THE HIGH COURT

COMPETITION

[1996 No. 10658 P.]

BETWEEN

FRAMUS LIMITED, AMANTISS ENTERPRISES LIMITED (IN VOLUNTARY LIQUIDATION) AND WILBURY LIMITED (IN VOLUNTARY LIQUIDATION)

PLAINTIFFS

AND

C.R.H. PLC, IRISH CEMENT LIMITED, ROADSTONE PROVINCES LIMITED, ROADSTONE DUBLIN LIMITED, TRADBURN LIMITED, READYMIX PLC, KILSARAN CONCRETE PRODUCTS LIMITED AND C.P.I LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Cooke delivered the 19th day of July 2012

1. This action was commenced by plenary summons on the 1st December, 1996, but by the 15th anniversary of that date it had not come on for trial. In fact it had lain dormant since at least 2006, until on the 1st of June 2011, notice of intention to proceed was given under O. 122 of the Rules of the Superior Courts. This initiative has been promptly responded to by the three motions now before the Court to have the proceedings dismissed upon grounds of inordinate and inexcusable delay.

2. As explained in greater detail below there are, in effect, several limbs to the claims made by the plaintiffs in the proceedings. They claim that the three plaintiff companies were forced out of business between 1993 and 1994 because of the operation of a cartel by the defendants in the market for the relevant products. Secondly, they claim that certain defendants held a dominant position in the markets in question and abused that dominance by conduct which forced the plaintiff companies out of business. Thirdly, the plaintiffs seek to recover damages for unspecified losses which the plaintiffs claim to have sustained as a result of the alleged infringements of ss. 4 and 5 of the Competition Act 1991, (now the Act of 2002) together with what was then Articles 85 and 86 of the EC Treaty. A claim is also made in respect of restrictive covenants contained in a series of agreements entered into on 28th February, 1994 between the three plaintiff companies and the second, third and fifth named-named defendants. A claim of conspiracy is also pleaded.

3. The first named plaintiff ("Framus") was previously called "Dublin Concrete Products Limited" but changed its name when it ceased trading in 1993. The second named plaintiff ("Amantiss") was placed in voluntary liquidation by its creditors on 1st April, 1994 as was the third named plaintiff ("Wilbury"). The Court has been informed that the liquidator of those two companies authorised the commencement of the proceedings in 1996 and that he "has been kept informed" but the Court has no evidence before it of that authorisation on the part of the liquidator nor any information as to the basis upon which the liquidator may have given that authority or as to whether the liquidator has now authorised the re-instigation of proceedings in June 2011.

4. The test or principles to be applied by the Court in ruling upon an application to dismiss an action for want of prosecution are well settled and have not been in dispute between the parties on this hearing although, understandably, the opposing sides have sought to place greater emphasis or weight on different aspects of the principles when applied to the facts of the case. The principles were stated by the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, and, so far as pertinent to the issues raised here, can be paraphrased as follows:-

> (1) The Court has an inherent jurisdiction to dismiss a claim when the interests of justice so require;
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> (2) The party seeking to have a claim dismissed on grounds of delay must establish that the delay has been inordinate and inexcusable;
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> (3) Even where the delay is both inordinate and inexcusable, the Court must exercise a judgment as to whether, in its discretion, on the facts, the balance of justice is in favour of or against the case proceeding further;
>
> (4) When weighing the balance of justice between the parties, the Court has regard to, *inter alia*, the following considerations:-
>
> > (a) the implied constitutional principles of basic fairness and procedures;
> >
> > (b) whether the delay and consequent prejudice in the special facts of the case were such as to make it unfair to the defendant to allow the action to proceed and make it just to strike it out;
> >
> > (c) any delay on the part of the defendant, because litigation was a two party operation and the conduct of both parties should be looked at;
> >
> > (d) whether the delay or conduct of the defendant amounted to acquiescence in the plaintiffs delay;
> >
> > (e) whether the delay had given rise to a substantial risk that it would not be possible to have a fair trial or was likely to cause or had caused serious prejudice to the defendant;
> >
> > (f) the fact that the prejudice to the defendant might arise in many ways and be other than that merely caused by the delay including damage to a defendant's reputation and business.

5. In the course of argument counsel for the parties also opened to the Court many other authorities relevant in different ways to the considerations included above. It is not necessary in the particular circumstances of the present case to recite that case law in detail, but sufficient to record that the Court has taken account particularly of the manner in which the principles have been approached and applied in the following cases: *Dowd v Kerry County Council [1970] IR 27; Comcast International Holdings Inc and others v Minister for Public Enterprise and others [2007] IEHC 297; Rogers v Michelin Tyre plc and another [2005] IEHC 294; Manning v Benson and Hedges Ltd [2004} IEHC 316; Birkett v James [1978] AC 297; Sheehan v Amond [1982] IR 235; Desmond v MGN Ltd [2008] IESC 56; Gilroy v Flynn [2004] IESC 98; Anglo Irish Beef Processors v Montgomery [2002] 3 IR 510; Stephens v Flynn Ltd [2005] IEHC 148; Carroll Shipping Ltd & Carroll v Matthews Mulcahy & Sutherland Ltd 1981 No. 2080P; Rodenhuis & Verloop v. HAS [2010] IEHC 465; O'Connor v John Player* 1997 15903P. (The Court notes that since the hearing of these motions the High Court judgment in *Comcast* has been successfully appealed but the reasons for allowing the appeal against the dismissal of that action have not become available at the date of this judgment.)

6. Before considering the application of these principles to the circumstances of the parties in this case it is necessary to indicate briefly what the businesses of these undertakings were alleged to be at the relevant time and then to describe the products and markets said to be involved in the infringement claims and to outline further the allegations pleaded in support of those claims.

7. The first-named plaintiff was, prior to ceasing to trade, engaged under its former name of Dublin Concrete Products Ltd, in the business of importing cement into the State and in the manufacture and supply of concrete products including particularly, readymix concrete. Prior to going into liquidation on 1st April 1994, the second named plaintiff had also been engaged in the importation and sale of cement in the State mostly supplied to it by an undertaking called Lagan Cement which sourced the material in Germany. The third named plaintiff was also in the business of manufacture and supply of concrete products including particularly readymix concrete and concrete blocks, trading under the names "Galway Readymix" and "National Concrete".

8. The first named defendant ("CRH") is a public company incorporated in the State and the holding company of a large number of subsidiary companies which include the second, third, fourth and fifth named defendants. (These defendants are collectively referred to in this judgment as the "CRH defendants".) The group is engaged in carrying on in the State, elsewhere in the European Union and internationally a wide range of businesses in the manufacture and supply of materials and products to the construction sector.

9. The sixth named defendant ("Readymix") is a public company incorporated in the State which carries on business in the production and supply of products in the construction sector including particularly readymix concrete and mortar, sand, gravel, pipes, masonry blocks and other building materials and products.

10. The seventh named defendant ("Kilsaran") is a company which also carries on business in the State in the production and supply of building products and materials and especially gravel, aggregates, readymix concrete and concrete products.

11. The eight-named defendant ("CPI") too is engaged in the State in carrying on business in the manufacture and supply of readymix concrete and mortar, aggregates and concrete blocks.

Chronology of the Proceedings

12. In order to appreciate the appraisal of the periods of lapsed time overall and of actual intervals or delays in the prosecution of the action once commenced it is useful to set out the dates of the main events, facts, pleadings and steps taken in chronological order:

4/12/1996 Plenary summons issued;

10/12/1996- 15/1/1997 Appearances entered by defendants;

3/2/1998 Statement of claim delivered;

13/511998 - 29/6/1998 Diverse requests for particulars from various defendants;

9/10/1998 Plaintiffs motion for judgment in default (6th defendant);

20/11/1998 Defence of 6th defendant

18/12/1998 Plaintiffs replies to particulars to 1st - 5th defendants and 8th defendant;

25/1/1999 Plaintiffs replies to particulars (7th defendant);

8/6/1999 Plaintiffs motion for judgment in default of defence (8th defendant);

2/7/1999 Defence (8th defendant);

18/8/1999 Affidavit of discovery (6th defendant);

23/3/2000 Defence (7th defendant);

19/5/2000 Plaintiffs motion for judgment in default (CRH defendants);

20/6/2000 Defence (CRH defendants);

29/6/2000 Plaintiffs motion for discovery;

21/11/2000 Amended statement of claim delivered;

19/6/2002 CRH defendants motion for security for costs

12/4/2002 Judgment of Herbert J. on discovery and security for costs for discovery;

20/12/2002 Notice of appeal against orders for discovery and security;

5/6/2003 Order plaintiffs make discovery to Kilsaran

22/4/2004 Supreme Court judgment on security for costs and discovery; Security fixed at €27,000

21/6/2004 Amount of security lodged.

15/7/2004 Master's order requiring plaintiff to make discovery to CRH defendants;

31/5/2005 Plaintiffs' motion to strike out CRH defence for non compliance with discovery order;

15/12/2005 Plaintiffs' affidavit of discovery furnished to CRH defendants.

13. Between the last step taken above by the furnishing of the plaintiffs' affidavit of discovery to the CRH defendants, no step was taken in the proceedings until the 29th March, 2011, when the plaintiffs' affidavit for discovery was furnished to Kilsaran and on the 1st June, 2011, when a notice of intention to proceed was served by the plaintiff. In the case of Kilsaran therefore there had been no step in the proceeding between June 2003 and March 2011, almost eight years.

The Claims of the Plaintiffs

14. The claims which the plaintiffs seek to pursue as pleaded and particularised in the original statement of claim delivered at the beginning of February 1998, are based upon allegations of infringement of the cartel rules of what is now s. 4 of the Competition Act 2002 and what is now Article 101 TFEU and abuses of dominant positions (including positions of "collective dominance" on the part of all defendants) contrary to s. 5 of that Act and Article 102 TFEU. (The former alleged infringements are hereafter referred to as "the cartel rules" and the latter as "the abuse of dominance rules"). The allegations of infringement relate to a number of product markets namely, the markets for cement, for aggregates (sand, gravel etc.), for readymix concrete, for speciality concrete products (masonry blocks, concrete pipes etc.). The geographic market for cement is said to be that of the State as a whole, while the geographic markets for the other products are said to be localised because of the product characteristics and the costs and logistics of transport. (The amended statement of claim delivered on 21st November 2000 contains no material changes in the substantive claims as originally pleaded.)

15. These claims as pleaded in the statement of claim appear to be broadly in three parts. It is first claimed that the defendants have infringed the cartel rules and have done so in all of the types of agreements, decisions, and concerted practices listed in s. 4(1)(a)-(e) of the Act of 2002, that is, by fixing prices, limiting and sharing markets, applying different conditions to equivalent transactions and so forth.

16. Secondly, the defendants are alleged to have infringed the abuse of dominance rules and to have done so under each of the headings ins. 5(2)(a)- (e) of the 2002 Act. More particularly, it is alleged that the CRH defendants hold one or more dominant positions in the market for cement and aggregates and that "the defendants or some of them between them control all or almost all of the local markets in Ireland in the manufacture and supply of readymix and the speciality concrete products". Furthermore, it is alleged that "the defendants together hold collective dominance in the State or a substantial part of the State in the market for the manufacture and supply of concrete products".

17. The third part of the claim is directed at restrictive covenants contained in four agreements entered into on the 28th February, 1994, between the plaintiff companies together with their directors Messrs Seamus Maye and Francis Maye with companies within the CRH defendants group. Under these agreements entered into prior to the liquidation of the second and third plaintiff companies, assets and goodwill of the businesses previously carried on by them were agreed to be sold to CRH group companies and as part of the consideration for the sales, it is alleged that those directors were required (or compelled), to give undertakings not to re-enter the relevant markets or to engage or be involved in any competitive activity in the products concerned for ten years. Furthermore, it is alleged that the directors were personally required to undertake verbally to observe these non-compete covenants for life.

18. In a schedule to the statement of claim, detailed particulars of the infringements alleged are set out. It is unnecessary for present purposes to recite or even summarise the full detail of these particulars. It is sufficient to observe that, for example, it was specifically pleaded that since at least the 1980's a cartel had operated in the markets for the relevant products under the effective control, oversight and coordination of senior executives of CRH who, it is alleged, convened and controlled meetings of the cartel and effectively policed its operation. It is alleged that in the market for readymix concrete in the greater Dublin area the cartel operated to contrive that contracts for major construction projects or building sites which were supposedly awarded on foot of competitive tenders were in fact allocated between cartel members according to their respective shares of the market. It is notable that the pleadings particularise specific meetings, conversations and events by date and place and identify the parties present by name including, for example, Mr. Seamus Maye on behalf of the plaintiff and various individuals representing defendant companies and third party contractors. Furthermore, the particulars given purport to identify specific instances of the impact of the cartel arrangements upon particular contracts for the supply of relevant products during the years 1990- 1993. Individual instances are given where a plaintiff company claimed to have concluded a contract for the supply of a relevant product to a customer only to be deprived of it by the collusive action of a defendant company intervening to procure a breach of that contract by offering materially reduced and therefore predatory prices to the customers. The Court notes that as of the delivery of the statement of claim, before discovery of documents was obtained and in the absence of any examination of discovered documents furnished on the part of the defendants, the plaintiffs were in a position to formulate detailed particulars to substantiate the cartel infringements by reference to specific contracts which included, in some instances, evidence based upon conversations between directors of the plaintiff companies and representatives of defendant companies or of third party contractors or customers concerned.

19. Similarly, particulars of the alleged breaches of the abuse of dominance rules were also given which again identify specific instances such as, for example, a particular meeting between Mr. Seamus Maye and executives of CRH companies at which it is said that the latter made explicit threats to eliminate the plaintiff companies from the relevant markets. Apart from the allegations made against the CRH defendants, specific instances are illustrated of anti-competitive conduct on the part of representatives of Kilsaran and Readymix.

20. While it is unnecessary to rehearse in detail the particulars given in substantiating the basic claims of infringement of the cartel and abuse of dominance rules, what is of significance to the Court in the light of the basis upon which the plaintiffs seek to resist the claims now made on these motions, is that in February 1998, the plaintiff companies through, in particular, Mr. Seamus Maye, claimed to be in a position to give direct evidence by way of illustration of a significant number of the instances in which the alleged infringements had impacted directly upon the businesses of the plaintiffs with the result that they put the companies out of business.

The Key Issues

21. That, accordingly, is the context in which it falls to the Court to consider the three essential issues raised by these motions: (i) Has the delay overall since the causes of actions arose and especially the delay between the last step taken in the proceedings in 2005 and the plaintiffs' service of a notice of intention to proceed in June 2011, been inordinate? (ii) If it has, can the delay be excused? (iii) If the delay is to be regarded as both inordinate and inexcusable, are there any other factors which bear upon the balance of justice between the parties which would justify the Court in refusing to dismiss the proceeding so as to allow it to proceed at this stage?

22. In the arguments addressed to the Court on the hearing of these motions, emphasis has been placed on the various stages in the history of events during which delay can be identified on the part of the plaintiffs: the time elapsed between the alleged origin of the causes of action in the 1980's and the issue of the summons in 1996: the gap between the cessation of trade by the plaintiffs and the commencement of the action: the 14 month delay in delivering a statement of claim; and above all, the delay since 2005. In the view of the Court, in the particular circumstances of this litigation, the two key aspects of the delay which determine the outcome of the present motions are first, the overall lapse of time between what appear to be the events, contracts, conduct, meetings and conversations on which the claims are based and which will feature in the likely evidence; and second, the long period of inaction from 2005 to June 2011. The former is clearly important in assessing the potential prejudice to the defendants in adducing evidence. The latter raises the implication that the case had been abandoned and therefore requires compelling explanation if it is to be excused. If, having appealed the security for costs issue and then lodged the required amount, the plaintiffs had pressed on with the action in 2004 to 2006, the delays in starting the case and in delivery of the statement of claim would not then have been a ground for dismissal in all probability had the issue arisen.

Inordinate Delay

23. The answer to the first of the above questions is, in the judgment of the Court, obvious and inevitable. In its ordinary meaning delay is "inordinate" when it is irregular, outside normal limits, immoderate or excessive. The plaintiffs' directors Messrs Maye, by whom this litigation is effectively being pursued, claim that the companies were put out of business between 1991 and 1993 by collusive agreements and anti-competitive conduct which occurred for the main part in the years 1990 to 1993. The companies were wound up in 1994 and the action was not commenced until the end of 1996. Thus, when the statement of claim was delivered in February 1998 particularising for the defendants the claims they faced, the trading activities, contracts, and anti-competitive activities from which the claims were said to arise stretched back to at least 1990 and the evidence which was foreshadowed in the references to events, meetings and conversations dated back to 1990, 1991 and 1992. In circumstances where there had been a material lapse of time from the point where the proceeding could have been commenced in at least 1994 and then a delay of 14 months in the delivery of a statement of claim following the issue of the summons, the effective abandonment of the action by the plaintiffs from the end of 2005 until June 2011 cannot be described as other than excessive, irregular and inordinate.

24. It is instructive to compare the delays evident in the present proceeding with those considered in some of the cases referred to in para. 5 above. For example, in the Desmond case, the defence had been delivered in February 1999, and a notice of intention to proceed was served in February 2005. This delay of 6 years was held to inexcusable even though the overall delay from the cause of action was only seven years. The excuse in that case also bears some analogy to the position of the plaintiffs in the present case, in that the delay was sought to be excused upon the basis that the plaintiff wanted to await developments in and/or the outcome of the Moriarty Tribunal. In *O'Connor v. John Player and Son*, a delay of four years and eleven months between the issuance of the summons and the delivery of the statement of claim was held inordinate. In *Stephens v. Flynn* the cause of action had arisen in 1995 and there had been a delay of just under six years before the action was initiated and a further delay of twenty months in delivering a statement of claim. When the motion to dismiss was brought the events out of which the action arose were nine years old. The delay was held inordinate. The *AIBP* case arose out of an agreement made in 1989 and the proceeding was commenced in that year. The pleadings closed in 1994 and nothing happened in the case between that date and the month of March 2001 apart from the service by the plaintiff of notices of intention to proceed in 1996, 1998 and December 2000. The delay of six and a half years from June 1994 to December 2000 was acknowledged in the case to have been both inordinate and inexcusable.

25. Accordingly, the delay on the part of the plaintiffs in the present action since mid 2004 or 2005 (depending upon which last step against the different defendants is considered), is at least equal to analogous delays already considered as inordinate by the High Court and/or the Supreme Court in recent years. More importantly, perhaps, on the basis of the case law to which the Court has been directed, the overall delay or lapse of time between the contracts, events, meetings and conversations which are at the heart of the claims sought to be pursued in this case and the earliest likely date for a trial of the action that is, approximately 20 years, exceeds any period of delay which has been considered tolerable or excusable in any commercial litigation dependent upon witness testimony in modem times.

26. The inordinate character of the delay between 2005 and 2011 is all the more pronounced and surprising because of the very extensive investment which had been made in the litigation on both sides during the years 1998 to 2004 in the numerous contested motions, the seeking and furnishing of particulars, the contesting and then the making of discovery and particularly the appeals to the Supreme Court on the orders for discovery of documents and security for costs. Having gone to such lengths and having succeeded in obtaining a substantial reduction in the amount of the security fixed, there was in the view of the Court a clear obligation on the plaintiffs then to prosecute the action without any further delay.

Excuses for Delay

27. Has such an obviously inordinate delay on the part of the plaintiffs an excuse? In answering the present motions, the plaintiff companies, while seeking to distinguish and excuse various stages of delay in the proceedings to date, have essentially focused on three factors by way of explanation as to why the proceedings ought not to be dismissed at this stage. Some reliance is placed upon the inability of the two directors to deal with business matters for reasons of ill health and in the case of Mr Seamus Maye by a family bereavement. Reliance is also placed upon financial difficulties faced both by the plaintiff companies and by Messrs Maye personally. Primarily however, the directors seek to excuse the delay by what is claimed to be the difficulties of proof of the claim faced by the plaintiff companies in further pursuing the proceedings at the end of 2005.

Preliminary Observations

28. Before addressing these essential issues it is necessary to make a very elementary observation as regards the position of the plaintiffs in the present action. The plaintiffs in this case are three defunct limited companies, all of which ceased to trade nearly twenty years ago and two of which are in liquidation. It is clear that the present litigation is being conducted through those companies by Mr. Seamus Maye and his brother Mr. Francis Maye with the consent or acquiescence of the liquidator of the second and third named plaintiffs. They are the directors of the companies and are presumably principal shareholders and therefore the ultimate beneficiaries of any surplus that might arise from the liquidation of the assets of the companies after discharge of their liabilities upon the dissolution of the companies. Messers Maye are not, however. co-plaintiffs in the action. Accordingly, when the

Court is asked to consider the factors put forward by way of excuse for the inordinate delay in bringing this action to trial, including the factors of financial difficulty and personal illness, it is necessary to bear in mind that limited companies do not suffer from ill health and limited companies in liquidation are in financial difficulty from the very outset.

29. The second basic observation which must be made is this. The case made on behalf of the plaintiffs does not seek to disguise the fact that the primary objective of the action at this stage is to recover damages. Insofar as the criteria applicable to the issues before the Court include that of balancing the interests of justice between the parties in deciding whether the proceedings should continue or be dismissed, it is obviously relevant to consider by whom and to what extent the benefits of any award in damages might accrue. It is necessary to make this point because the Court has not had the benefit of any affidavit from the liquidator of the second and third named plaintiffs as to the status of the liquidation in those companies, the extent of their deficiencies, the identity of their creditors and what amount might be required by way of damages to discharge their indebtedness before any benefit is yielded to shareholders.

30. These considerations are particularly pertinent because, especially in the case of the second and third named plaintiffs, the carriage of these proceedings is or should be, strictly speaking, in the hands of Mr. Donegan as their liquidator. At the very least it is questionable whether companies which are admittedly insolvent and in liquidation can be permitted to excuse inordinate delay in prosecuting a case upon the basis that the shareholders or directors who are promoting the litigation are said to have difficulties of health or finance which preclude their conducting the liquidation with the necessary expedition. It does not seem to the Court to be any part of the stautory duty or function of a liquidator to facilitate by postponement of a winding up the pursuit of damages claims intended to benefit shareholders or directors unless the liquidator has satisfied himself that the litigation will first bring a benefit to the creditors. As already mentioned, the Court has heard nothing from the liquidator.

31. In the present proceedings, emphasis has been placed by Messrs Maye on behalf of the plaintiff companies upon policy considerations in the area of competition law relating to the desirability and need to enhance what is referred to as "private enforcement'' in other words, the policy of pursuing compliance with the competition rules of both the Act of 2002 and Articles 101 and 102 TFEU through the medium of civil litigation brought by undertakings which are complainants or victims of anti competitive conduct and agreements. It should be noted that the cause of action created by s. 14 of the Act of 2002, is available to "any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5 ...". If, as seems to be the case, the two directors wish to maintain that their own personal financial difficulties are also caused by the anti competitive agreements and conduct alleged against the defendants, it was open to them to join as co-plaintiffs in the action when it was commenced. As they did not do so, it is questionable whether they can now rely upon that complaint to excuse the delay in the prosecution of this case by the three plaintiff companies which were already defunct and insolvent when the proceeding was initiated.

32. In this regard the Court would point out that in the submissions made on behalf of the plaintiffs the distinction between the corporate identity of the plaintiffs and the personal circumstances and interests of the two directors/shareholders has been frequently blurred or ignored and arguments based on the circumstances of the latter have been advanced as though they were the plaintiffs. They are not entitled, in the view of the Court to have it both ways. The directors/shareholders cannot on the one hand decline to pursue a right of action available to them both under the competition rules and the agreements of 28th February, 1994 and, on the other, seek to make the case they might thus have made through the proxy of the plaintiff companies.

The Finance Excuse

33. In his affidavit sworn on the 10th October, 2011, Mr. Seamus Maye invokes the financial difficulties in both the plaintiff companies and of himself. He says:-

> "Following the demise of the plaintiffs' business and the sale of the good will in the plaintiff companies to the fourth named defendant in February 1994, the plaintiffs were unable to secure banking facilities from any financial institution sufficient to allow the plaintiffs to carry on any business or any commercial activity. Repeated applications made by me for new accounts and/or working capital during these years were rejected, including applications made in my personal capacity and, separately, applications made as part of a bid to start up new enterprises, unconnected with the business of the plaintiffs. As a result, both the plaintiff companies and myself found ourselves shut out from access to funds."

34. It is therefore clear that these financial difficulties already existed in 1994 and 1995 and must have been appreciated both when the action was commenced in December 1996 and when a decision was taken to move it forward by the delivery of a detailed statement of claim in February 1998. While these financial difficulties of both the directors and the companies are described in general terms, the Court has not been provided with any detailed evidence either from the directors or from the liquidator as to the precise amounts of the deficit in the companies and who the creditors may be, and whether they are third parties or include the directors and shareholders themselves.

35. Whatever the answers to these questions may be, it is clear that the financial difficulties were not so acute as to prevent the action being prosecuted throughout the years 1998 - 2005 when extensive interlocutory skirmishing took place including an important appeal to the Supreme Court over the issues of discovery and security for costs. Having brought the litigation thus far and, in June 2004, complied with the order for security for costs of discovery, it is difficult for the Court to accept that financial difficulties on the part of Messers Maye was a material factor in the failure to take the next logical steps in the litigation including, for example, the examination of the documents made available as a result of the hard fought discovery motions. It has not been suggested that at any stage the legal representatives of the plaintiff companies declined to act for them because of the financial difficulties. Furthermore, no evidence has been placed before the Court that the financial position of either of the companies or Messers Maye has changed since 2005, such that it became possible once again in 2011 to finance the prosecution of the action.

36. In this regard it is relevant to note that in affidavits sworn on behalf of the CRH and Readymix defendants, documentation has been exhibited demonstrating that Mr. Seamus Maye has for a number of years been actively involved as a director of Cartel Damages Claims SA which is described as "a Brussels based company specialising in the purchase and private enforcement of damage claims arising from breaches of European national competition law where fines have been imposed on industry sectors by European Commission or national competition authorities". Also exhibited is the print of Mr. Maye's page on the social network website "Linkedin" which includes in his personal profile, his directorship of Framus Limited with the information "Framus Limited is engaged in a long running anti trust case against major international players in the cement and concrete sector including CRH (trading in the US as Oldcastle), Mexican giant Cemex and others. Framus Limited has unrivalled knowledge of the international cement cartel, the structure of problems arising from vertical integration and the effects on independent operators and final consumers. Framus Limited provides international consultancy services in the cement, concrete and aggregate markets specialising in anti trust issues". Mr. Seamus Maye has not sought to distance himself from this evidence but nor has he given any indication to the Court as to whether his involvement in this Brussels based company and/or the consultancy business apparently now carried on by the first named plaintiff explains the

change of financial fortunes for at least that company and which now makes it possible for it to resume the prosecution of the action. In making a judgment as to where the balance of justice lies between the parties in these circumstances, it is clearly necessary for the Court to know with some confidence that, if the defendants' motions are rejected, there is a realistic prospect that the action will be proceeded with expeditiously to a conclusion and will not again stall for lack of finance. In circumstances where two plaintiffs are insolvent and the individuals promoting the action claim serious personal financial difficulties and provide no evidence as to how they or the first named plaintiff propose to overcome those difficulties if the action is permitted to continue, it is impossible for the Court to accept that the financial difficulties were the cause of the delay since 2005 and that the delay can be excused because those difficulties have now been overcome.

The Ill-Health Excuse

37. Mr. Seamus Maye also relies upon his own ill health as an explanation for the delay particularly since 2005. He says that between May 2006 and January 2008, he suffered from serious depression which hindered him giving instructions to solicitors and generally advancing the action. In December, 2008, he suffered the serious personal set back of the death of a son in a car accident. In his affidavit of the 24th January, 2012, Mr. Maye lists the various medical practitioners that he consulted between 1990 and 2008, including "periodic" consultations with consultant psychiatrists between 1990 and 2008 and again 2011.

38. As against that, the defendants point out that during all of this time and particularly since 2004, Mr. Seamus Maye has apparently been active in various business activities including regular attendance at the annual general meetings of CRH plc and Readymix. In addition, as already noted above, he has been actively involved in the work of Cartel Damages Claims SA and apparently in the consultancy services of the first named plaintiff as well as maintaining an active involvement, including writing articles, on competition law issues with particular reference to the cement, concrete and construction industries.

39. In these circumstances the Court also has difficulty in accepting that such health problems which Mr. Maye has encountered over the years and particularly since 2004 constitute an excuse for the effective abandonment of the proceedings in 2005. The reality that has brought about the present situation is the discovery by the two directors of the plaintiff companies of a potential ally of the plaintiff in another proceeding relating to these markets also before this Court in the matter of Goode Concrete v. CRH plc, Roadstone Wood Limited and Kilsaran Concrete (2010 No. 10685 P). In that proceeding an analogous claim of the existence of a similar cartel, if not the very same cartel, is to be alleged against CRH Plc, Roadstone Wood Limited, and Kilsaran Concrete, who are also defendants in the present proceedings. In essence, the directors of these plaintiff companies now assert that they will be able to call in aid the testimony of the directors of the plaintiff companies in that proceeding in support of the allegations and claims they make in the present case. In effect, they seek to resist the present motions upon the basis that this new source of evidence makes all the difference between the situation in which the plaintiffs found themselves in 2005, when the delay might be said to have intervened and the position which they now find themselves.

40. The Court is thus satisfied that the real explanation for the attempt to resume prosecution of the case in 2011, is to be found in the emergence of an apparent ally in the form of Mr. Tom Goode, whose company Goode Concrete is a plaintiff in the above analogous action.

The Evidence Excuse

41. It is therefore necessary to consider a number of issues which arise from this purported answer to these motions. Were the "evidential difficulties" a genuine and acceptable reason for the failure to prosecute the action following the making of discovery or is this an explanation which arises retrospectively because of the fortuitous appearance of Mr. Tom Goode as a potential witness? Secondly, is it appropriate and in the interest of doing justice between the parties in these circumstances that the action should be allowed to proceed having regard to the claimed effect of the evidence that it is proposed will now be available to the plaintiffs as compared with that available to the defendants?

42. In relation to the first of those questions, the Court notes that an important part of the cause of action as originally pleaded in the statement of claim was that related to the agreements concluded on the 28th February, 1994, under which the plaintiff companies disposed of good will and assets to the second, third and fifth named defendants and in which the two directors also entered into non-competition covenants personally. It is claimed that these restrictive covenants were unlawful as unduly restrictive of competition and therefore null and void. Declarations to that effect are sought together with a mandatory order directing the defendants in question to restore to the plaintiff companies all of the assets and good will covered by the agreements.

43. On the face of it, there does not appear to have been any basis upon which it could have been asserted that the prosecution of these particular claims was inhibited by lack of evidential support. Those issues turned entirely upon the contents of the agreements, the analysis of the relevant markets at the time, the effects of the restraints and. if necessary, the personal testimony of the two directors.

44. It is also appropriate to note for the purpose of considering where the balance of justice lies between the parties in respect of the prosecution of that particular aspect of the claims. that it would now appear to be redundant because the period of non competition restraint has long since expired and there has been no evidence put before the Court that any of the three companies ever planned or intended to seek to re-enter the markets in question at any point during the period when the clauses might have been relied upon against the plaintiffs by the relevant defendants. In so far as complaint is made of the restraint imposed on (or agreed by,) the two directors personally, they chose not to pursue any remedy by joining as plaintiffs in the action in 1996.

45. The viability of this aspect of the claims must also be highly doubtful. The Court understands from the pleadings that substantial consideration was received by the plaintiffs from the sales of the assets and goodwill in 1994. That has presumably been disbursed to creditors to the benefit of the companies and also it seems to the indirect benefit of the directors/shareholders who mention in evidence the pressure they were under to meet debts incurred by the companies. In those circumstances it must be questionable whether the plaintiffs were entitled in 1996 to resile from the undertakings given in the agreements and to repudiate the agreements as unlawful.

46. Furthermore, it is obviously wholly unrealistic at this stage to suppose that the Court could be persuaded to grant the mandatory order sought divesting those defendants of those assets and good will almost twenty years after the event. Clearly, therefore, no just purpose could be served at this stage in allowing the claims pleaded at paras. 22 -- 24 of the statement of claim and the reliefs sought on foot thereof to be pursued.

47. Next, it is necessary to consider whether the reliance placed upon the alleged evidential difficulties faced by the plaintiff companies in respect of the other claims in the proceedings are a credible explanation and valid excuse for the inaction since 2005.

48. The case made in this regard initially by Mr. Seamus Maye in his affidavit of the 10th October, 2011, is in very general terms.

Emphasis is placed upon the difficulties typically faced by undertakings which are the victim of anti competitive collusion on the part of other undertakings in the market. He says at paragraph 18 that defendant undertakings will have taken:

> "...calculated steps to conceal their actions, thereby making it very difficult for the plaintiffs to obtain evidence to prove the allegations made in its case. Ultimately unless an insider within the cartel decides to act as a whistle blower the prospects of a private litigant securing direct evidence of the cartel's operations and decision making processes are low. This was the experience of the plaintiffs in the period up until early 2011 ... in the light of the extremely limited utility of material obtained in discovery, the plaintiffs found themselves in a situation where there was no reality to them bringing their case to trial unless or until such time as a market participant was prepared to challenge the defendants anti competitive dominion by giving evidence on behalf of the plaintiffs."

(The evidence of Mr. Maye is sought to be supported by quotations on the subject of difficulties of proof in competition cases to be found in submissions and reports such as one of the chairman of the Competition Authority in this jurisdiction in 2004 and the OECD Report on Regulation in Ireland in 2001.)

49. In his second affidavit sworn on the 28th November, 2011, Mr. Maye does however, address the actual difficulties said to have been encountered in this particular action. He says that he attempted to approach the principals of the contracting firms listed in the schedule to the statement of claim and provides a list of ten individuals who he says were approached in an attempt to persuade them to give evidence about the contracts in question and their dealings with the defendants concerned. (See exhibit SM9.) He says that the individuals were not willing to give evidence and he believes that they were motivated by a fear of jeopardising their ongoing commercial relations with those defendants. He does not however say when these approaches were made and whether it was before or after 2004. Mr. Maye also complains that attempts were made to persuade the Competition Authority to conduct an investigation into the defendants conduct in 2002, but the Authority declined. At para. 50 of that affidavit, he summarises the position as follows:-

> "... Subsequent to the exchange of pleadings and the discovery process, the plaintiffs have been unable to advance their claims in circumstances, where, for reasons that are outside their direct control, they have been unable to secure access to the evidence required to facilitate the setting down of the case for trial. In particular, the position is that persons who would otherwise be in a position to give relevant evidence have expressed themselves unwilling to do so in circumstances where they are concerned that, by giving evidence in relation to the plaintiffs' claims, they would be prejudiced in terms of their ongoing commercial dealings with the defendants. In the light of the inherent secrecy surrounding the activities of any cartel, this left the plaintiffs unable to secure access to relevant evidence until the emergence of new witness evidence earlier this year."

50. The Court finds it extremely difficult to accept that this was genuinely regarded as an obstacle to the further prosecution of the case following the resolution of the discovery issue in the Supreme Court in 2004. In the first place, insofar as reliance is placed upon the somewhat self-evident proposition that cartels generally operate in secret and that the best evidence is invariably that of a dissident cartel member willing to "blow the whistle", this was a problem that was known or ought to have been known to and appreciated by the plaintiff companies and their directors from the very outset. It did not arise as an obstacle for the first time in 2004 or 2005. If it did, it is all the more surprising that the prosecution of the claim was deliberately stalled without taking the step of examining such documentation as had been made available on discovery.

51. More importantly, however, it is difficult to reconcile this explanation with the way in which the proposed claims were presented in the statement of claim. As already observed, what is notable about the schedule to the pleading is the detail with which allegations are pleaded with references to named individuals, specific meetings on given dates, quoted statements and threats.

52. For example, in the particulars of breaches of the cartel rules, the very specific allegation is made that the cartel was organised and coordinated by senior executives of CRH "in particular Mr. Art Shiran whose specific duty is to supervise such cartels". In the same part of the schedule the specific allegation is made that the existence of market sharing arrangements between the defendants Readymix and CRH in particular "was acknowledged by Mr. John McNerney at a meeting with Mr. Seamus Maye on the 6th September, 1993". Another specific allegation is made that at a meeting in March 1991, between Mr. Seamus Maye and Mr. Sean Quinn of Quinn Cement, the latter stated that "the participants in the Galway concrete products market had stated in his presence that 'they would hang Maye out to dry'". An allegation was made that at a meeting in the 12th January, 1993, between a Mr. Doyle of CRH and Mr. Seamus Maye, the former requested the plaintiffs to alter the terms and conditions of their agreement with their aggregate suppliers Hudson Brothers in advance of the take over of the plaintiff companies by CRH.

53. Similarly, in the particulars of the alleged infringements of the abuse of dominance rules, reliance is placed upon detailed allegations relating to meetings between Mr. Seamus Maye and representatives of the defendant companies including, for example. a meeting on the 5th February, 1991, where a representative of CRH is said to have told a representative of the plaintiffs that "no matter how long or how much it takes, we will not have National Concrete in Dublin". Again, a meeting in August 1992 is referred to with Mr. Dermot McKeown and the late Mr. Kevin McKeown of Kilsaran at which an alleged threat of "Belfast prices" ie. very low concrete prices was discussed.

54. Notwithstanding the well know difficulty referred to by Mr. Maye of adducing direct first hand evidence from inside the membership of the cartel, the detail given in that schedule and the numerous examples cited by reference to specific contracts make it very difficult for the Court to understand why the sort of evidence Mr. Maye felt was needed from inside a cartel constituted a genuine obstacle to this action proceeding in 2005. The combination of the direct testimony of Mr. Seamus Maye, his brother and the other representatives of the plaintiff companies mentioned in the schedule, with the assistance of appropriate interrogatories, witness summonses, third party discovery and the other procedural instruments available to plaintiffs in these circumstances, would seem to have been capable of going a very great distance in establishing a *prima facie* case that the infringements had occurred so as to put the defendants in a position of having to explain their conduct in evidence. It is also worth noting that having regard to the nature of the collusive activity alleged against the defendants, much of the case as pleaded would have turned upon an examination of the prices in the various contracts listed in the schedule with a view to assessing whether the prices were predatory as alleged. For these reasons the Court has considerable difficulty in accepting as genuine the claim that the companies faced insurmountable obstacles through lack of evidence and failed to continue the prosecution of that action from 2004 onwards for that reason.

55. Clearly, therefore, the real incentive which has provoked the plaintiffs into reactivating the proceedings is the happenstance of the emergence of Mr. Goode as a potential witness. This was first mentioned by Mr. Seamus Maye at para. 25 of his affidavit of the 10th October, 2011 and then expanded upon in his affidavit of the 24th January, 2012. In the latter Mr. Maye avers that Mr. Tom Goode has agreed to make himself available as a witness and that his evidence will cover the matters which he has testified to in an affidavit of the 21st June, 2011, in the proceedings brought by his own company referred to above relating to the manner in which a cartel was operated so as to allocate contracts to particular members in a way which sought to maintain their respective market

shares. He exhibits documentation which he says was furnished to him by Mr. Goode and which, it is claimed, records in detail the allocation of identifiable contracts with named customers amongst the cartel members.

56. Having regard to the evidence which Mr. Goode apparently proposes to give in the proceedings brought by his own company against most of the same, named defendants in the present proceedings, it is easy to understand why Mr. Seamus Maye might have believed that his difficulties in the present proceedings would now be overcome. The Court, however, is not convinced on closer examination that this development is of itself sufficient to tip the balance of justice between these parties in favour of the plaintiff companies notwithstanding the inordinate delay that has occurred.

57. In the first place, it is clear from the affidavit of Mr. Goode of the 21st June, 2011, that the claims in that proceeding relate to alleged infringements of the same rules but at a period which post-dates the infringements alleged in the present action. In that affidavit the evidence of Mr. Goode is first concerned with allegations relating to cartel activity by CRH companies and Kilsaran in the cement and concrete markets between 1982 and 1987. In 1984 his cement business was sold to Roadstone and in 1987 his concrete company was apparently sold to Kilsaran and Mr. Goode departed the market to became involved in a number of other business ventures unrelated to the import of cement and the sale and supply of concrete. He avers that he returned to the concrete trade in Ireland in or around 1993 when he established the plaintiff company in that action and the infringements which constitute the basis for the claims in the action relate to the years 2005 to 2010. None of the alleged infringements therefore overlaps with the infringements alleged in the present case and Mr. Goode and his company do not appear to have been involved in any of the relevant markets at any time when the present plaintiff companies were involved. It may well be that the plaintiffs in the present action would claim that this was the same cartel involving the same or most of the same undertakings throughout the entire period from the 1970s until 201 0. No doubt Messrs Maye would seek to raise an inference to the effect that if a cartel between particular defendants can be proved to have existed at specific times a few years apart, the onus lies with the same undertakings as defendants to prove it did not continue during the periods alleged in this action. The position remains however, that there must be considerable doubt as to the admissibility and probative value of this new evidence, both documentary and oral testimony as evidence against the defendants in the present proceedings in respect of the listed contracts which appear to constitute the basis of the claims for damages. It is also to be noted that CPI the last-named defendant in the present action does not appear to be identified as a member of the cartel impugned by Goode Concrete.

58. Moreover, insofar as the Court is urged to take account of the important policy considerations of ensuring that the rules of both the 2002 Act and the Treaty are enforced, it is clear that the allegations made by Mr. Goode will fall to be considered and judged in the case brought by Goode Concrete. The availability of evidence of alleged similar infringements which appear to have commenced, not only after the present plaintiffs had ceased trading, but after the prosecution of the present action was deliberately stalled, does not, in the view of the Court, provide a sufficient justification for allowing the pursuit of the present claims to be resumed.

59. There are, however, a series of other factors which arise in these circumstances and have an important bearing upon the balance of justice between the parties. The first of these concerns the prejudice to which the defendants say they are exposed in adducing the evidence that would be relevant to the claims made against them after this protracted lapse of time. Much of the argument on these motions has been devoted to the identification of the witnesses appropriate to deal with the claims on behalf of the defendant companies including the individuals named in the schedule to the statement of claim. Some are now dead, others have retired from their relevant employment some years ago; some have had ill health and all claim to have little no recollection of the events and conversations alleged to have occurred in 1994 and the preceding years.

60. In the submissions on this issue the defendants thus identify various directors and employees upon whom they claim they would need to rely at a hearing and give details of the difficulties faced by those who have survived. Mr. Seamus Maye has responded 1.0 the submissions by expressing doubt and surprise at the alleged difficulties such witnesses and by listing other individuals who, he claims, could or should be available to the defendants having regard to the contracts, meetings and conversations identified in the statement of claim and to Mr. Maye's own dealings with the defendant companies. In his affidavit of the 28th November, 2011, he expresses scepticism as to the claimed lack of recollection on the part of individual witnesses having regard to their previous roles in the defendant companies and their involvement in the present proceedings over the years to 2005.

61. In the judgment of the Court it is not an answer to the particular prejudice complained of by these defendants for Mr Maye to put forward the names of alternative witnesses. It is for the defendants to assess what evidence and which witnesses will be needed to meet the case made against them. It may well be that some of the individuals named by Mr Maye as operations managers, sales managers and in other functions were personnel he dealt with in the defendant companies at the time and some may even have had some involvement in some of the contracts impugned by the plaintiffs. The serious prejudice asserted by the defendants, however, relates to the fact that the case pleaded and particularised in the statement of claim relies explicitly on allegations of admissions and threats claimed to have been made by specific representatives of the defendants on given days at named locations. It is the availability of the individuals thus implicated and the reliability of their recollections which governs the question of prejudice to the defendants and their ability to get a fair trial of these claims at this point in time.

62. It is clearly impossible for this Court in these circumstances to make any ruling on these opposing contentions. The fears expressed on behalf of the defendant would only come to be tested as valid when they come to rely upon witnesses at some point in the future when the action is tried. The Court can only endeavour to assess the balance of prejudice between the parties by considering the information given on behalf of the defendant companies in respect of individuals already named as having been involved in events referred to in the pleadings.

The CRH Defendants:

Mr. Art Shiran: now 67 years old; retired 6 years ago; has had a heart attack and although he prepared a memorandum in 1998 in relation to the claims made against CRH is said now to have no reliable memory of the relevant facts.

Mr Declan Doyle: Aged 64, retired four years ago; implicated in several of the meetings with representatives of the plaintiffs. Prepared a memo on the allegations in 1998. Claims not to have a clear recollection of the relevant events but otherwise is not claimed to be unavailable or in ill health or to be particularly deficient in recollection.

Mr. Gilmore: now 72 years old and retired 12 years ago. Named as present at a meeting in Goatstown in February 1991. He has suffered from a heart condition and claims he cannot remember the events relied upon by Framus, although he too prepared a memorandum in 1998 on that meeting:

Mr. Tony O'Loughlin: now 65 years old and retired 5 years. Identified as representing Irish Cement Limited at a meeting in the Green Isle Hotel in December 1991. He too prepared a memorandum in 1998 but is said not be able to recall the

relevant events at this point.

Mr. Martin McAodha: aged 67 and retired 7 years. He is said to have represented Roadstone Dublin Limited at meetings in 1992; is said to have been in ill-health and to have been hospitalised. He has no recollection of Mr. Maye complaining about Roadstone's behaviour.

John McNerney: managing director of Readymix Plc retired 7 years ago. He is said to have no recollection of the Guinness Brewery and Croke Park contracts identified by the plaintiffs. He is the only representative of Readymix identified in the pleadings.

Kilsaran:

Kevin McKeown died in 1994.

Dermot McKeown: current managing director. It is claimed that the company would have difficulty at this remove verifying his attendance at the alleged meetings and the contents of the alleged conversations.

Mr. Joe Doyle: former operations manager. He left the employment on the 31st July, 1998 and is now said to be resident in Northern Ireland (although Mr. Seamus Maye disputes this), and to have suffered from serious ill health. He is said to be unable or unwilling to give evidence.

Richard Adair: senior sales operative in the Dublin area reporting to Mr. Kevin McKeown. He was responsible for four of the contracts impugned by the plaintiffs in the schedule. He died in 2000.

CPI:

George Eyre: company sales director: retired in 1997 and now aged 80 and under medical supervision, and unable attend at a trial or give oral testimony. He was responsible for the CPI account with Ascon.

63. Having regard to the very specific allegations of fact, the reliance placed on particular rneetings and conversations and threats alleged to have been made by various representatives of the defendant companies, the Court is satisfied that the preponderance of prejudice clearly lies with the defendants in the balance between the two sides In these circumstances. Quite apart from the fact that several individuals who would have been key witnesses have died, the defendants will be at an obvious disadvantage in relying on other important witnesses who have retired from employment many years ago and whose recollection of such matters, if any, will obviously be far weaker now than it would have been had this action come to trial even in 2005/2006. The position of CPI would appear to be especially vulnerable having regard to the former role of Mr Eyre in the only transaction in which that company is implicated by the plaintiffs (the Ascon contract,) and his current age and state of health. This is clearly a situation in which the observation made by McGuinness J in the *Carroll Shipping* case is apt, namely that where it is necessary to rely on recollections of witnesses long retired from the businesses concerned in order to counter allegations in relation to events and conversations over 20 years earlier, the evidence is likely to be "dangerously defective" and therefore materially prejudicial to the party thus affected. For this reason alone the Court is satisfied that a trial of these claims in these circumstances runs a significant risk of being unfair.

64. In assessing where the balance of prejudice lies as between the parties from the point of view of the availability or lack of availability of relevant testimony, it is also appropriate, in the view of the Court, to attempt to make a realistic assessment of the respective positions of the parties as disclosed in the evidence before the Court and in the light of the assertions made on either side. As already indicated, the case made on behalf of the plaintiff companies relies heavily for support for the commercial und economic case made on the predatory pricing and anti-competitive poaching of contracts, upon conversations and threats by particular individuals at specific meetings. As is evident from his affidavits, these matters still loom large in the recollection of Mr. Seamus Maye and it is understandable that they should do so. He clearly harbours strong grievances against the defendants because of the failure of the family business and it is clear from the evidence of his attending at the AGMs of defendant companies, from the information as to his participation in the Brussels damages claims company and his activities of lobbying and writing on competition issues in the construction sector, that these matters have formed a large part of his life over the intervening years. While for him these meetings, conversations, threats and the conduct of the defendants and their representatives over particular contracts may appear to be dear and beyond doubt, experience shows that individuals in such situations can be at risk of persuading themselves with complete certainty of the reliability of their recall but in reality of thereby succumbing to self deception.

65. On the other hand, for the witnesses likely to be needed by the defendants, it is highly unlikely that such events, conversations and alleged threats have any equivalence in their recollections. For those who were employees or even directors, but have retired six or more years ago and for whom Mr. Maye's companies and even the contracts in question, may form only a small number of the persons and contracts they dealt with during their careers, no such detail of recollection at this stage could now be reasonably expected. These observations are not intended as either criticism or exculpation of the individuals concerned on either side. They are the Court's assessment of the inevitable consequence in human terms of the protracted delay for any litigation which is dependent in a material degree upon oral testimony in relation to past events and conversations. This is a case between three plaintiff companies and eight defendant companies. Those corporate entities are dependent so far as concerns the administration of justice between them, upon the testimony of the natural persons they must call upon to prove and answer the claims asserted and resisted. The question before the Court is whether in these circumstances, the defendant companies are prejudiced to the extent that they are unlikely to have a fair trial of the claims made against them because of the difficulties they face in adducing direct relevant evidence in response to the claim particularised on behalf of the plaintiffs. In the judgment of the Court, the answer to that question must necessarily be that the extensive lapse of time since the crucial period in which the events, conversations and threats are alleged to have occurred makes it highly probable that the defendants would be so disadvantaged as to deprive them of a reasonable prospect of a fair trial.

66. There is, however, another factor relative to the balance of justice from the perspective of the Court itself so far as concerns the availability and the reliability of evidence. As already indicated above, the plaintiffs have placed great emphasis upon the importance of the public interest in enforcing competition rules and thus impliedly on the duty of the Court to ensure access for the plaintiffs to the rights of action under the Act of 2002 and the Treaty. The policy consideration in this regard is that of implementing the objectives of policing the restriction and distortion of competition in relevant commercial markets. If that is so, the question necessarily arises as to whether there is any public policy interest in seeking now to investigate claims of restriction and distortion of competition which is said to have occurred in these markets twenty years ago. More particularly, how can this Court confidently expect to adjudicate reliably on the economic issues that must necessarily arise from such an investigation twenty years after the event? For example, one of the central issues inherent in the claims made relates to the predatory character of the prices allegedly

quoted in the contracts identified in the schedule to the statement of claim. Given the lapse of time and leaving aside for the moment the fact that the construction sector markets in question has presumable changed dramatically because of the intervening collapse or that sector, can the Court realistically expect now to be put in a position to reach valid conclusions on the significance and effect of prevailing forces upon prices in the relevant markets in the years 1990- 1994? Will it be possible to make any valid assessment of the balance of supply and demand for the various products in those markers of the market shares of undertakings; of the levels at which prices may have been predatory and the other dynamics which were influencing competition in those markets at the time? The analysis of an alleged situation of "collective dominance" is notoriously difficult even in the case of a current merger (where the issue more typically arises), such that the prospect of making any useful evaluation of that claim after twenty years is at the very least highly problematic.

67. In other words, a fundamental question is raised as to what purpose is served and whose interest is advanced by the Court embarking at this remove on the extensive and complex legal and economic evaluations which would be required in order to determine whether the anti competitive activities alleged against the defendants are proved? The answer in the judgment of the Court is "none".

68. Finally, it is also relevant in the view of the Court, when assessing the balance of justice between the parties on these motions to have regard to the nature and apparent tenability of the rights of action from which the plaintiffs will be excluded should the motions be granted and the action dismissed. There is no doubt that when commenced, the action raised allegations of serious anti-competitive conduct and particularly allegations of the existence of a so-called "hard-core cartel" that is, a deliberate and organised collusion amongst important undertakings to restrict competition share markets and fix prices in an important sector of the economy. But in addition to the fact that these infringements at this stage take on a somewhat historic appearance from the point of view of competition rule enforcement as mentioned above it is also notable that several of the facts, contracts and events relied upon clearly pre-date by more than 6 years the initiation of the proceeding in December 1996 and/or predate the commencement of the Competition Act 1991 on 1st October 1991 (See the Competition Act 1991 Commencement Order 1991: S.I. 249 of 1991.) As such they are either statute barred and/or fell outside the scope of those statutory prohibitions.

A plaintiff's inability to prove his case is a reason for discontinuing; it is not an excuse for deliberate delay. A party cannot expect to commence a proceeding making claims of illegal conduct against corporate defendants based upon serious allegations of misconduct against named directors and employees of those defendants and then to seek to excuse a protracted delay in prosecuting the claim upon the basis that the evidence was not available to prove the case.

Acquiescence

69. This assessment of the balance of justice between the parties is not, in the Court's judgment, altered by the plaintiffs' assertion that there has been acquiescence on the part of the defendants. The only acquiescence suggested is the omission on the part of the defendants to call upon the plaintiffs to proceed at any time since 2004 or 2005 and to apply to the Court to dismiss the action for want of prosecution.

70. As the case law indicated in para. 5 above makes clear, it is necessary in this regard to distinguish between active or culpable delay and inactive conduct on the part of a defendant where a proceeding lies dormant. (See particularly the judgment of Fennelly J. in the *AIBP* case).

71. When a proceeding has stalled at a point where the next step to be taken in a case lies with a defendant, that party has a greater burden of explanation to discharge when seeking to have the action dismissed as compared with the case where the failure to proceed lies entirely with a plaintiff. Furthermore, in the latter situation a defendant has a delicate judgment to make. If the motion to dismiss is brought too soon it may fail and bring on a case which might otherwise have been abandoned by the plaintiff. The action or inaction of a defendant is, as Clarke J in the High Court held in *AIBP*, a factor to be taken into account but one to which less weight will be attached where the defendant has merely let the matter lie and has not contributed to the delay by foot-dragging on the delivery of pleadings or other interlocutory steps.

72. In the judgment of the Court, there has been no culpable acquiescence on the part of the defendants in the present case. The defendants actively participated in the case until shortly after the Supreme Court judgment on discovery and security for costs. Given that the plaintiffs had provided the security for discovery in June 2004, and all defences had been delivered, the defendants had every reason to understand that the initiative lay with the plaintiffs and that when the plaintiffs did not follow up by examining- the available discovered documents, to assume the plaintiffs had decided to proceed no further. In that assumption they were clearly correct. As already indicated above, the plaintiffs' excuse is that they considered at that point that they did not have the wherewithal in evidence to continue the case and effectively decided to sit and wait in the hope that something would turn up. In the judgment of the Court the suggestion of acquiescence on the part of the defendants is unfounded.

73. In the judgment of the Court therefore, the delay in prosecuting this case both generally since 1996 at least and particularly since 2004 when it was apparently decided not to proceed until or in the hope, that better evidence might emerge, has been manifestly inordinate has not been acceptably excused. Furthermore, having regard to the non-availability to the defendants of some key witnesses and the very probable difficulties of recollection of others who may be available, there is obvious and serious prejudice to the defendants which outweighs any detriment caused at this stage to the three plaintiff companies by depriving them and their unidentified creditors of the trial of the case.

74. The defendants' motions will therefore be allowed and the action will be dismissed.