or even "a parody of justice";
> >
> > (e) that the foregoing principles apply with particular force in a case where "disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past …", as opposed presumably cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony."

62. Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290 at pp. 293 and 294 of his judgment made the following observations:-

> "It is important to make the point that there have been significant developments in this area since the decision of the High Court in Rainsford or in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459. By S.I. No. 63 of 2004, Ord. 27 of the Rules of the Superior Courts has been significantly amended in particular by the following provision:
>
> > (1) If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, subject to the provision of rule 1A, at the expiration of that time apply to the Court to dismiss the action, with costs, for want of prosecution; and on the hearing of the first such application, the Court may order the action to be dismissed accordingly, or may make such other order on such terms as the Court shall think just; and on the hearing of any subsequent application, the Court shall order the action to be dismissed as aforesaid, unless the Court is satisfied that special circumstances (to be recited in the order) exist which explain and justify the failure …".
>
> Secondly, the 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. Thirdly, following such cases as *McMullen v. Ireland* [ECHR 422 97/98, July 29, 2004] and the European Convention on Human Rights Act, 2003 the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time. These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one…It hardly needs saying that any further delay in the taking of any step in this action in the context of the gross delay that has already occurred will expose the plaintiff to a very serious risk of the dismissal of his action."

63. Clarke J. in *Stephens v. Flynn* [2005] IEHC 148, dealing with an appeal against an order of the Master of the High Court dismissing the plaintiff's claim for want of prosecution on the grounds of inordinate and inexcusable delay in the commencement and prosecution of the proceedings, stated that:-

> " … I now turn to the factors which are relevant to a consideration of the balance of justice. For the reasons indicated above it does seem to me that there needs to be a re-calibration of the weight to be attached to many of those factors in favour of imposing a significantly greater obligation on parties to move with expedition. The factors, and my assessment of them, are as follows:-
>
> (a) The degree of delay
>
> > For the reasons indicated above I am satisfied that there was a very significant delay indeed particularly having regard to the principle set out in *Birkett* to the effect that a particular obligation to move with expedition lies upon a party who has waited to the last moment to commence proceedings within the limitation period. I am satisfied that a delay which goes beyond the minimum which may be considered inordinate can be an additional factor to be weighed in the balance. I am satisfied that such a delay occurred here.
>
> (b) The excuse tendered
>
> > I am also satisfied that the Plaintiff has not only failed to render that delay excusable but has failed to do so by a significant margin and this must also be a factor to be taken into account.
>
> (c) Prejudice
>
> > The Defendant contends for prejudice based upon the fact that the evidence which will require to be tendered to the court will be impaired by the lapse of a minimum of ten years between the events and any likely trial date. He

has not, however, been able to point to any specific witness who is no longer available. It must also be taken into account that there are, apparently, statements of the relevant witnesses to the events of the 5th December, 1995 taken by the Gardaí on the occasion in question. That being said an issue as to the credibility of witnesses (which will almost certainly arise) will be all the more difficult of resolution where those witnesses are being asked to recollect matters that occurred so long ago. While the prejudice may not be quite as great as the Defendant contends for I am satisfied that it will nonetheless be of some significance. In relation to the evidence which will need to be tendered in respect of quantum I am not so sure that the same level of prejudice has been established. It would appear on the evidence that the Defendant was afforded, at the relevant time, an opportunity to have the premises concerned inspected by an engineer. It has not been contended that the engineer concerned is not available or that his records have become unavailable by the passage of time so as to render his evidence less clear. As the onus will lie upon the Plaintiff to establish his case it will be necessary for the Plaintiff to call all necessary witnesses concerning the quality of the works carried out by the Defendant, the extent of the works which remained to be done as of the date of the departure of the Defendant, and the costs of all additional and remedial works that were required. There will be some additional difficulty placed upon the Defendant at being asked to attempt to evaluate that evidence in respect of events that occurred a very considerable period of time ago. However on the basis of the evidence before me I could not place that prejudice at a higher degree than moderate.

(d) Inaction of the Defendant

It is clear from both *Rainsfort* and *Hogan* that "delay on the part of a Defendant seeking a dismissal of the action and, to some extent, a failure on his part to exercise a right to apply at any given time for the dismissal of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion". In this case there was no significant delay on the part of the Defendant. It might be said that there was some inaction between July 2002 and November 2003. However it is clear that even on the basis of the traditional test inaction is of less weight than delay. It is described as applying "to some extent". While remaining a factor it is one which, in the current context, should be given an even lower weighting.

I am therefore satisfied that the Defendant has suffered prejudice by virtue of the delay, but that same cannot be placed at too high a level. Finally in that regard I have considered the prejudice on the basis of the delay from the time of the incidents giving rise to the proceedings rather than solely in respect of the period from the commencement of the proceedings to date. While I agree that the court is confined, in determining whether a delay has been inordinate, to the period subsequent to the commencement of proceedings I am of the view that in assessing the balance of justice the court has a wider discretion and can take into account prejudice which may be cumulatively attributable to a delay both prior to and subsequent to the commencement of proceedings.

In all of the above circumstances I am satisfied that the weight to be attributed to both the delay and its excusability coupled with the moderate degree of prejudice and the minor weighting attributable to the limited inaction on the part of the Defendant is such that the balance of justice favours the dismissal of the proceedings."

64. Peart J. in *Byrne v. The Minister for Defence Ireland and the Attorney General* [2005] 1 I.R. 577 came to the conclusion that, in exercising its inherent jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay, the court had to consider and protect competing interests which were the plaintiff's right of access to the courts and, on the other hand, the defendants' right to an expeditious hearing, to finality and not to be adversely prejudiced by delay as well as the public interest which was independent of the parties in not permitting claims which had not been brought in a timely fashion to take up the valuable and important time of the courts and thereby reducing the availability of that much used and needed resource to plaintiffs and defendants who had acted promptly in the conduct of their litigation as well as increasing the cost to the taxpayers of providing a service of access to the courts which best served the public interest.

65. Peart J. at pp. 585 and 586 of his judgment states as follows:-

"It is usually the situation therefore, at least in the case of a twenty year delay, that where a plaintiff has been guilty of inordinate delay and the court is not satisfied that it is excusable, the court will proceed to dismiss the claim because the defendant will usually have been able to show that he/she is prejudiced. But I have not been referred to a case and I am certainly not aware of one, where the pre-commencement delay is both inordinate and inexcusable and yet there has been no prejudice made out to justify a dismissal.

22. In addressing that interesting question, I believe that it would be proper to consider what interests are there to be considered and protected by the court's inherent jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay. Certainly there are competing interests. There is first of all the plaintiff's undoubted right of access to the courts. There is also the defendant's right to an expeditious hearing of any claim brought against him and to finality. Linked to this consideration is the defendant's right not to be adversely prejudiced in such defence by delay for which he bears no responsibility. Finally, there is a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up the valuable and important time of the courts and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their litigation, as well as increase the cost to the Courts Service and through that body to the taxpayers, of providing a service of access to the courts which serves best the public interest.

23. It is really the final interest which is relevant to consider in the present case since I have already found that the defendant has not been prejudiced by the plaintiff's delay. The question is whether the public interest which I have identified trumps the plaintiff's right of reasonable access to the courts in the present case.

24. In the unusual circumstances of the present case, I believe that it does. I say that, because a feature of this case is that the major portion of the plaintiff's claim has fallen away, namely the claim related to tinnitus which emerged in about 1998. Prior to that the plaintiff had some difficulty with hearing loss, but it was not significant and certainly not sufficiently significant to drive him to consult either a solicitor or a doctor. Mr Dougan, audiologist, has described his loss of hearing as mild to moderate and that it ought not to impact him greatly. I have already stated that in all probability the plaintiff would not have brought a claim in respect of this hearing difficulty were it not for the emergence of the loss of balance difficulty which started in 1998.

25. The court has therefore had to hear a claim whose only real justification was on the basis of tinnitus, rather than hearing loss. That claim for hearing loss, if it were to stand alone, could have been and should have been commenced

> much earlier than 1998 and certainly not in the High Court. By 1998 it was in my view a stale claim. The court's jurisdiction to dismiss such an old claim is an important power in the public interest, regardless of prejudice to the defendant, yet one which must be used sparingly lest a plaintiff might unreasonably be deprived of a remedy to which he is entitled. If the court were never to invoke that power it would send the wrong message, namely that the courts will tolerate and indulge unreasonable delay in the bringing of claims where a defendant cannot show prejudice. That consideration must exist regardless of the existence of a defendant's right to plead the Statute of Limitations by way of defence pleading. That statute has the capacity to protect the defendant's rights which I have identified, but it serves no purpose in the protection of the public interest to which I have referred."

66. I take the view that it is appropriate in considering this application to dismiss for want of prosecution that I have regard to the fact that there was for all practical purposes a delay of seven years from the date of the cause of action until service of the plenary summons and that this imposed on the plaintiffs a duty to expedite the proceedings. In considering prejudice, however, arising from the inordinate and inexcusable delay on this aspect of the State defendants application, I take the view that it is appropriate that the issue of prejudice be considered only from the date of the issue of the plenary summons herein on the basis that it was issued within the time prescribed and allowed for by the Statute of Limitations, 1957, as amended.

67. No case is made out on the defendants' behalf of any specific prejudice having occurred by reason of the inordinate and inexcusable delay.

68. Mr. O'Donnell on the defendants' behalf submits that the defendants did not contribute to the delay and that there is no obligation on the defendants to force the plaintiff's hand. It is submitted that the defendants did not in any way encourage the delay and even if there was permissive delay on the part of the State defendants, this does not achieve any significant rating in respect of the court's decision.

69. Mr. Cush, on behalf of the *Comcast* plaintiffs, submits that there is no risk of an unfair trial in the circumstances that arise and that the State defendants are in the best position because all relevant witnesses have made statements and given evidence before the Moriarty Tribunal. There is no suggestion of a single missing document and no suggestion of any incapacity on the part of any relevant witness. There is no specific prejudice identified. Mr. Cush accepts that any significant delay necessarily involves almost some level of prejudice but, within the particular circumstances of this case, the State defendants have been dealing with the very issues involved by engaging actively with the Moriarty Tribunal.

70. Mr. O'Neill, on behalf of the *Persona* plaintiffs, refers to the test as laid out in *Primor* and submits that the Court should look at the overall delay and that aspect of the delay as attributable to the inaction on the part of the State defendants. The State knew at all times what the issues were and that the statement of claim was not being delivered. Insofar as the State defendants sought delivery of the statement of claim from the *Persona* plaintiffs within 21 days, they caused the plaintiff to incur additional expense as it appears that they were intent in bringing the motion herein on for hearing in any event.

71. Mr. O'Neill submits that there is no specific prejudice actually affecting the State defendants and they are in the best position themselves having prepared for the Moriarty Tribunal. While it would have to be accepted that memories do lapse over a period of time, the reality in this situation is that the State defendants have been focusing on the issues that are involved throughout the hearing of the module before the Moriarty Tribunal dealing with the second GSM mobile telephone licence. Mr. O'Neill submits that there is no question that a fair trial is impossible and the balance of justice is very much against a dismissal of the proceedings and it would be unfair to deprive the plaintiff of its cause of action.

72. In my view, in the particular circumstances of this case, both the plaintiffs and the defendants have contributed to the delay involved.

73. In the particular circumstances of this case all the parties who are involved in these three sets of proceedings were parties with an interest in the matters being dealt with at the Moriarty Tribunal. The relevant parties to these proceedings were present on every hearing date relating to any matters touching on the subject matter of these proceedings.

74. Insofar as Mr. Maloney, the previous solicitor to the plaintiff in the *Persona* proceedings, had casual conversations with Mr. Shaw from the Chief State Solicitor's Office at public hearings before the Moriarty Tribunal, Mr. Jolley is not in a position to indicate that at any stage Mr. Shaw consented to the ongoing situation.

75. A statement of claim was delivered in the *Comcast* proceedings on the 3rd June, 2005, and this was delivered in response to an application to strike out the plaintiff's proceedings as brought against the fourth named defendant in the *Comcast* proceedings, Mr. Denis O'Brien. No notice for particulars was ever raised in respect of the content of that statement of claim and, accordingly, the next move was for the defendants to have filed their defence within the time as prescribed by the Rules of the Superior Courts and not alone have they not complied with the Rules, but they have never at anytime sought an extension of time to deliver a defence.

76. Further, against this background, the present solicitors for the *Persona* plaintiffs served a notice of change of solicitor on 23rd March, 2006, and this notice was met within seven days by a letter from the solicitors for the defendants looking for a statement of claim and making no reference to having suffered any prejudice. In effect, the solicitor for the defendants was inviting the plaintiffs to proceed with the claim and when Mr. Jolley sought an extension of time his request was refused. Mr. Jolley, accordingly, delivered the statement of claim on behalf of the *Persona* plaintiffs within the 21 days as allowed for by the solicitor on behalf of the defendants and then subsequently was met with the motion herein to dismiss for want of prosecution.

77. It is clear from the judgment of Clarke J. in *Stephens v. Paul Flynn Limited* [2005] IEHC 148 which I propose to follow, that there is a shift in emphasis in respect of the manner in which delayed proceedings are to be approached in an application such as is now before this Court. As Clarke J. stated at p. 7 of his judgment "the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which need to be significantly reassessed and adjusted in the light of the conditions now prevailing" furthermore, "the balance of justice may be tilted to imposing grater obligations of expedition and against requiring the same level of prejudice as heretofore".

78. In the circumstances of this application, the State defendants are not in a position to identify any particular witness who may not be available at the hearing of these proceedings or any particular document which may have been mislaid and which would have been available if the matter had been brought to trial expeditiously notwithstanding a late start but nevertheless a start within the time period as provided for in the Statute of Limitations. I am, nevertheless, of the view that in the particular circumstances of this case, clearly with the passage of time involved since the commencement of the proceedings, as a matter of probability, the memory of

relevant witnesses as to what occurred at the time when the alleged cause of action arose will be dimmed and in this regard, allowing for the passage of time involved, the State defendants will suffer a presumed prejudice. Clearly issues as to the credibility of witnesses will almost certainly arise in this case and thus that issue will be all the more difficult to resolve where the witnesses are now being asked to recollect vital matters that occurred so long ago. I am satisfied in this regard that the prejudice that will be suffered by the State defendants is moderate.

79. I take account of the fact that in the first and second sets of proceedings involving *Comcast* a statement of claim was delivered on 3rd June, 2005, and no further action was taken by the State defendants. I take into account that in the third set of proceedings involving Persona the statement of claim was delivered on 21st April, 2006, in reply to a direct request from the State defendant's solicitors who, having requested delivery of the statement of claim, declined to give any extension of time to the plaintiff's solicitors in this regard. I further bear in mind that it was, at all times open to the State defendants to have brought this motion to dismiss for want of prosecution at a much earlier stage.

80. There was, in my view, active inaction on the part of the State defendants in failing to either raise a notice for particulars or deliver defences to the *Comcast* statements of claim as served in June, 2005 but, having not received a defence within the time as prescribed by the Rules of the Superior Courts, it was alternatively open to the plaintiff's solicitor to bring a motion for judgment in default of defence which course of action they did not pursue. I do not attach any significant weight to the fact that the solicitors on behalf of the State defendants called upon the *Persona* plaintiffs to deliver their statement of claim which they did on 21st April, 2006, and which was followed up by the notice of motion herein as dated 26th May, 2006. Overall I would attach a minor weighting to the limited inaction on the part of the State defendants and I am satisfied that, in any event, it only applies to some extent.

81. The plaintiffs in these proceedings have a constitutional right of access to the courts and the defendants have a right to an expeditious hearing of any claim as brought against them within a reasonable period of time.

82. There is no doubt but that this is a very substantial commercial claim for damages running undoubtedly into many millions of Euros and, in addition, people's individual characters and reputations will be subjected to the most significant scrutiny and may be subject to serious impact.

83. I take the view that in the present day and age with a modern legal system in place, with the advances in technology that are available, with the continuing shift in emphasis of evolving jurisprudence against delay, the circumstances of each case of this nature have to be subject to more rigorous scrutiny than heretofore may have been the view adopted. In this case there has been inordinate and inexcusable delay and the delay, in my view, on the part of the plaintiffs goes beyond the minimum which may be considered inordinate. There have been deliberate tactics in commercial litigation on the part of the plaintiffs to delay the proceedings to benefit their cause of action by awaiting developments at the Tribunal of Inquiry into Payments to Politicians and Related Matters. While no actual prejudice has been referred to, I am satisfied that there is presumed prejudice at a moderate level. There is, I am satisfied, evidence of active inaction on the part of the defendants in failing to react to the delivery of the *Comcast* statements of claim in June, 2005 and further evidence of inactivity in not having brought this motion at an earlier stage but I do not regard the inaction on the part of the State defendant as being of any real significance in the particular circumstances of this case against the plaintiffs' declared tactics of not taking any steps in the litigation while the Tribunal was continuing. I take the overall view that the excuse as offered on the plaintiffs' behalf fails by a significant margin to excuse the delay.

84. What is, in my view, of particular significance is the failure on the part of the plaintiffs after a late start to move on the proceedings expeditiously against a background where there is no onus on a defendant to force the plaintiff on with proceedings that have been instituted. The defendants have to be entitled to a trial within a reasonable period of time of the commencement of the proceedings and, as matters presently stand, it is now six years since the first set of *Comcast* proceedings were issued by way of a plenary summons, somewhat over five and a half years since the second set of *Comcast* proceedings were issued and six years since the *Persona* proceedings were issued and in each case the proceedings now rest with the delivery of a statement of claim. There can be no immediate prospect of a hearing in these matters and, allowing for the completion of the pleadings, discovery, possible claims to privilege in respect of discovery, possible interrogatories and the final preparations for a hearing, it appears reasonable to come to a conclusion that a full hearing of the subject matter of these proceedings is unlikely for a further two years.

85. In my view, a hearing of a substantial commercial matter deliberately delayed for seven to eight years from the date of the issue of a plenary summons is not a hearing within a reasonable period of time. I am further satisfied that the prospect of a fair trial is significantly undermined by reason of the inordinate and inexcusable delay on the part of the plaintiffs giving rise to presumed prejudice.

86. I come to the conclusion that where responsibility for inordinate and inexcusable delay rests primarily with the plaintiffs, where there is presumed prejudice of a moderate nature, where the issues to be determined are of a very substantial commercial nature, where the actions leading to the delay involved are deliberate and conscious, where the prospects of a fair trial have been undermined, where the plaintiffs have failed after a late start to advance their proceedings expeditiously, the balance of justice favours the dismissal of the proceedings and, accordingly, I dismiss the plaintiffs proceedings as against the State defendants for want of prosecution.

87. The second aspect of the defendants' application is pursuant to the inherent jurisdiction of the court to dismiss the plaintiffs' claim in the interests of justice. In this regard reliance is also placed on Article 6 of the European Convention on Human Rights.

88. The jurisprudence in respect of an application to dismiss the plaintiffs' proceedings by reason of the lapse of time without any reference to culpable delay pursuant to the inherent jurisdiction of the courts emanates from the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151 at pp. 157 and 158:-

> "After due regard to all relevant factors, I am driven to the conclusion that not only was the delay in this case inordinate and inexcusable but there are no countervailing circumstances which would justify a disregard of that delay. I consider that it would be contrary to natural justice and an abuse of the process of the Courts if the defendant had to face a trial in which she would have to try to defeat an allegation of negligence on her part in an accident that would have taken place 24 years before the trial, and a claim for damages of which she first learned 16 years after the accident…. While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial."

89. O'Domhnaill was followed by *Toal v. Duignan (No. 1)* [1991] ILRM 135 and *Toal v. Duignan (No. 2)* [1991] ILRM 140 wherein Finlay C.J. upheld the inherent jurisdiction stating at pp. 142 and 143:-

> "In the course of the argument on these appeals a question was raised as to whether the court had jurisdiction to dismiss by reason of delay an action which was in fact commenced within a time limit fixed by Act of the Oireachtas. My judgment in the previous appeal in respect of the other defendants in this case was based on an acceptance of the principles laid down in the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151 with which Griffin J. agreed. I have carefully reconsidered the principles laid down in that judgment on the question as to the jurisdiction of this Court in the interests of justice to dismiss a claim where the length of time which has elapsed between the events out of which it arises and the time when it comes for hearing is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself or herself against the claim made. I have also recognised the dissent from the view expressed by McCarthy J. in the judgment delivered by him in *O'Domhnaill v. Merrick*. I adhere to the view expressed by me in the previous appeal in this case that the court has got such an inherent jurisdiction. It seems to me that to conclude otherwise is to give to the Oireachtas the supremacy over the courts which is inconsistent with the Constitution."

90. There is also the very pertinent judgment of Hardiman J. in *J.O'C v. Director of Public Prosecutions* [2000] 3 I.R. 478 as already referred to herein.

91. Kelly J. in *Kelly v. O'Leary* [2001] 2 I.R. 526 ultimately reached his conclusion that the relevant criteria for a dismiss in the interests of justice arise from answering the same two fundamental questions which appear to be raised in the judgments in the two *Toal* decisions and the *O'Domhnaill* decision and which are:-

> 1. Whether, by reason of the lapse of time (or delay), there is a real and serious risk of an unfair trial;
>
> 2. Whether, by reason of the lapse of time (or delay), there is a clear and patent unfairness in asking the defendant to defend the action.

92. Finlay Geoghegan J. succinctly summed up the situation in M*anning v. Benson and Hedges* [2004] 3 I.R. 556 where at p. 565 wherein she stated:-

> "I accept that the courts have recognised the existence of a jurisdiction to dismiss a claim by reason of a lapse of time without there being any delay in the sense of culpable delay by a plaintiff and where the requirements of what are variously described as the "interests of justice" or the prevention of "patent unfairness" or the requirements of "constitutional principles of fairness of procedure" or the risk of putting "justice to the hazard" so require."

93. Article 6 of the European Convention of Human Rights states:-

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The European Convention of Human Rights has now been incorporated into domestic law by the European Convention of Human Rights Act 2003 which came into force on 31st December, 2003. Section 2 of the Act, of 2003 provides as follows:-
>
> > "(1) In interpreting and applying any statutory provision or rule of law, a court shall in, so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
> >
> > (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

94. Article 6 of the ECHR was considered by Henchy J. in the Supreme Court in the context of an application to dismiss for want of prosecution in *O'Domhnaill v. Merrick* [1984] I.R. 151. Henchy J. stated that one had to assume that the Statute of Limitations, 1957 was enacted (giving no indication therein of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law including any relevant treaty obligations. He explained the relevance of this rule of statutory interpretation as follows at p. 159:-

> " … [A]rticle 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides:-
>
> > 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial Tribunal established by law…'
> >
> > While the Convention is not part of the domestic law of the State, still, because the Statute of Limitations, 1957, was passed after this State ratified the Convention in 1953, it is to be argued that the Statute, since it does not show any contrary intention, should be deemed to be in conformity with the Convention and should be construed and applied accordingly."

95. In *McMullen v. Ireland, European Court of Human Rights No. 422 97/98* 29th July, 2004 the Court of Human Rights held that Ireland had violated Article 6(1) of the Convention because "the proceedings… were not dealt with within a "reasonable time" as required by Article 6.1." In explaining its reasoning the European Court of Human Rights stated *inter alia* as follows:-

> "The court recalls that a State is obliged to organise its legal system so as to allow its courts comply with the reasonable time requirement of Article 6. It has held on a number of occasions that a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings does not dispense the State from complying with the requirement to deal with cases in a reasonable time. If a State lets proceedings continue beyond the "reasonable time" prescribed by Article 6 of the Convention without doing anything to advance them, it will be considered responsible for the resultant delay."

96. Hardiman J. in *Gilroy v. Flynn* at p. 294 stated:-

> " … [F]ollowing such cases as *McMullen v. Ireland*… and the European Convention on Human Rights Act, 2003, the courts, quite independently of the action or inaction of the parties have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."

97. Finlay Geoghegan J. in *Manning* dealt extensively with this very issue concerning a dismiss in the interests of justice, and having

reviewed the various relevant authorities including in particular the views of Hardiman J. as expressed in *J O'C v. DPP* as already referred to herein, went on to say at pp. 568 and 569 of her judgment:-

> "The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial. This, as was submitted, is required by Article 34 of the Constitution. Accordingly, if a defendant can on the facts establish that having regard to a lapse of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss."

98. Also, if a defendant can establish that a lapse of time for which he is not to blame is such that there is a clear and patent unfairness in asking him now to defend the claim then he may also be entitled to an order to dismiss. This entitlement derives principally from the constitutional guarantee to fair procedures in Article 40.3 of the Constitution.

99. Whilst in some of the cases the judgments have referred to matters under both these headings, they appear to be potentially separate grounds upon which the inherent jurisdiction to dismiss may be exercised.

100. The factors to be considered by the court in relation to each question may overlap. It appears to me that these may include:-

1. has the defendant contributed to the lapse of time;

2. the nature of the claims;

3. the probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;

4. the nature of the principal evidence; in particular whether there will be oral evidence;

5. the availability of relevant witnesses;

6. the length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and the probable trial date.

101. The cause of action herein has to have its genesis at a point in time between 2nd March, 1995, when the competition process for the awarding of a second GSM mobile telephone licence was announced and the result of the competition on 25th October, 1995, and that brings about a situation whereby the Court is asked to consider the matter at this point in time some 12 years on and, allowing for a further two years for the action to come on for hearing, the Court would then be asked to decide the issues between the parties some 14 years after the date of the cause of action allegedly occurred.

102. Turning to the matters as referred to by Finlay Geoghegan J. in *Manning*, the State defendants did contribute to the lapse of time involved but not, in my view, in any significant way. The nature of the claim as previously outlined herein is clearly of a very serious nature. I take the view that it is reasonable to come to the conclusion that, by and large, the issues in this case will be primarily factual as distinct to legal issues. The evidence that will be involved will as a matter of probability be primarily oral in addition to documentary evidence and it appears that the relevant witnesses will be available although as previously concluded herein their memories will be dimmed especially at a remove of some 14 years from the cause of action.

103. The situation with regard to the European Convention on Human Rights is that Article 6 was brought into force of domestic law by the European Convention of Human Rights Act, 2003 on 31st December, 2003, which provides for a fair and public hearing within a reasonable time.

104. The Act of 2003 operates prospectively only from the date of the coming into force of the European Convention on Human Rights Act, 2003 but I am satisfied, having regard to the available jurisprudence, that the European Convention of Human Rights is an extra factor to be added into consideration by this Court but subject to the application of existing Irish law and jurisprudence.

105. In my view, for this Court to be asked in 2009 to determine primarily issues of fact that will have occurred at the time of the prospective hearing date some 14 years previously, gives rise to a basic unfairness of procedures, undermines the defendants ability to have a fair trial, creates a clear and patent unfairness in asking the defendants to defend the action, and clearly fails to provide the defendants with a hearing within a reasonable time of the alleged cause of action having occurred. In essence, in my view, in a case such as this, it puts "justice to the hazard to such an extent that it would be a derogation of basic fairness to allow the case to proceed to trial" as per Henchy J. in *O'Domhnaill* at p. 158. In these circumstances, I come to the conclusion pursuant to the inherent jurisdiction of the court to dismiss the plaintiffs claim as against the State defendants.