**THE HIGH COURT**

**[2004 No. 7017 P]**

**BETWEEN**

**PATRICK MCNAMARA AND PAULA MCNAMARA**

**PLAINTIFFS**

**AND**

**IRISH LIFE ASSURANCE PLC**

**DEFENDANT**

**[2004 No. 10427 P]**

**BETWEEN**

**JOHN TOM CONLON AND KATHLEEN CONLON**

**PLAINTIFFS**

**AND**

**IRISH LIFE ASSURANCE PLC**

**DEFENDANT**

**[2004 No. 8590 P]**

**BETWEEN**

**JAMES HIGGINS AND MARGARET HIGGINS**

**PLAINTIFFS**

**AND**

**IRISH LIFE ASSURANCE PLC**

**DEFENDANT**

**JUDGMENT of Ms. Justice Murphy delivered on the 6th day of July, 2017.**

1. This is the defendant's application to dismiss each of the above named plaintiffs' claims for want of prosecution. By way of notice of motion dated 24th May, 2016, the defendant seeks orders in each of the above proceedings pursuant to the inherent jurisdiction of the Court and/or pursuant to Order 122 of the Rules of the Superior Courts dismissing the plaintiffs' claims as against the defendant for want of prosecution and/or on the ground of inordinate and inexcusable delay causing prejudice to the defendant in the conduct of its defence.

**Background**

2. The three claims arise in similar circumstances although there are some factual differences in each case.

3. Each claim arises from the sale of a life assurance product known as "*The Lifesaver Plan*" by the defendant to the plaintiffs. The plan provided for a combination of investment and life cover.

4. The McNamaras signed a proposal form on 20th July, 1983; the Conlons signed their proposal form on 4th April, 1989; and the Higgins signed theirs on 14th August, 1986. Each policy commenced shortly thereafter and each remains in force. From inception until the year 2000, the policy operated with inflation-linked adjustments to premiums and benefits.

5. Between September and November, 2000, the defendant wrote to each of the plaintiffs notifying them that the defendant had conducted a review of the premium payable on the policy and that following the review, it had noted that the premium currently being paid by each plaintiff was insufficient to maintain the chosen level of life cover into the future. The plaintiffs were offered the option of paying an increased premium to remain on the cover currently held, or alternatively, to maintain the same level of premium and have their level of cover reduced.

6. The plaintiffs disputed the defendant's entitlement to carry out such a policy review. When the plaintiffs declined to exercise the option, a default position was imposed upon them in 2002 whereby they continued to pay the same premia with a considerable reduction of life cover, 31.7% in the *McNamara case*, 10.6% in the *Higgins* case, while at that juncture, the defendant accepted that the Conlons could maintain their existing life cover and their premia.

7. The plaintiffs in each case allege that prior to signing the proposal form in respect of the life assurance cover, they were not told of any provision for reviewing the amount of premiums payable or the amount of life cover, other than provision for index-linking. The defendant on the other hand alleges that the terms of the contract between the parties included a policy review provision set out in the policy document. The plaintiffs assert that they were not provided with the policy document at the time they made the contract. The Higgins could not recall whether they ever received such a document although Mrs. Higgins averred in her affidavit that they were not provided with the policy document.

8. Following the invocation by the defendant of the alleged '*policy review*' in or about 2000/2001, there followed in each case, correspondence between the plaintiffs and the defendant in relation to the "*policy review*". No resolution was achieved, and between May and July, 2004, plenary summonses were issued in each of the three cases. The plaintiffs each claim the following reliefs:-

> (i) a declaration that the defendant was not entitled to adjust unilaterally the premiums payable and/or the amount of life cover effected under the policy, or otherwise to avail of any policy review clause contained in the contract while the contract remains in force;

(ii) an order requiring the defendant to restore the terms of the policy to the prior levels;

(iii) damages for misrepresentation;

(iv) damages for negligent misstatement;

(v) damages for breach of contract.

9. A number of similar claims have been initiated and it was proposed by those affected, that these three claims proceed as test or "*pathfinder*" cases.

10. Having served notice of trial in November, 2015 each plaintiff made an application for a trial date in April, 2016. At that point, the defendant indicated its intention to bring this motion.

11. By notice of motion dated 24th May, 2016, the defendant seeks orders dismissing each of the proceedings for want of prosecution and/or on the ground of inordinate and inexcusable delay giving rise to alleged prejudice. The motions in each case are grounded on the affidavit of Mr. John O'Toole, senior administrator of Irish Life Assurance plc who, the Court notes, was materially involved in the activation of the policy renew clause in 2000/2001 and who was also materially involved in the pre-litigation correspondence.

12. The essence of the plaintiffs' claim in each case is that they were informed by the defendant that the policy would provide for increases in the amounts of life cover, and corresponding increases in premiums, to protect the amount of cover against the effects of inflation, such increases to be at the option of the plaintiffs. The plaintiffs were not told, either verbally or in writing, before entering the contract, of any other basis on which premiums could be increased or cover reduced. They were not provided with a copy of the policy document for the said Lifesaver life assurance policy prior to completing the proposal form. In particular, they were not made aware of any policy review clause that purported to entitle the defendant to impose unilaterally either increased premiums to maintain existing cover or reduced cover for existing premiums.

13. The defendants have specifically denied each of the factual assertions made by each plaintiff and have further denied breach of contract or misrepresentation. In its defence the defendant makes specific denials in respect of the plaintiffs' claims at paras. 1 to 13 of its defence and alternatively pleads that if the "*policy review clause*" was not part of the contract proposal, the actual policy issued containing the "*policy review clause*" represented a counteroffer by the defendant which was accepted by the plaintiffs.

**Delay**
14. In support of its application to dismiss the defendant relies on three alleged periods of delay by the plaintiffs in each case:-

**McNamara chronology**
15. Paula McNamara who was born on 25th June, 1947 is aged 70. Patrick J. McNamara was born on 26th November, 1943 and is aged 74. They are married to each other and reside in Co. Roscommon. The Court has been furnished with an agreed chronology of the McNamara proceedings. It reads as follows:-

**"Chronology**

***20 July 1983:*** *The Plaintiffs signed the proposal form.*

***1 September 1983:*** *Policy commences.*

***1983 – 2000:*** *Policy operates with inflationary adjustments only to premium and benefits*

***20 October 2000:*** *Irish Life writes to the Plaintiffs reminding them of the policy review clause and informing them of their options in relation to same.*

***31 October 2000:*** *Plaintiffs make a phone call to Irish Life and by letter of 1 November 2000 Irish Life says it will contact them shortly 'regarding the issues you have raised', and Irish life then gives its response on 14 November 2000.*

***17 January 2001:*** *Irish Life write to the Plaintiffs (signed by Mr O'Toole).*

***10 August 2001:*** *Further letter to Plaintiffs from Irish Life offering additional options.*

***21 August 2001:*** *Plaintiffs write to Irish Life declining all options and indicating that they were 'sold a life policy. Not a policy that was going to be changed after a number of years'.*

***22 August 2001:*** *Irish Life write an acknowledgement on 22nd August and a more detailed response on 24th August (see below).*

***24 Aug 2001:*** *Further letter to Plaintiffs from Irish Life seeking confirmation of chosen options and advising of default position in absence of choice.*

***20 September 2001:*** *Plaintiffs write to Irish Life declining options and stating 'we kept up our end of the bargain. We now expect you to do the same'.*

***5 October 2001:*** *Irish Life writes a further letter.*

***23 November 2001:*** *Irish Life writes to the Plaintiffs in relation to the new premium and the new amount of cover following the policy review.*

***3 December 2001:*** *Plaintiff's write saying they want to retain their existing policy. Irish Life reply on 4 December 2001.*

***8 November 2002:*** *Plaintiffs write in asking to have the original proposal form. This is provided under cover of a letter from Irish Life dated 13 November 2002.*

***31 July 2003:*** *Letter of Claim from Damien Tansey & Associates Solicitors*

***26 August 2003:*** *Irish Life response to Letter of Claim (in name of Mr O'Toole).*

***April 2004:*** *Plaintiffs attend further meeting in Dublin with Solicitors and other potential plaintiffs. Solicitors brief Counsel.*

***17 May 2004:*** *Plenary Summons issues.*

***16 August 2004:*** *Plenary Summons is served on Irish Life.*

***20 August 2004:*** *Irish Life enters an Appearance through its solicitor.*

***4 November 2004:*** *Statement of Claim is delivered.*

***7 January 2005:*** *Notice for Particulars is served by Irish Life.*

***7 March 2005:*** *Defence is delivered by Irish Life.*

***11 May 2005:*** *Replies to Particulars is delivered on behalf of the Plaintiffs.*

***5 December 2006:*** *First Notice of Intention to Proceed served on behalf of the Plaintiffs.*

***23 August 2007:*** *Irish Life write to Plaintiffs Solicitors re planned policy review on 1 September 2007. The Defendant's Solicitor write to the Plaintiffs solicitor on 7th November 2007 and there is an exchange of letters up to and including 19 November 2007. This includes a letter from Mrs McNamara dated 29 August 2007 declining to take any of the options offered.*

***4 December 2007:*** *Plaintiff's Solicitors write to request copies of a) Introductory Sales Brochure and b) Introductory letter said to have been furnished to the Plaintiff and ask for particulars of when the Policy document was furnished to the Plaintiffs.*

***8 July 2008:*** *Notice of Change of Solicitor served on behalf of the Plaintiffs (the new firm representing the Plaintiffs appears to be the successor firm of their previous solicitors, meaning that there is no break in continuity of representation).*

***22 January 2009:*** *Plaintiffs attend meeting between various Plaintiffs and the Solicitors in Dublin. The need for discovery is discussed and papers are forwarded to Counsel with a view to drafting discovery requests.*

***10 August 2009:*** *Plaintiffs' solicitors serve a request for voluntary discovery.*

***17 August 2009:*** *Irish Life reply to indicate that Counsel is on vacation so they cannot reply within 3 weeks.*

***7 December 2009:*** *Plaintiffs' solicitors serve a reminder regarding their request for voluntary discovery.*

***28 January 2010:*** *Plaintiffs' solicitors serve a second Notice of Intention to Proceed.*

***1 March 2010:*** *Plaintiffs' solicitors issue a discovery motion returnable for 4 June 2010.*

***4 June 2010:*** *Order for discovery against Irish Life made by consent, with discovery to be made by Irish Life within 12 weeks from the making of the order.*

***19 August 2010:*** *Plaintiffs' solicitors send a reminder regarding the making of discovery.*

***10 March 2011:*** *Plaintiffs' solicitors issue a notice of motion returnable for 9 June 2011 regarding Irish Life's failure to make discovery.*

***3 June 2011:*** *Irish Life delivers its affidavit of discovery to Plaintiffs' solicitors.*

***20 February 2012:*** *Plaintiffs' solicitors write requesting details of adjustments to premium and cover.*

***16 March 2012:*** *Irish life responds furnishing requested details of adjustments to premiums and cover.*

***April 2014:*** *The Plaintiff attended a meeting in Dublin with his Solicitor and senior Counsel. Thereafter Senior Counsel asked to provide final proofs.*

***9 April 2014:*** *Plaintiffs' solicitors serve a third Notice of Intention to Proceed.*

***9 November 2015:*** *Notice of Trial served.*

***10 December 2015:*** *Certificate of Readiness furnished on behalf of the Plaintiffs.*

***April 2016:*** *Application by Plaintiff for date. Defendant indicates it will bring this motion."*

16. Mr. John O'Toole, senior administrator of Irish Life Assurance plc, who has been materially involved in this controversy since the outset, avers on behalf of the defendant that at a minimum, three separate lengthy periods of unexplained delay on the part of the plaintiffs have occurred during which the plaintiffs have done nothing at all to progress their claim. He outlines the periods of delay on the part of the plaintiff as:-

*"(a) The period of in excess of three and a half years between November 2001, being the date on which the change in cover complained of was notified to the Plaintiffs, and the issue of proceedings on 17 May 2004.*

*(b) The period in excess of 4 years between the receipt of the Plaintiffs' replies to particulars in May 2005 and the Plaintiffs' request for voluntary discovery in July 2009.*

*(c) The period of in excess of 4 years between delivery of Irish Life's affidavit of discovery in June 2011 and service of notice of trial in November 2015 (excepting, perhaps, the exchange of correspondence in early 2012 concerning adjustments to premiums and cover, which was completed in less than a month)."*

17. He calculates this as being a total of almost 12 years, during which, through no fault of Irish Life, no steps were taken by the plaintiffs to pursue their claim against Irish Life. He further alleges that there are certain additional periods during which the plaintiffs did very little to advance their claim, for example, he states that it was unclear why a period of almost six months elapsed between the issuing of the plenary summons and the delivery of the statement of claim.

18. Mrs. Paula McNamara, in her replying affidavit on behalf of the plaintiffs, explains that in relation to the first period of delay between November, 2001 and the issuing of proceedings in May, 2004, they had hoped that a resolution could be achieved between the parties directly. She outlines the steps taken by the plaintiffs during this period and alleges that there was no culpable delay on their part in relation to that period. Counsel for the plaintiffs has submitted that this pre-litigation period should not count against the plaintiffs in determining the delay.

19. Mrs. McNamara responded to the alleged second period of delay, being the period between the replies to particulars which were delivered on 11th May, 2005 and the plaintiff's request for voluntary discovery in July, 2009. She set out the correspondence between the parties in 2007 in relation to a proposed further review of their policy. Counsel for the plaintiffs submits that this correspondence is relevant as it shows activity relating to the case if not directly relating to the moving of the actual proceedings. She noted in particular that their solicitor wrote to the defendant seeking further documentation on 4th December, 2007 and that this was not replied to until it eventually formed part of discovery in 2011. In that letter, the plaintiffs' solicitor sought copies of the introductory sales brochure which the defendant alleged it had provided to the plaintiffs prior to completing the application and copies of the introductory letter which the defendant alleged it had provided to the plaintiffs when the policy commenced in 1983. Further, in light of the defendant's statement that "*the Plaintiff has had sight of the policy conditions for 20 years*", the solicitor for the plaintiff requested the defendant to indicate precisely when the policy document was allegedly furnished to the plaintiffs. No reply to the particulars sought was received.

20. Mrs. McNamara also states that she was one of a number of policy holders who felt aggrieved by the actions of the defendant. There are a large number of plaintiffs who have similar claims. Being people of limited means they have banded together to support one another and it appears that at a meeting on 22nd January, 2009 of a large number of plaintiffs in related cases it was decided to run these three claims as "*test cases*".

21. Mrs. McNamara refers to the defendant's own delay in and about the making of discovery which in her claim took just short of two years. Discovery was first sought in July, 2009 and was not furnished until June, 2011.

22. The third significant period of delay identified by the defendant spans from June, 2011 until notice of trial was served on 11th November, 2015. Mrs. McNamara referred to further correspondence between the parties in 2012 but she does not provide much in the way of explanation for the subsequent delay other than to point to the fact that an actuary needed to be briefed and that her solicitor was involved in obtaining final proofs from senior counsel in this and the other related cases. It was submitted on her behalf that this is of relevance as it shows that the plaintiffs were not personally blameworthy for the delay and that this is a factor which the Court may consider when determining this motion.

23. In general terms, Mrs. McNamara explains the delay in her case as mainly attributable to the fact that a number of similar cases were being worked on together and that her case, being one of a number of tests cases, could not proceed until the others were ready. She further explains that she and her husband are "*simple persons*" mounting a High Court case against the defendant who is a large company. She suggests that the defendant's delay in responding to requests for discovery and particulars has been such that any delay on their part should not be termed "*inexcusable*".

24. Mrs. McNamara further avers that they have incurred considerable legal costs preparing for trial and that at no point from the commencement of the proceedings in 2004 until the application for a trial date in April, 2016 have the defendants ever complained about delay.

25. Mr. O'Toole swore a further affidavit in which he focuses on the second and third major periods of delay and states that no proper explanation has been provided by Mrs. McNamara. He avers that only a small number of letters appear to have been written by the plaintiffs' solicitors during the second period and they relate primarily to the policy review rather than the progression of court proceedings. Mr. O'Toole rejects any contention that the defendant acquiesced in any delay. He repeats the allegation of prejudice caused to Irish Life arising from the delay.

**Conlon delay**

26. John Tom Conlon was born on 23rd August, 1936 and is aged 81. His wife Kathleen Conlon was born in August, 1939 and unfortunately died in the course of these proceedings. The Court has been furnished with an agreed chronology of events in the Conlon case which reads as follows:-

**"Chronology**

***4 April 1989:*** *The Plaintiffs signed the proposal form.*

***1 July 1989:*** *Policy commences.*

***1989 – 2000:*** *Policy operates with inflationary adjustments only to premium and benefits*

***21 November 2000:*** *Irish Life writes to the Plaintiffs reminding them of the policy review clause and informing them of their options in relation to same.*

***8 December 2000:*** *Mr. Conlon writes to Irish Life declining to accept either a reduction in benefit or an increase in premia.*

***13 December 2000:*** *Irish Life write a 'holding letter' to Mr. Conlon.*

***21 December 2000:*** *Irish Life write a further letter to the Plaintiffs again asserting the policy review clause.*

***13 February 2001:*** *Mr. Conlon writes to Irish Life indicating he was not made aware that policy was unit linked or had term reviews.*

***19 February 2002:*** *Irish Life writes to the Plaintiffs stating that the premiums currently payable are sufficient to maintain cover, but stating that a new premium and a new amount of cover may be fixed following a policy review in 2008.*

***October 2002:*** *Plaintiffs attend meeting in Dublin with Solicitors and other potential plaintiffs*

***31 July 2003:*** *Letter of Claim from Damien Tansey & Associates Solicitors*

***21 August 2003:*** *Irish Life response to Letter of Claim (in name of Mr O'Toole).*

***April 2004:*** *Plaintiffs attend further meeting in Dublin with Solicitors and other potential plaintiffs. Solicitors brief Counsel.*

***5 July 2004:*** *Plenary Summons issues.*

***16 August 2004:*** *Plenary Summons is served on Irish Life.*

***20 August 2004:*** *Irish Life enters an Appearance through its solicitor.*

***4 November 2004:*** *Statement of Claim is delivered.*

***7 January 2005:*** *Notice for Particulars is served by Irish Life.*

***7 March 2005:*** *Defence is delivered by Irish Life.*

***10 November 2005:*** *Replies to Particulars delivered on behalf of the Plaintiffs.*

***5 December 2006:*** *First Notice of Intention to Proceed served on behalf of the Plaintiffs.*

***4 December 2007:*** *Plaintiff's Solicitors write to request copies of a) Introductory Sales Brochure and b) Introductory letter said to have been furnished to the Plaintiff and ask for particulars of when the Policy document was furnished to the Plaintiffs.*

***14 April 2008:*** *Defendant writes to Plaintiffs regarding a proposed policy review. The Defendant's Solicitor writes to the Plaintiffs' solicitor on 22nd April 2008 and there is an exchange of letters up to and including 14 Nov 2008. The Plaintiff's Solicitor asks that the status quo be maintained and this is declined.*

***8 July 2008:*** *Notice of Change of Solicitor served on behalf of the Plaintiffs (the new firm representing the Plaintiffs appears to be the successor firm of their previous solicitors, meaning that there is no break in continuity of representation).*

***December 2008:*** *Mrs. Conlon dies. This leads to a letter from the Plaintiff's solicitor on 25 February 2009.*

***22 January 2009:*** *Plaintiffs attend meeting between various Plaintiffs and the Solicitors in Dublin. Mr. Conlon is still grieving and cannot attend. The need for discovery is discussed and papers are forwarded to Counsel with a view to drafting discovery requests.*

***10 August 2009:*** *Plaintiffs' solicitors serve a request for voluntary discovery.*

***17 August 2009:*** *Defendant's solicitors acknowledge receipt of the voluntary discovery letter but advise that as Counsel is on vacation they will require more than 3 weeks to respond.*

***4 June 2010:*** *Consent order for discovery made against Irish Life in the related case of McNamara v Irish Life Assurance Plc Record No 2004/7017P.*

***19 August 2010:*** *Plaintiffs' solicitors serve a reminder regarding their request for discovery in these proceedings.*

***18 July 2011:*** *Plaintiffs' solicitors serve a further reminder regarding their request for voluntary discovery in these proceedings.*

***17 November 2011:*** *Irish Life serves a response to the request for voluntary discovery dated 10 Aug 2009.*

***29 August 2012:*** *Plaintiffs' solicitors serve a second Notice of Intention to Proceed.*

***15 October 2012:*** *Plaintiffs respond to Irish Life's letter of 17 November 2011 regarding discovery.*

***2 November 2012:*** *Irish Life's response to Plaintiffs' letter concerning discovery*

***2 January 2013:*** *Plaintiffs respond to letter of 2 November 2012 concerning discovery.*

***3 January 2013:*** *Irish Life delivers its affidavit of discovery to Plaintiffs' solicitors.*

***2 April 2013:*** *Plaintiffs' solicitors seek supplemental affidavit of discovery identifying documents within specific categories.*

***4 October 2013:*** *Supplemental affidavit of discovery delivered.*

***April 2014:*** *The Plaintiff attended a meeting in Dublin with his Solicitor and senior Counsel. Thereafter Senior Counsel asked to provide final proofs.*

***9 April 2014:*** *Plaintiffs' solicitors serve a third Notice of Intention to Proceed.*

***11 November 2015:*** *Notice of Trial served.*

***10 December 2015:*** *Certificate of Readiness furnished on behalf of the Plaintiffs.*

***April 2016:*** *Application by Plaintiff for date. Defendant indicates it will bring this motion."*

27. In this case too, Mr. O'Toole identifies three separate lengthy periods of what he characterises as unexplained delay on the part of the plaintiffs. He outlines them as follows:-

*"(a) The period of almost two and a half years between February 2002, being the date on which the proposed policy review complained of was notified to the Plaintiffs, and the issue of the proceedings on 5 July 2004.*

*(b) The period in excess of three and a half years between the receipt of the Plaintiffs' replies to particulars in November 2005 and the Plaintiffs' request for voluntary discovery in August 2009.*

*(c) The period in excess of 2 years between delivery of Irish Life's supplemental affidavit of discovery in October 2013 and service of notice of trial in November 2015."*

28. Mr. O'Toole avers that this amounts to a total period of approximately 8 years during which, through no fault of the defendant, no steps were taken by the plaintiffs to pursue their claim as against the defendant. He further points to certain additional periods during which the plaintiffs did very little to advance their claim, for example, he instances periods of close to a year elapsing between various letters sent by the plaintiffs in respect of discovery between 2009 and 2012. He asserts that it is unclear why a period of some months elapsed between the plenary summons issuing and the delivery of the statement of claim.

29. Mr. John Tom Conlon swore a replying affidavit. His wife, the second named plaintiff, unfortunately died in December, 2008. Like Mrs. McNamara, Mr. Conlon explains the first period of delay as being due to the fact that they had initially hoped a resolution could be reached between the parties. He also highlights the correspondence that was exchanged during 2003 and early 2004 relating to the policy review clause.

30. Mr. Conlon addresses the second period of delay between November, 2005 and August, 2009 and highlights that his solicitor filed a notice of intention to proceed in December, 2006. His solicitor wrote to solicitors for the defendant on 4th December, 2007. She sought copies of the introductory sale brochure which the defendant alleged it had provided to the plaintiff prior to completing the application and the introductory letter which the defendant alleged it had provided to the plaintiff when the policy commenced in 1989. She further requested particulars of when the policy document was furnished in light of the defendant's statement that "*the Plaintiff has had sight of the policy conditions for 14 years*". This request was never answered.

31. Mr. Conlon points out that there was correspondence in 2008 about a further proposed policy review. Mr. Conlon avers that the defendant did not complain about any delay until a trial date was sought in April, 2016. The Court notes from the agreed chronology that it took from August, 2009 until January, 2013, a period of almost three and a half years, for the defendant to furnish the plaintiff with discovery in this case.

32. Mr. O'Toole swore a further affidavit in which he states that Mr. Conlon has not provided an adequate explanation for the delay in his case.

**Higgins chronology**

33. James Higgins was born on 6th July, 1931, and is aged 86. Margaret Higgins was born on 6th June, 1937, and is aged 80. They are married to each other and reside in Dublin. The following is the chronology provided in the *Higgins* case:-

**"Chronology**

***14 August 1986:*** *The Plaintiffs signed the proposal form.*

***1 December 1986:*** *Policy commences.*

***1986 – 2000:*** *Policy operates with inflationary adjustments only to premium and benefits*

***15 September 2000:*** *Irish Life writes to the Plaintiffs reminding them of the policy review clause and informing them of their options in relation to same.*

***October 2000:*** *Plaintiffs complain to Irish Insurance Federation.*

***10 October 2000:*** *Letter to Plaintiffs from Irish Life*

***13 November 2000:*** *Further letter to Plaintiff from Irish Life*

***10 July 2001:*** *Further letter to Plaintiffs from Irish Life offering additional options.*

***26 November 2001:*** *Further letter to Plaintiffs from Irish Life*

***18 February 2002:*** *Further letter to Plaintiffs from Irish Life seeking confirmation of chosen option.*

***16 May 2002:*** *Further letter to Plaintiffs from Irish Life seeking confirmation of chosen option and advising of default position in absence of choice.*

***11 July 2002:*** *Irish writes to the Plaintiffs confirming details of and cover following the policy review.*

***October 2002:*** *Plaintiffs attend meeting in Dublin with Solicitors and other potential plaintiffs*

***30 October 2002:*** *Plaintiffs phone seeking, and Irish Life provide under cover of letter of 30 October 2002, the proposal form.*

***31 July 2003:*** *Letter of Claim from Damien Tansey & Associates Solicitors*

***21 August 2003:*** *Irish Life response to letter of claim, in name of Mr O'Toole.*

***April 2004:*** *Plaintiffs attend further meeting in Dublin with Solicitors and other potential plaintiffs. Solicitors brief Counsel.*

***27 May 2004:*** *Plenary Summons issues.*

***16 August 2004:*** *Plenary Summons is served on Irish Life.*

***20 August 2004:*** *Irish Life enters an Appearance through its solicitor.*

***4 November 2004:*** *Statement of Claim is delivered.*

***7 January 2005:*** *Notice for Particulars is served by Irish Life.*

***5 March 2005:*** *Defence is delivered by Irish Life.*

***10 November 2005:*** *Replies to Particulars delivered on behalf of the Plaintiffs.*

***5 December 2006:*** *First Notice of Intention to Proceed served on behalf of the Plaintiffs.*

***3 December 2007:*** *Plaintiff's Solicitors write to request copies of a) Introductory Sales Brochure and b) Introductory letter said to have been furnished to the Plaintiff and ask for particulars of when the Policy document was furnished to the Plaintiffs.*

***4 December 2007:*** *Plaintiffs serve a Notice for Particulars.*

***22 April 2008:*** *Defendant writes to Plaintiffs' Solicitors regarding a proposed policy review. The Plaintiffs' Solicitor write back and there is an exchange of letter up to and including 8 Oct 2008. The Plaintiff's Solicitor ask that the status quo be maintained and this is declined.*

***8 July 2008:*** *Notice of Change of Solicitor served on behalf of the Plaintiffs (the new firm representing the Plaintiffs appears to be the successor firm of their previous solicitors, meaning that there is no break in continuity of representation).*

***22 January 2009:*** *Meeting between various Plaintiffs and the Solicitors in Dublin*

***17 July 2009:*** *Plaintiffs' solicitors serve a request for voluntary discovery.*

***4 June 2010:*** *Consent order for discovery made against Irish Life in the related case of McNamara v Irish Life Assurance Plc Record No 2004/7017P.*

***19 August 2010:*** *Plaintiffs' solicitors serve a reminder regarding their request for voluntary discovery in these proceedings.*

***18 July 2011:*** *Plaintiffs' solicitors serve a further reminder regarding their request for voluntary discovery in these proceedings.*

***17 November 2011:*** *Irish Life serves a response to the request for voluntary discovery dated 17 July 2009.*

***29 August 2012:*** *Plaintiffs' solicitors serve a second Notice of Intention to Proceed.*

***15 October 2012:*** *Plaintiffs respond to Irish Life's letter of 17 November 2011 regarding discovery.*

***2 November 2012:*** *Irish Life's response to Plaintiffs' letter concerning discovery*

***2 January 2013:*** *Plaintiffs respond to letter of 2 November 2012 concerning discovery.*

***3 January 2013:*** *Irish Life delivers its affidavit of discovery to Plaintiffs' solicitors.*

***2 April 2013:*** *Plaintiffs' solicitors seek supplemental affidavit of discovery identifying documents within specific categories.*

***4 October 2013:*** *Supplemental affidavit of discovery delivered.*

***April 2014:*** *A meeting was held in Dublin with certain Plaintiffs and the Solicitor and senior Counsel. Thereafter Senior Counsel asked to provide final proofs.*

***10 April 2014:*** *Plaintiffs' solicitors serve a third Notice of Intention to Proceed.*

***11 November 2015:*** *Notice of Trial served.*

***10 December 2015:*** *Certificate of Readiness furnished on behalf of the Plaintiffs.*

***April 2016:*** *Application by Plaintiff for date. Defendant indicates it will bring this motion."*

34. Mr. O'Toole submits that there were, at a minimum, three separate lengthy periods of delay on the part of the plaintiffs in the *Higgins* case, during which the plaintiffs did nothing at all to progress their claim. He identifies the three periods of delay as follows:-

> *"(a) The period of in almost two years between July 2002, being the date on which the change in cover complained of was notified to the Plaintiffs, and the issue of proceedings on 17 May 2004.*
>
> *(b) The period of in excess of three and a half years between the receipt of the Plaintiffs' replies to particulars in November 2005 and the Plaintiff's request for voluntary discovery in July 2009 (while a Notice for Particulars was served on behalf of the Plaintiffs in December 2007, the Plaintiffs have never subsequently followed up on this Notice, whether through serving a letter of reminder, issuing a motion, or otherwise).*
>
> *(c) The period in excess of 2 years between delivery of Irish Life's supplemental affidavit of discovery in October 2013 and service of notice of trial in November 2015."*

35. Mr. O'Toole calculates this as a total delay of over seven years during which, he again states that through no fault of the defendant, no steps were taken by the plaintiffs to pursue their claim against Irish Life. He avers that there are certain additional periods during which the plaintiffs did very little to advance their claim, for example, periods of close to a year elapsed between various letters sent by the plaintiffs in respect of discovery between 2009 and 2012. He asserts that it is unclear why a period of almost six months elapsed between the plenary summons issuing and delivery of the statement of claim.

36. Mrs. Margaret Higgins, in her replying affidavit, offers similar explanations for any delay which has occurred to those offered by Mr. Conlon and Mrs. McNamara. Mrs. Higgins avers that they originally hoped to resolve the issue between the parties without having to institute proceedings and it was for that purpose that correspondence was exchanged during 2003.

37. Mrs. Higgins, in addressing the second alleged period of delay between 2005 and 2009, states that they filed a notice of intention to proceed in December, 2006. Mrs. Higgins avers that their solicitor, Ms. Valerie Neiland wrote to the solicitors on behalf of the defendant on 3rd December, 2007, seeking copies of the introductory sales brochure which the defendant alleged it had provided to the plaintiffs prior to completing the application and the introductory letter which the defendant alleged it had provided to the plaintiffs when the policy commenced in 1986. Ms. Neiland, in light of the defendant's statement that "*the Plaintiff has had sight of the policy conditions for 16 years*", also requested the defendant to state precisely when the policy document was furnished to the plaintiffs as asserted by them. A further letter was sent on 4th December, 2007 seeking further and better particulars. These letters were never answered by the defendant.

38. Mrs. Higgins also identifies correspondence being exchanged by the parties in relation to a further policy review that the defendant sought to impose in 2008. Mrs. Higgins also avers that the defendant made no complaint about any of these periods of delay until a trial date was sought.

39. Mr. O'Toole swore a further affidavit in which he avers that Mrs. Higgins did not adequately explain the delays.

**Delay in all cases**

40. In respect of all three cases, Mr. O'Toole submits that the plaintiffs' delay is grossly excessive; that the significance of this delay is magnified when one considers that the factual dispute which is the principal subject matter of the proceedings relates to events that occurred between 27 and 30 years ago, and approximately 15 to 20 years prior to the issuing of proceedings. He points out that the specific application of the policy review provisions of which the plaintiffs complain was finalised in or about November, 2001, February, 2002, and July, 2002 respectively.

41. While accepting that they should perhaps have proceeded with greater dispatch, the plaintiffs counter-argue that any delay prior to the issuing of proceedings cannot count against them in the consideration of this motion although they have accepted that they perhaps should have proceeded with greater dispatch. The plaintiffs point out that the issue of policy review only came to their attention in 2000 and that no proceedings could have issued in the 1980s when the facts would have been fresh in the minds of any potential witnesses.

42. Mr. O'Toole avers that the said delay appears inexcusable as the plaintiffs have never proffered any explanation for their failure to take reasonable steps to progress their claim during the periods identified.

43. He further states that the existence of the period of delay is in and of itself coercive of dismissal, irrespective of whether any specific prejudice arises and irrespective of any explanation which may be proffered on behalf of the plaintiffs in relation to the delay.

**Alleged prejudice**

44. Mr. O'Toole alleges that the effluxion of time arising from the delay in these cases has caused specific prejudice to Irish Life in defending the proceedings as follows.

45. The defendant is seriously prejudiced arising from the plaintiffs' delay as the question of what information was given to the plaintiffs concerning the terms of the policy in and about the time of signing the proposal form as early as July, 1983 is central to the case and thirty three years had elapsed at the date of the hearing of this application.

46. The defendant identifies that in replies to particulars, the McNamaras allege that the person who introduced them to the policy was "*Joe Gallagher*", who they allege to have been an agent of Irish Life and that neither Mr. Gallagher nor anybody else furnished them with any sales materials prior to the commencement of the policy. Mr. O'Toole avers that the defendant's own internal records correspond with the plaintiffs' account that the policy was sold by Joe Gallagher, a former agent of Irish Life.

47. Mr. O'Toole avers that Mr. Gallagher no longer works for Irish Life. He avers that the defendant has made efforts to seek to identify his current whereabouts and that it has found a death notice published in the *Irish Independent* on 30th November, 2012, indicating that a Joe Gallagher ("*ex Irish Life*") who appeared to have a residence in Roscommon (the same county in which the plaintiffs reside) died on 27th November, 2012. Mr. O'Toole states that given the antiquity of the matter, the defendant has not yet been able to establish with absolute certainty that this is the individual who dealt with the sale of the policy, but that it seems likely that this is the case.

48. In her replying affidavit, Mrs. McNamara avers that the defendant could have attempted to identify and take instructions from Joe

Gallagher when the proceedings were issued in 2004 and the defendant has not established that the delay has affected any potential evidence that could have been provided by Mr. Gallagher. The Court notes that the proposal form in this case carries a specific number on the top right hand corner and is stated to issue "*through the account of J Gallagher*". Directly underneath that entry it states:- "*Irish Life Inspector B McGowan*". Mr O'Toole has not shared with the Court any evidence as to the role or function of its inspector in the issuing of this policy.

49. In replies to particulars, the Conlons allege that a servant or agent of Irish Life accompanied by another individual understood by the plaintiffs to be an Irish Life "inspector" was the person who invited the plaintiffs to purchase life assurance cover, and that no sales materials were provided to the plaintiffs prior to the commencement of the policy.

50. Mr. O'Toole avers that Irish Life's internal records indicated that the policy was sold by a "*D Dempsey*", a former agent of Irish Life. He states that Mr. Dempsey no longer works for Irish Life and that Irish Life has made efforts to seek to identify his current whereabouts but has been unsuccessful in this respect.

51. Mr. Conlon notes in his affidavit that it is unclear whether efforts were made by Irish Life to contact Mr. Dempsey at any point since 2004 when his name was originally brought to the attention of the defendant. The Court again notes that this application, at the top right hand corner, contains information identifying the district number, the seller code and the inspector number. The number appears to be 191. This policy was sold directly by an Irish Life employee. No evidence has been offered to the Court by the defendant as to the identity, role and function of its inspector in this case.

52. In replies to particulars, the Higgins allege that the person who introduced them to the policy was a servant or agent of Irish Life who they met in the Irish Life Centre, whose identity is unknown to them, and that they were furnished only with a booklet which did not contain the policy terms prior to commencement of the policy.

53. Mr. O'Toole avers that Irish's Life's internal records indicate that the policy was sold by an agent of Irish Life Direct Sales in 1986.

54. Again, the plaintiffs argue that no effort was made to identify or take instructions from this agent and it was clear that the defendant had not sought out this person at an earlier stage. The Court noted a witness signature on the application form. It appears to be "*O'Keeffe*". The document has a district number and a seller code number. While no inspector number is inserted in the relevant box, there is above that space the reference "*2692402 SOC/O*". No evidence as to the significance of this information has been offered to the Court by the defendant. Mr. O'Toole alleges that the delay in prosecution of the proceedings has limited the range of witnesses available to Irish Life to give evidence at any trial of the "*sales practices*" at the time, and he complains that the plaintiffs will be in a position to take advantage of their own delay in prosecuting the proceedings by challenging a witness's ability to accurately recall matters at such a remove in time.

55. The plaintiffs submit that there is no evidence that the defendant contacted any expert at any time for the purpose reporting on any aspect of this policy. The plaintiffs also point to Mr. O'Toole's affidavit in which he says that there is a reduced number of witnesses who may be able to give evidence as to the practices in the 1980s and not that there are none at all.

56. Mr. O'Toole notes that the solicitors on record for each of the plaintiffs also represent a number of plaintiffs in similar claims and that notice of trial has been served in two cases only of these.

57. Mr. O'Toole alleges that the delay on the part of the plaintiffs in prosecuting the proceedings is inordinate and inexcusable and that the balance of justice favours the dismissal of the proceedings.

58. All three affidavits on behalf of the plaintiffs submit that the balance of justice is in favour of these proceedings continuing. They submit that the constitutional principles of fairness should permit the plaintiffs to obtain relief for a wrong. They submit that all documents and correspondence are intact and that the plaintiffs are in a position to give evidence. Although Mr. O'Toole raises an issue about the defendant's ability to call witnesses, the plaintiffs state that there is no evidence that the defendant has ever sought to identify witnesses nor whether they would have been available in the early noughties when the issue of the policy review first occurred. The plaintiffs have accepted that the cases have taken a long time to get on. However, they submit that this delay is not inexcusable in the context of mounting a High Court case against a large corporation which has taken between two and four and a half years to reply to a simple voluntary discovery requests.

59. The plaintiffs suggest that there has been acquiescence by the defendant and that they have incurred legal costs in circumstances where there was no complaint of delay until a trial date was sought. The plaintiffs further submit that this matter can still receive a fair trial as there is no definitive evidence that any identifiable witness other than Mr. Gallagher is unavailable. It was submitted on behalf of the plaintiffs that the defendant has not identified one witness who has material evidence to give, who was ready and willing to give evidence in 2004 and who is now unavailable to do so, because they failed to seek out these witnesses in 2004, or at any time prior to making this application.

60. In his second affidavit, Mr. O'Toole acknowledges that the defendant did take a significant amount of time to respond to the request for voluntary discovery although he contends some of this delay was contributed to by the plaintiffs' failure to insist on discovery being completed. The plaintiffs argue that the contribution to the delay by the defendants is more significant than just the period identified by Mr. O'Toole and that the defendant effectively acquiesced in such delay as has occurred. The plaintiffs further argue that the fact that the defendant did not raise an issue about the delay until the plaintiffs sought a date for trial also amounts to acquiescence.

**Legal submissions**

61. Written legal submissions were filed on behalf of the defendant outlining the Court's jurisdiction to dismiss an action on grounds of delay. Counsel on behalf of the plaintiffs also produced written legal submissions, to the effect that the delay in this case is either excusable or alternatively that the balance of justice is in favour of the case proceeding.

62. It is accepted by both parties that the power of the Court to strike out proceedings for want of prosecution on the grounds of delay results both from an inherent jurisdiction to do so where that delay has been inordinate and inexcusable, and/or pursuant to O. 122, r. 11 of the Rules of the Superior Courts.

**Order 122, rule 11**

63. Order 122, rule 11 provides as follows:-

> "*In any cause or matter in which there as been no proceeding for one year from the last proceeding had, the party who*

*desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule.*"

Counsel for the plaintiffs submits that as notice of trial was served in November, 2015, there has been a "*proceeding*" within the meaning of the O. 122, r. 11 within two years of the bringing of this application and that therefore the motion has been brought too late.

**Primor**

64. It is accepted that the general principles to be applied by the Court are those laid down by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459:-

> "*(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."*

65. The defendant also cited *Keogh v. Wyeth Laboratories Incorporated* [2006] 1 I.R. 345 where the Court observed at para. 10:-

> "*The tests laid down in Primor…are of their nature very general. In seeking to apply these tests the court must look closely at the particular facts of the case before it. However the central thread running through these principles are the concepts of fairness and prejudice, which should be at the forefront of the court's consideration as to where the balance of justice lies."*

66. Counsel for the defendant notes a separate and distinct basis for the exercise of the Court's inherent jurisdiction in a line of cases including *O'Domhnaill v. Merrick* [1984] I.R. 151, *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135 and *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140, submitting that the emphasis in this line of authority is on "unfairness" to the defendant rather than the "*balance of justice*", and that the defendant need not necessarily identify any culpable behaviour on the part of the plaintiff, in the event that unfairness is established. The defendant cites Geoghegan J. in *McBrearty v. North Western Health Board* [2010] IESC 27 where he described this line of authority as "*an important and partly overlapping jurisprudence*". The defendant quotes Hogan J. in *Donnellan v. Westport Textiles* [2011] IEHC 11 where he concluded at para. 37 that:-

> "*…the Primor rules are not exhaustive and all-encompassing, but that the courts enjoy a separate and distinct constitutionally derived inherent jurisdiction to protect the proper administration of justice."*

Counsel for the defendant notes that *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50 addressed the distinction between these two lines of authority without a definitive resolution, and also considered the issue of the impact of the European Convention on Human Rights on delay jurisprudence without any definitive resolution. However he submits that Denham C.J. identified *Primor* as the "*primary relevant law*" and that it was "*not dissimilar*" to the jurisprudence of the Court of Human Rights. She held as follows at para. 13:-

> "*The nature of an inordinate and inexcusable delay requires to be considered in all the circumstances of the case. Thus, the factors of each case require to be analysed.*
>
> *In addition, in recent times there has been an acknowledgement that cases may not be let lie, in a laissez faire attitude, for the parties to move. There is a requirement to ensure that cases are progressed reasonably. This approach has been the subject of litigation in Ireland and has also been addressed by the European Court on Human Rights. For example, in Price and Lowe v. The United Kingdom 43185/98, there was an application alleging a violation of Article 6 of*

*the Convention in connection with the length of the proceedings at issue. Article 6 provides:*

> *"In the determination of his civil rights and obligations … everyone is entitled to a … hearing within a reasonable time…"*

*The ECtHR reiterated that the reasonableness of the length of the proceedings must be addressed in the light of the circumstances of the case, and having regard to the criteria laid down in the Court's case law, in particular:*

- *The complexity of the case,*
- *The conduct of the applicant,*
- *The conduct of the relevant authorities, and*
- *The importance of what is at stake for the applicant in the litigation.*

*The Court held that the manner in which a State provides for mechanisms to comply with this requirement - whether by way of increasing the number of judges, or by automatic time-limits and directions, or by some other method - is for the State to decide. In this case the domestic law is that stated in Primor, where the factors identified by Hamilton C.J., as set out previously, are not dissimilar to the criteria set out in Price."*

Counsel for the defendant notes that this approach was subsequently adopted in *Kilcoyne v. Minister for Defence* [2014] IESC 10. Counsel for the plaintiff accepts that while there is a trend towards some recalibration of the test in light of Article 6(1) of the European Convention on Human Rights, the basic principles remain as they were set out by the Supreme Court in *Primor*.

67. The defendant also cites Ryan J. in *Murray v. Irish National Insurance Public Ltd Company* [2013] IEHC 513:-

> *"Recent jurisprudence on the question of delay highlights not only the interest of the parties in having disputes expeditiously determined but also the obligation on courts to ensure that their procedures achieve a measure of efficiency consistent with justice. Those concepts are not in conflict. Indulgence of delay on one side imposes a burden on the other of having to endure the strain of litigation for longer than necessary or of having to make long-term financial provision for a stale claim."*

**Inordinate and inexcusable delay**

68. It is submitted on behalf of the defendant that there is no precise point in time by which delay can be said to have become "*inordinate*", referring to *NC v. PMcG* [2009] IEHC 438 and Delaney & McGrath, *Civil Procedure in the Superior Courts*, 3rd Ed. (Dublin, 2012) at para. 15–12.

69. The defendant argues that the fact that a motion to dismiss for want of prosecution can be brought under the Rules of the Superior Courts where there has been no step for two years may provide some benchmark, but that that does not mean that inaction for less than two years is incapable of being inordinate.

70. Counsel for the defendant accepts that the onus of establishing that delay has been inordinate lies on the defendant.

71. Referring to *O'Carroll v. EBS* [2013] IEHC 30, a case in which a four year period between the making of discovery by the defendant and the bringing of the motion to strike out for delay was regarded as inordinate but in the circumstances excusable, counsel for the defendant argues that it suggests that "*inordinate*" is measured by reference to "*the ordinary standards of litigation*". Counsel for the defendant also referred to *Corcoran v. McArdle* [2009] IEHC 265 where the delay was found to be inordinate and inexcusable in circumstances where the plaintiff had not advanced proceedings for 27 months after the delivery of the defence and counter-claim.

72. The defendant submits that applying *Primor*, the Court is primarily concerned with delay which arises after proceedings have commenced, although delay in commencing proceedings can be considered in assessing whether delay in the prosecution of proceedings has been inordinate. He relies on Geoghegan J. in *McBrearty v. North Western Health Board* [2010] IESC 27 who stated as follows:-

> *"The learned High Court judge, correctly in my view, considered that in applying the 'inordinate and inexcusable delay' test, he was concerned in the main with what happened after the commencement of the proceedings and not with what happened before the commencement. I have used the expression 'in the main' because as it clear from case law, it has been well established for a long time that even in cases where the court is only concerned with delay post the commencement of the proceedings, it will view the obligation of expedition after the commencement much more strictly when there has been a considerable lapse of time before the commencement."*

Counsel for the defendant also refers to Tanner v. O'Donovan [2015] IECA 24 where the Court of Appeal endorsed the observation of Lord Diplock in Birkett v. James [1978] A.C. 297, 322:-

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

73. Counsel for the plaintiffs accepts that the while the original policy commencements in this case date back to the 1980s, no cause of action existed until the defendant attempted to review the plaintiffs' policies in 2000 and 2001. It was submitted that any delay prior to the commencement of proceedings should not be held against the plaintiffs as there was certain *inter partes* and *inter* solicitor correspondence and they had hoped to resolve the issue. The plaintiffs state that insofar as there was pre litigation delay, it was entirely reasonable and sensible and the period of circa three years it took to issue proceedings was neither inordinate nor inexcusable.

74. It is accepted on behalf of the plaintiffs that the overall period of 11 ½ years of delay from the date of institution of the proceedings in 2004 to date is inordinate. However, it is submitted that the delay is excusable and the proceedings should not be dismissed on the balance of justice.

75. The defendant accepts that it must establish that the delay is not just inordinate but also inexcusable, citing Quirke J. in *O'Connor v. John Player and Sons Ltd* [2004] IEHC 99:-

> *"…the onus may be discharged by way of evidence and argument demonstrating that no reasonable or credible explanation has been offered, or can reasonably be said to exist, which would account for, or excuse, the delay."*

The defendant argues that in practice, it is for the plaintiff to identify the factors which are regarded as excusing the delay, citing *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] 3 I.R. 150. Counsel for the defendant refers to *Keogh v. Wyeth Laboratories* [2006] 1 I.R. 345, where the Supreme Court accepted that a distinction could be made between delay on the part of a plaintiff and delay on the part of a solicitor where the plaintiff could not fairly be blamed for that delay. However, counsel submits that that case also suggests that the Court will look for evidence that attempts were made by the plaintiff personally to progress his or her case. The defendant quotes Geoghegan J. in *Truck & Machinery Sales Limited v. General Accident Fire & Life Assurance Corporation* [1999] IEHC 201 as follows:-

> *"Strictly speaking it would seem to me that the excuses relied on should relate in some way to the actual proceedings in hand because an opposing party can hardly be expected to stand aside an wait while the other party resolves its problems which have nothing to do with the litigation. Nevertheless I am satisfied that all the surrounding circumstances including so called excuses based on extraneous activities must to some extent be taken into account and weighed in the balance in finally considering whether justice requires that the action be struck out or allowed to proceed."*

76. The defendant accepts that in general, it appears that delay will not be regarded as "*inexcusable*" if the relevant limitation period has not expired, although a different approach might be taken if the issue of proceedings was deliberately delayed to obtain a perceived advantage (Barron J. in *Southern Mineral Oil Ltd. (in liquidation) v. Cooney* [1997] 3 I.R. 549 at p. 571).

**Balance of justice**
77. It was submitted on behalf of the defendant that the following factors are likely to be of relevance in most cases in determining the balance of justice:-

> (i) Prejudice suffered by the defendant as a result of the delay;
>
> (ii) The defendant's conduct of the proceedings, and in particular whether the defendant's conduct amounts to acquiescence in the delay;
>
> (iii) The nature of the case, *i.e.* gravity of the claim and the consequences of dismissing the case on the plaintiffs (*Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561).

Counsel for the defendant notes the decision of Hogan J. in *Quinn v. Faulkner t/a Faulkner's Garage* [2011] IEHC 103 where having concluded that there was gross delay by both the plaintiff and defendant so that the competing arguments on the balance of private interests effectively cancelled each other out, he struck out the proceedings in light of the constitutional requirement on the Court to ensure the "*timely administration of justice*".

78. It is accepted by counsel for the defendant that any delay by the defendant will be taken into account, and that in some cases, the defendant's failure to move earlier to strike out proceedings on delay grounds was held against them. In *Dunne v. ESB* [1999] IEHC 199 there was a lull of four and a half years between the exchange of discovery and the reactivation of proceedings by the plaintiff's new solicitors. Laffoy J. concluded:-

> *"Having regard to the ongoing controversy between the Defendant, on the one hand, and the Plaintiff and his uncles, on the other hand, which had endured for 30 years without resolution and without direct action being taken by the Defendant against the Plaintiff or his uncles to terminate the controversy, in my view, the inaction by the Defendant during the 4 ½ years tilts the balance of justice against acceding to the Defendant's application."*

79. However, the defendant argues that this approach is inconsistent with subsequent cases, in particular the following *dicta* of Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510 which were adopted by the Supreme Court in *Keogh v. Wyeth Laboratories* [2006] 1 I.R.345:-

> *"When considering any allegation of delay or acquiescence by the appellants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the respondents' claim dismissed."*

The defendant also cites the Court of Appeal in *Tanner v. O'Donovan* [2015] IECA 24, at para. 35 as follows:-

> *"The fact that a defendant has been inactive does not excuse a plaintiff from prosecuting proceedings with the appropriate degree of expedition and vigour, not least where (as here) the plaintiff has delayed before issuing proceedings."*

80. Counsel for the plaintiffs cites *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 where Finlay P. set out that the defendant must establish that the delay was inordinate and inexcusable and even where it was, the Court is required to exercise its discretion to decide where the balance of justice lies. Finlay P. identified two relevant factors in determining the balance of justice – the defendant's delay in seeking the dismissal and the litigant's own personal blameworthiness separate to that of their solicitor.

81. The factors highlighted for the consideration of the Court on behalf of the plaintiffs were as follows:-

> (i) While the overall period of delay up to the notice of trial was 11 ½ years, the plaintiffs submit that the period of delay by the defendant in relation to discovery ought not to be reckoned against the plaintiffs. It is conceded by the defendant that it delayed in relation to discovery from July, 2009 to October, 2013 in the *Higgins* case; from August, 2009 to October, 2013 in the *Conlon* case; and from July, 2009 to June, 2011 in the *McNamara* case.
>
> (ii) The defendant itself delayed in issuing the motions in circumstances where there was service of a notice of trial in

November, 2015, the cases were certified as ready in December, 2015 and applications for a trial date were made in or about April, 2016.

(iii) The defendant has acquiesced to the extent that no motion to dismiss for delay was brought until after it was indicated that the plaintiffs were seeking a trial date. In Conlon and Higgins, the defendant did not deliver its supplemental affidavit of discovery until two years prior to the service of the notice of trial. Counsel on behalf of the plaintiffs also notes that that acquiescence has led to the incurring of legal costs, which he submits is a separate but linked factor.

(iv) There is no evidence that the plaintiffs are personally blameworthy for the delay.

(v) The plaintiffs argue that in terms of overall constitutional principles, they are ordinary persons while the defendant is a large commercial entity, and that this is at least a partial factor. They cite *Guerin v. Guerin* [1992] 2 I.R. 287 and *Silverdale & Hewetts Travel Agencies Ltd v. Italiatour Ltd* [2001] 1 I.L.R.M. 464 in support of this factor.

**Prejudice**

82. Counsel for the defendant relies on the case of *Woods v. Woods* (Unreported, High Court, Kelly J., 18th January, 2001) as support for the proposition that specific prejudice is not essential once the defendant has established inordinate and inexcusable delay.

83. The defendant also refers to *Nolan v. Chadwicks* [2014] IEHC 542 where Keane J. stated:-

> *"I accept that some prejudice is likely to flow almost inexorably from any significant delay in proceedings. It is certainly a matter that I am required to take into account. However, each case must turn on its own particular facts. In this case, there are a number of other relevant factors."*

Counsel for the defendant seeks to distinguish that case from the instant case. He states that in *Nolan*, the Court declined to dismiss the case on the basis that it was less a recollection case than an expert evidence case. Counsel for the defendant submits that the instant case is the opposite.

84. Counsel for the defendant also refers to Hogan J. in *Tanner v. O'Donovan* [2015] IECA 24 at para. 38:-

> *"The lapse of time between 1998 and 2010 was accordingly inherently prejudicial, since the capacity of the witnesses – on all sides – to recollect this detail has doubtless been considerably impaired. As Finlay Geoghegan J. said in Manning v. Benson & Hedges Ltd. [2005] 1 I.L.R.M. 190, 208:*
>
> > 'Delays of four to five years as a matter of probability will reduce the potential of such witnesses to give meaningful assistance or to act as a witness'."

Hogan J. also noted that in *Rogers v. Michelin Tyre plc* [2005] IEHC 294, Clarke J. stated that as the delay affected the ability of witnesses to recall the minutiae of an important meeting some ten years earlier, this meant that the defendant had suffered what he described as "*at least a moderate degree of prejudice in defending this action*."

85. Counsel for the plaintiffs states that prejudice to the defendant falls within factors (b) and (f) in *Primor*, and quotes Laffoy J. in *Manning v. National Housebuilding Guarantee Company* [2011] IEHC 98, that the crucial issue in relation to prejudice is the risk of an unfair trial.

86. The plaintiffs identify the primary allegation of prejudice made by the defendant as being the absence of witnesses. The plaintiffs criticise the defendant's failure to provide evidence in relation to the point at which Irish Life sought to identify the sales agents or any witnesses to the sales practices at the time.

(i) In *Conlon*, Mr. O'Toole avers that the policy was sold by a "*D Dempsey*", a former agent of Irish Life who has since left Irish Life, and that they have been unsuccessful in their efforts to identify his current whereabouts. The plaintiffs argue that there is no evidence as to when the defendant sought to contact Mr. Dempsey, nor is there evidence of what steps they took to contact him, nor any documents exhibited in that respect.

(ii) In *Higgins*, Mr. O'Toole avers that the policy was sold by "*an agent of Irish Life Direct Sales*". The plaintiffs argue that there is no evidence of when the defendant ever sought to identify the sales agent neither when the policy review clause became an issue in 2000/2001, nor when proceedings were issued in 2004, nor that its position is any different now than had the case been heard in 2004.

(iii) In *McNamara*, Mr. O'Toole avers that the policy was sold by a Joe Gallagher, and then exhibits a death notice for a Joe Gallagher "*ex Irish Life*" who died on 27th November, 2012. The plaintiffs argue that there is no evidence as to whether the defendant sought to obtain instructions from Mr. Gallagher between 2004 and 2012, nor is there evidence that they had taken a witness statement from him identifying evidence helpful to the defendant at any stage between 2004 and 2012.

(iv) Mr. O' Toole makes the point that generally speaking, the number of witnesses available is diminished including witnesses as to "*sales practices at the time*".

87. The plaintiffs state that the defence filed not merely puts them on proof of their claim, but in fact, they face express denials of their pleadings in relation to what occurred at sales meetings. They allege that the defendant either did have access to the sales representatives at the time of drafting its defence or alternatively, pleaded express denials without any need for information from the sales representatives. The plaintiffs state that the defendant is silent as to when it went looking for the witnesses. They argue that if the defendant has only begun to look for witnesses because the matter has been set down for trial, then it has largely caused its own witness difficulties. The plaintiffs further argue that if the defendant never had any relevant witnesses, then their difficulty has not been caused by the alleged delay of the plaintiffs.

88. Counsel for the plaintiffs submits that where cases wholly or partly hinge on documentary evidence, it will be harder for a defendant to have a claim dismissed (*Carroll Shipping Ltd v. Mathews Mulcahy & Sutherland Ltd* [1996] IEHC 46). The plaintiffs argue

that the respective proposal forms and documents which they signed in the 1980s are available, and to that extent, the case is largely based on documents. The plaintiffs allege that these documents do not contain the term contended for by the defendant. The plaintiffs note that the policy document to which Mr. O'Toole refers as the source of the asserted term is exhibited but that Mr. O'Toole does not refer to any correspondence as to when such document was sent to the plaintiffs. This is significant in the context of the plaintiffs' assertions that they did not see or receive the policy documents on which the defendant now seeks to rely.

**Decision**
89. The defendant brings its application to dismiss the plaintiff's claims herein under two headings. The first is an application to dismiss for want of prosecution pursuant to O. 122, r. 11 of the Rules of the Superior Courts. The second heading invokes the Court's inherent jurisdiction to dismiss on the grounds of inordinate and inexcusable delay which the defendant contends on the balance of justice would render it unfair for the defendant to be made answerable to the plaintiff.

**Order 122, rule 11**
90. The relevant part of the order provides:-

> *"…in any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the court to dismiss same for want of prosecution, and on the hearing of such application the court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the court may seem just. A motion or summons on which no order has been made shall not, but notice of trial though countermanded shall, be deemed a proceeding within this rule."*

91. A cursory glance at the chronology of each of the plaintiff's claims demonstrates that the defendant's application to dismiss for want of prosecution does not comply with the terms of O. 112, r. 11. In each case, notice of trial – a proceeding within the meaning of the order – was served in November, 2015. In each case the application to dismiss pursuant to O. 112, r. 11 was initiated on 24th May, 2016, five months after the service of the notice of trial and at a time when the plaintiffs had actually applied for a trial date. While it might be arguable that at an earlier stage in the proceedings the defendant might have had grounds to seek a dismiss for want of prosecution pursuant to O. 112, r. 11, it is clear that at the time the application was actually made, two years had not elapsed since "*the last proceeding had*", being the service of notice of trial in November, 2015. The Court is therefore satisfied that the application to dismiss for want of prosecution pursuant to O. 112, r. 11 being brought six months after the last proceeding had is not in compliance with the order and must fail.

92. That of course does not conclude the application because the defendant has also invoked the inherent jurisdiction of the Court to dismiss the plaintiff's claim on the grounds of inordinate and inexcusable delay resulting in the balance of justice favouring dismissal.

93. In an application such as this the Court is engaged in balancing the right of the plaintiffs to access to the courts to litigate a justiciable dispute against the right of the defendant to a fair trial. The principles to be applied by a court in considering whether to exercise its discretion to strike out proceedings are well settled. They are set out in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The *Primor* principles were recently endorsed with some minor reservations and potential qualifications by the Supreme Court in *Comcast International Holdings Incorporated v. Minister for Public Enterprises & Anor* [2012] IESC 50. The oft quoted *Primor* principles are 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,*
> >
> > *(viii) 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."*

The Court does not accept that there is necessarily a conflict between the line of jurisprudence stemming from *O'Domhnaill v Merrick* and *Toal v Duignan* and that founded on the *Primor* principles. If in assessing the balance of justice under the *Primor* test, a court were to conclude that there was a real risk of an unfair trial, that would tilt the balance of justice decisively in favour of a dismissal.

**Delay**

94. The defendant has undoubtedly contrived an accumulated period of culpable delay in each case. It includes the pre-litigation period in each case which ranges from two to three and a half years. Such periods are not reckonable if the proceedings are brought within the period limited by statute, as each of these cases is. It is accepted however, that a delay in issuing proceedings might be put into the balance of justice were there to be culpable delay in the prosecution of the proceedings, once issued.

95. The defendant asserts a second period of culpable delay in each case between 2005 when the defence was delivered and replies to particulars were furnished by each plaintiff and 2009 when a request for voluntary discovery was made. The defendant chooses to characterise this as a period of four years delay approximately. In doing so it somewhat blithely ignores the fact that in late 2007 each plaintiff sought from it particulars concerning the policy issued and the brochures produced at the time of sale. Those requests were never answered by the defendant. The operative period of delay therefore appears to the Court to be two years, rather than the claimed four.

96. Similarly, in relation to the third claimed period of culpable delay the Court considers that the period of two years that elapsed between the defendant finally making discovery (in two cases four years after it was requested), and the setting down for trial should not entirely be classed as a period of culpable delay. The plaintiffs were entitled to some time post-discovery to get their proofs in order. On that basis the Court considers that a period of a year post-discovery would not have been unreasonable and so assesses the period of culpable delay at that stage to have been one year.

97. Having said that, having regard to the chronologies hereinbefore set out it is difficult to escape the conclusion that delay in each of these cases has been inordinate. Proceedings were issued in 2004. The issues between the parties were essentially joined in March, 2005 when the defendant delivered its defence denying the facts upon which the plaintiffs' claims were based and pleading a legal defence that the Lifesaver policy issued by the defendant was in fact a counter offer accepted by the plaintiffs. It took a further ten and a half years for notice of trial to be served. By any measure that is an inordinate delay. The plaintiffs' claims concern the terms and construction of a contract of assurance and are not of a complexity that would justify a delay of ten and a half years between the joining of the issues and the service of the notice of trial. In fairness to the plaintiffs/respondents they have not seriously contested that the delay was inordinate but rather pointed to the role of the defendant/applicant in the desultoriness of the proceedings.

**Inexcusable delay**
98. The plaintiffs are in many respects reluctant litigants who hoped at each stage of the process that the defendant would come to the table to resolve the issues. Each of them is of modest means. The fact that these were for them pathfinder cases means that each of the three cases had to be ready before any of the cases would proceed. While the Court has some sympathy for these elderly litigants the fact is that once one chooses to take the litigation route one must proceed with reasonable dispatch. There was more than a two year period from November, 2005 to December, 2007 when nothing happened other than the service in December, 2006 of notices of intention to proceed. It is of note that the defendants never replied to the plaintiffs' short notice for particulars served in December, 2007 nor did they supply the sales brochures and introductory letters requested by the plaintiff's solicitors in December, 2007. That said, a further eighteen months elapsed before the plaintiff sought voluntary discovery in July, 2009. There is no doubt that the defendant was extremely remiss in the manner in which it dealt with particulars and discovery of which more below, but discovery was complete in all cases by October, 2013. A further two years elapsed before notice of trial was served. While the plaintiffs may well have been lulled into inaction by the defendants own dilatoriness in dealing with procedural matters particularly the issue of discovery, that is not sufficient to excuse the plaintiffs' delay in prosecuting their claims. While solicitors who take on the claims of impecunious plaintiffs are to be commended for the service they provide to the interests of justice, once they do so, they must ensure that those proceedings are conducted with reasonable dispatch. The Court is therefore reluctantly compelled to the view that the plaintiffs' delay in these claims is in overall inexcusable.

**Balance of justice**
99. This case, as so many of these applications do, comes down to the balance of justice. Where the Court finds that the respondent's delay was both inordinate and inexcusable the Court must then proceed "*to exercise a judgment on whether in its discretion on the facts of the case, the balance of justice lies in favour of, or against, the proceeding of the case*". In the Primor test at item (d) the Supreme Court set out a number of factors to be considered in weighing the balance of justice. This list is not exhaustive and different considerations may apply on the facts of any particular case. 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.

100. Some of the factors set out at (d)(i) to (vii) in the *Primor* case are relevant in this case. The Court has in mind factor (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."*

Looking at each of the chronologies in these cases, it is clear that there was something of a general hiatus following the delivery of the defence and replies to particulars in 2005. Notices to proceed were served in December, 2006 but no proceedings followed for a full year. However, particulars were sought from the defendant in December, 2007, being in each case copies of the introductory sales brochure and the introductory letter said to have been furnished to the plaintiff by the defendant and further asking for particulars of when the alleged policy document was furnished to each plaintiff. The defendant simply ignored this request and the requested documents were not furnished until many years later during the discovery process. It appears to the Court that the plaintiffs have still not been told the dates when the policies alleged to have been furnished to them, were furnished. It sits ill with the Court to hear the defendant complain about delay on the part of the plaintiff during this period, at a time when it was in default in failing to reply to the plaintiff's particulars raised in December, 2007. The suggestion by the defendant that the plaintiffs' failure to bring a motion to compel them to reply to particulars constitutes a further dereliction on the plaintiffs' part is novel but unreasonable. The defendant must accept responsibility for its own default in replying to particulars raised and cannot be allowed to deflect its dereliction onto the plaintiffs.

101. Similarly, the defendant's conduct in and about the making of discovery must be put into the balance in considering where the interests of justice lie. The defendant was first asked to make voluntary discovery in the matter on 10th August, 2009. Despite consenting to an order for discovery on 4th June, 2010, discovery was not in fact completed in all cases until 4th October, 2013, more than four years after discovery was first requested. No explanation has been offered for this delay.

**Acquiescence**
102. From the time the proceedings issued in each case in 2004, the defendant never once sought to inject any urgency into these proceedings. It failed to reply to the notices for particulars raised in December, 2007. It delayed discovery in the case for more than four years in one instance. These appear to the Court to be countervailing factors which drain merit from its complaint of plaintiff

delay. It appears to the Court that this was not mere acquiescence but rather a deliberate stringing out of the proceedings perhaps in the hope that they would simply fade away, a distinct possibility having regard to the age of the plaintiffs. During the course of argument the Court asked counsel for the defendant why his client had neither complained of delay nor taken proceedings to dismiss for want of prosecution at an earlier stage in the proceedings. Counsel explained that the defendant as a major life assurance company receives a multiplicity of claims many of which never proceed to hearing. It adopts a "*wait and see*" approach to litigation because many threatened claims never materialise and those that do materialise may never proceed to a hearing. The defendant is entitled to formulate whatever strategy it wishes to the threat or fact of litigation. However, it seems to the Court unfair and unjust that the defendant having been responsible for major delays in the conduct of these proceedings should be permitted to benefit from admitted delays of less duration by each of the plaintiffs.

103. Yet another factor identified in the *Primor* case to be weighed in the balance is conduct by the defendant which induces the plaintiffs to incur further expense in pursuing the action. As already identified the plaintiffs have been guilty of delay. In particular, the period between 2005 when the defence was delivered and 2007 when a notice for particulars was raised; again the period between 2013 and 2015 after discovery had been made and before notice of trial was served. There was no complaint at any stage by the defendant in respect of any delay. The plaintiffs were allowed by reason of that inaction by the defendant to proceed to the point of service of the notice of trial and application for a date for trial, before any issue of delay was raised by the defendant. It seems to the Court that in the circumstances of this case it is certainly arguable that by waiting until in effect the eve of hearing before complaining of delay, the defendant has allowed the plaintiff to incur the vast majority of the expense of maintaining their claims without demur. The defendant by its action in allowing that to occur without complaint has disentitled itself to complain at this juncture.

**Prejudice**

104. All of the foregoing factors feed into the question of whether or not the defendant is prejudiced to the extent that it is not possible to have a fair trial. In conducting the balancing exercise on this issue the applicant must satisfy the Court not merely that there is prejudice but that the prejudice arises from the default of the plaintiffs in prosecuting their action.

105. The defendant has asserted that in the *McNamara* case it is prejudiced because the person who allegedly sold them the policy, a Mr. Joe Gallagher, is deceased since November, 2012. In the *Conlon* case the defendant's deponent Mr. O'Toole averred to the great surprise of the Court that he has not yet been able to establish with certainty whether in fact it was Mr. Gallagher who in fact sold the policy but suggests that it is likely that that was the case. The Court finds it difficult to believe that Irish Life's records are so deficient that it cannot identify the party who sold a life assurance policy on its behalf.

106. In the *Conlon* case the plaintiffs allege that the policy was sold to them by an individual accompanied by a person understood by the plaintiffs to be an Irish Life "*inspector*". According to the defendant's deponent Mr. O'Toole, who as earlier noted, has been involved in these matters since the issue of the policy review first emerged in 2000, internal records show that the individual who sold the policy was a "*D. Dempsey*" who no longer works for Irish Life and whose current whereabouts he has been unable to establish. No evidence has been placed before the Court as to the attempts made to establish contact with Mr. Dempsey.

107. In the *Higgins* case the policy was sold from the defendant's head office by an agent of Irish Life direct sales. The defendant's deponent Mr. O'Toole has averred that they are unable to identify their own sales assistant. The Court has the impression that the evidence offered by Mr. O'Toole is less than complete. He has told the Court nothing about the sales process; the role of the Irish Life Inspectors referred to by name in the *McNamara* case and by number in the *Conlon* case; the significance of the number on the top right corner of the proposal in the *McNamara* case and the application in the *Higgins* case.

108. In addition Mr. O'Toole on behalf of the defendant asserts that the range of witnesses available to Irish Life to give evidence at any trial of the sales practices at the time has diminished.

109. The Court has the impression that the evidence of Mr. O'Toole in relation to alleged prejudice is somewhat contrived. It appears that the defendant only went searching for these sales people at the time of the filing of its application to dismiss for want of prosecution. There is no evidence that any of these persons were sought out in 2000 and 2001 when the issue of the validity of the review clause in the assurance policy was first raised. There is no evidence that these people were sought out by the defendant in 2004 when proceedings were issued. In 2005 the defendant filed a full defence to the plaintiffs' claims denying specifically the facts alleged by the plaintiffs. It did so without apparently having had the need to nor the benefit of, any consultation with any of the sales persons. The defendant has not in fact established that it is prejudiced by the absence of these people in circumstances where it is unclear as to what evidence they would give if available. It might well be that each of them if present would in fact substantiate the plaintiff's claims. The defendant has thus failed to prove that the absence of these people is actually prejudicial to their defence. Even if the Court is wrong in that and their absence could be construed as prejudicial then that prejudice arises from the defendant's own failure to identify and obtain relevant evidence from their sales people seventeen years ago when these issues first arose.

110. Finally, in the context of the balance of justice, it appears to the Court that there is a bigger issue at play here. The defendant is a major provider of life assurance. Life assurance contracts by their nature can subsist for decades. The contracts at issue in these proceedings are subsisting contracts. A fresh issue on the construction of these contracts could arise tomorrow. Were that to occur, would a Court allow the defendant to avoid litigation on the grounds that the contracts were entered into thirty years ago? Clearly not. It seems to the Court that it is incumbent on those who sell life assurance policies which by their nature can be of long duration to ensure that it maintains all appropriate records and evidence of the contract so that should issues arise decades after the event it can mount such defence as it considers appropriate. It is entirely foreseeable that in contracts of life assurance issues may arise on the proper construction of the policy at a time when the original sellers of the policy are no longer available. To allow life assurers to avoid justiciable controversies because of the death or non availability of the original sellers would in the Court's view be contrary to public policy.

111. For all of the foregoing reasons the Court is convinced that the balance of justice in this case tilts decisively in favour of allowing the claims to proceed.