Neutral Citation: [2014] IEHC 396

THE HIGH COURT

[2001 No. 2673 P]

BETWEEN:

THOMAS MCCORMACK AND ROSALEEN MCCORMACK

PLAINTIFFS

AND

OLIVER ROUSE

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 27th day of February, 2014

1. The defendant to these proceedings applies by way of notice of motion dated 10th June, 2013, to dismiss the plaintiffs' action on the grounds of inordinate and inexcusable delay and pursuant to the inherent jurisdiction of this Court.

2. The plaintiffs operated a jewellery business under the style and title of "Harte and McCormack Jewellers" at Pearse St, Ballina, Co. Mayo for fifty five years prior to the commencement of these proceedings. The plaintiffs sold the premises on 14th July, 1998, to a third party and ceased trading. The defendant, Mr. Oliver Rouse, subsequently took a lease of property from the third party owner pursuant to which the plaintiff took over the property from which the plaintiffs had previously run their jewellery business. The sale of the goodwill of the plaintiffs' enterprise to the defendant was considered but never came to fruition. The defendant then commenced trading under the style and title of "Rouse's Jewellers."

3. The plaintiffs allege that on a number of different occasions and particularly over the Christmas period of 1998 the defendant attempted to associate his business with that of the plaintiffs which was previously carried on from the same premises. The plaintiffs allege that this has had the effect of misleading the public as to the true ownership of the goodwill of the plaintiffs' business. The plaintiffs seek an injunction restraining the defendant from representing that he has acquired the goodwill or the fixtures of the plaintiffs' business and restraining him from associating his business with the plaintiffs' former business. The defendant has filed a full defence to the proceedings. The plaintiffs also seek damages and/or an account of profits and other ancillary orders.

4. It is necessary to set out the chronology of the pleadings in these proceedings. This action was instituted by plenary summons issued on 22nd February, 2001. A statement of claim was delivered on 22nd April, 2002. Notice for particulars and a defence were served on 28th June, 2002. A reply and particulars were received on 29th July, 2002. The defendant avers that he has not delayed in bringing on these proceedings. In his grounding affidavit to this notice of motion he states that the plaintiffs did nothing further to advance the litigation after 29th July, 2002, until a request for voluntary discovery was furnished on 11th November, 2004. The defendant then refused to make discovery in the terms sought and he avers that nothing further occurred for two and a half years. A notice of intention to proceed was served by the plaintiffs on 17th August, 2006, and then a motion for discovery was issued by the plaintiffs and made returnable for 4th May, 2007. This motion was dealt with on 8th June, 2007, and an order for discovery was made. The plaintiffs appealed the discovery order and this appeal was heard on 22nd October, 2007. That appeal had not been filed on time and Edwards J refused leave to extend the time to appeal the order. A discovery affidavit was sworn by the defendant on 6th February, 2008, and a supplemental affidavit was also sworn by him on 7th April, 2008.

5. According to the defendant no further steps were taken by the plaintiff in relation to this case after leave to appeal the discovery order was refused except the issuing of notices of intention to proceed on 29th June, 2010, 16th June, 2011, and 4th December, 2012. A notice of trial was served by the plaintiffs on 10th January, 2013.

6. At the date of the issuing of this notice of motion twelve years have passed since the initiation of these proceedings and fifteen years since the matter complained of by the plaintiffs occurred. In the intervening period three witnesses in the case, Mr. Miko Browne an auctioneer and Mr. and Mrs. Jack Gaughan, have died.

7. Mr. McCormack avers, in an affidavit sworn on 26th June, 2013, by way of reply to the grounding affidavit to this motion, that he did not cause the delay in prosecution of this action and that he, on returning yearly from his second residence in California, checked the progress of the case with Mr. Ronan Tierney, his solicitor, and was assured on these occasions that matters were in hand and that the case was progressing.

8. Mr. Ronan Tierney, solicitor on record for the plaintiffs, also swore a replying affidavit to this notice of motion on 27th June, 2013. Mr. Tierney avers that he was instructed to act for the plaintiffs in 1998 in relation to the sale of the premises from which their jewellery business was operated. The plaintiffs emigrated to the USA and spend part of the year there and the remainder of the year in Ireland. The premises, though originally intended to be sold as a going concern, was eventually sold with vacant possession. A draft agreement for the sale of the stock and goodwill of the business to the defendant was drawn up by Mr. Tierney but this did not proceed and the sale of the vacant premises was completed on 23rd October, 1998.

9. Mr. Tierney was then instructed in relation to the complaint which is at the centre of these proceedings. Mr. Tierney avers that he wrote to the defendant on 1st September, 2000, requesting that he cease trading utilising the goodwill of the plaintiffs' business. He was assured by a phone call from Mr. Adrian Burke, solicitor for the defendant, that this activity would cease but received no written confirmation of this fact. Mr. Tierney sought such confirmation by way of letters of 12th September, 2000, and 14th November, 2000. Mr. Tierney received another call from Mr. Burke on 17th November, 2000, explaining that the dispute should not have continued and requesting proof that the problem was ongoing. This proof was furnished to him by way of letter from Mr. Tierney on 20th November, 2000, and Mr. Burke replied by letter of 29th November, 2000, enclosing a letter of apology from the defendant on 27th November, 2000, for what had occurred.

10. Mr. Tierney avers that he remains instructed by the plaintiffs. Mr. Tierney repeats the history of the proceedings as set out in the affidavit of Mr. McCormack. Discovery was sought by the plaintiff by letter of 11th November, 2004. The defendant's solicitor did not

reply to this request. The discovery request was repeated on 24th October, 2005, and a further letter seeking voluntary discovery was sent on 24th October, 2006, to the defendant. The last supplemental affidavit in respect of discovery was received by the plaintiff on 9th April, 2008. Without prejudice meetings were sought by the plaintiff on 28th September, 2008, and again on 3rd July, 2009. A response was received on 6th July, 2009, but this meeting never occurred. Two notices of intention to proceed were then sent by the plaintiff on 29th June, 2010, and 17th June, 2011.

11. Mr. Tierney avers that there was a delay in progressing the matter in 2010 and 2011 and offers by way of explanation the fact that he suffered two bereavements of close family members during that period. In July, 2011 Mr. Tierney prepared a brief for counsel in order to set the case down for hearing. Mr. Tierney met with the plaintiffs in Knock on 1st September, 2011. In October, 2011 an auditor was hired to assess the quantum of the claim and during 2012 further work was done to progress the proofs in the case. The majority of the proofs were prepared during the second half of 2012 according to Mr. Tierney. A further notice of intention to proceed was served and a certificate of readiness was received from Senior Counsel on 17th January, 2013. Mr. Tierney avers that he met with the plaintiffs every year since the event causing the complaint and that the plaintiffs kept in regular contact with him by phone and in writing in order to ensure that the case progressed.

12. Mr. Tierney avers that Mr. Browne, the auctioneer for the premises, died in December, 2008 but that any oral evidence which he may have given is not essential to this case as he was merely involved in the sale of the premises in question and not in the events which are at issue between the parties. No prejudice was asserted by the defendants prior to the service of this notice of motion.

13. The defendant avers in a supplemental affidavit sworn on 9th July, 2013, that the evidence of Mr. Browne, deceased, is essential to the case since it would have dealt with issues which arose between the plaintiffs and the defendant as regards whether the fixtures and fittings were included in the sale of the premises. There was litigation between the plaintiffs and the defendant in relation to this issue and Mr. Browne was also the subject of a claim by the plaintiffs. The evidence of Mr. and Mrs. Jack Gaughan deceased is also essential to this issue according to the defendant as they eventually purchased the fixtures and fittings from the plaintiffs which is relevant to the plaintiffs' claim for a loss of £100,000 which is made in these proceedings. In a supplemental affidavit sworn on 25th July, 2013, the plaintiff avers that the evidence of Mr. Browne would not be relevant as the latter was the auctioneer of the property alone and the goodwill and stock was excluded from his role as auctioneer. The plaintiff also avers that the evidence of Mr. and Mrs. Gaughan is not essential as they only purchased some cabinets from the premises and these were then purchased by the defendant who would now be in a position to give any relevant evidence in relation to that matter. Mr. Tierney in a supplemental affidavit sworn on 26th July, 2013, avers that there were communications between the parties' solicitors between 2008 and 2013 and that the defendant gave the impression that he was considering certain proposals made by the plaintiffs during that time.

Submissions of the Plaintiff

14. Mr. Simon Boyle SC, for the plaintiff, submitted that the court apply the principles set out by Hamilton C.J. in the Supreme Court decision of *Primor v Stokes Kennedy Crowley* [1996] 2 I.R. 459 at p. 475:

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

15. Counsel for the plaintiff drew attention to the fact that there has been considerable judicial comment in recent years in relation to whether the test set out above by Hamilton C.J. needs to be recalibrated or altered in some way to take into account relevant legal developments subsequent to the handing down of this decision. Such developments include the rights which a litigant would have under Art 6 of the European Convention on Human Rights to a fair trial and the enactment of the European Convention on Human Rights Act 2003 (hereafter "the 2003 Act"). The interpretive obligation which that legislation places on the courts under s2, which provides that "[i]n interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions," may be of relevance to such applications to dismiss proceedings for want of prosecution. Under s2(2) of that Act this obligation applies to all legislation including enactments promulgated prior to the date of passing of the 2003 Act.

16. This need to recalibrate the traditional *Primor* test in light of subsequent developments such as the 2003 Act was suggested by Clarke J in the High Court in *Stephens v Paul Flynn Limited* [2005] IEHC 148 and *Rodenhuis and Verloop BV v HDS Energy Limited* [2010] IEHC 465. However counsel submitted that the Supreme Court, in its recent judgment in the joined cases of *Comcast Int. Holdings v Minister for Public Enterprise, Persona Digital Telephony Ltd v Minister for Public Enterprise* [2012] IESC 50, reaffirmed the applicability of the *Primor* test but reached no consensus between its various members as to the need to substantially alter that test in light of developments subsequent to the decision in *Primor*. A contrary interpretation of this decision would presumably militate against the contention of the plaintiff that the balance of justice favoured the maintenance of the proceedings.

17. Counsel for the plaintiff also relies on the decision of Laffoy J in *Manning v National House Building Guarantee Company Ltd and Anor* [2011] IEHC 98 at para. 4.5 of which the court referred to "the crucial issue as to whether the first defendant is likely to be prejudiced in the defence of the action at this remove, so that there is a substantial risk that it will not have a fair trial." The court held that the delay between the issuing of the plenary summons in the action in 2001 and the service of the motion to dismiss in 2010 and the fact that a witness to events which had occurred over thirty years previously had very limited recollection of those events did not result in the balance of justice favouring the strike out of those proceedings.

18. In relation to the specific facts at issue in these proceedings counsel for the plaintiff conceded that overall the delay may be considered inordinate but part of the delay is attributable to the defendant as there was a large delay from the date of the plaintiffs' request for voluntary discovery in November, 2004 until April, 2008 when the defendant delivered his supplemental affidavit of discovery on foot of an order of the Master. The defendant is therefore partly responsible for the delay according to the plaintiff. The defendant did not refuse to make discovery, he simply ignored the plaintiffs' request. The plaintiffs also submitted that their delay after April, 2008 should be considered excusable as the plaintiffs lived in the United States and therefore it was more difficult for them to give instructions to their solicitor. However the court recognises that the plaintiffs met with the solicitor regularly, usually once every year, and were in phone and written contact with him. In 2010 and 2011 the plaintiffs' solicitor suffered bereavements of close family members. Correspondence sent by the plaintiffs up until August, 2009 seeking a without prejudice meeting with the defendant was either ignored or the subject of a non-committal response. Thereafter the plaintiff avers that the case was being prepared for trial. counsel for the plaintiffs also submitted that it had at all times been the intention of the plaintiffs to proceed with the trial.

19. In relation to the balance of justice in this case it was submitted by counsel for the plaintiff that this element of the *Primor* test favoured the case proceeding to trial as the defendant has suffered no real prejudice in defending the case due to the delay and it has not been shown that the deceased parties could have given any evidence of relevance to the proceedings. In addition the defendant himself had delayed since 2008 in moving to strike out the proceedings since it was at that time that the parties in question died. In addition the plaintiff submits that the evidence in this case will mostly be documentary rather than oral in nature and the defendant delayed in issuing this motion to dismiss for want of prosecution and inordinate and inexcusable delay until after the plaintiffs served a notice of trial on 10 Jan, 2013.

Submissions of the Defendant
20. Ms. Kate Kennedy BL, for the defendant, relies extensively on the decision of Clarke J in *Kategrove Limited (In Receivership) v Anglo Irish Bank Corporation plc* [2006] IEHC 210 at para. 3.1 and onwards:

> "3.1 In the recent cases of *Stephens v. Flynn* [2005] IEHC 148 and *Rogers v. Michelin Tyre plc and Another* [2005] IEHC 294, I had to consider the principles applicable to the exercise of the court's jurisdiction to strike out proceedings for inordinate and inexcusable delay. Having reviewed authorities from *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 to *Gilroy v. Flynn* (Unreported, Supreme Court, Hardiman J., 3rd December, 2004) I expressed the following view in *Stephens* at p. 7:-
>
> > 'Having considered the matter I am satisfied that the two central tests remain the same. The court should therefore:-
> >
> > 1. Ascertain whether the delay in question is inordinate and inexcusable; and
> >
> > 2. If it is so established, the court must decide where the balance of justice lies.
> >
> > However it seems to me that for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay, are issues which need to be significantly reassessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligations of expedition and against requiring the same level of prejudice as heretofore.'
>
> 3.2 On considering the matter in *Rogers* and having referred to *Stephens* I went on (at p. 6) to say the following:-
>
> > 'That is not to say, however, that there has been any change in the factors which the court should properly take into account in assessing where the balance of justice lies. It is simply that the weight to be attached to such factors may need to be re-considered'.
>
> 3.3 In *Wolfe and Another v. Wolfe and Others* [2006] IEHC 106, Finlay Geoghegan J., having conducted a similar review, stated the following:-
>
> > 'I respectfully agree with the view expressed by Clarke J. in *Stephens v. Paul Flynn Limited* [2005] IEHC 148 and *Rogers v. Michelin Tyres plc* [2005] IEHC 294 that the decisions since *Primor plc v. Stokes Kennedy Crowley* do not mean that there has been a change in the factors which the court should properly take into account in assessing where the balance of justice lies but rather that the weight to be attached to the various factors may need to be reconsidered.
>
> It remains the position as set out clearly and succinctly by Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510 that 'each case must be judged on its own merits' (p. 520) and also at p. 518:
>
> > "…the court should aim at a global appreciation of the interests of justice and should balance all the considerations

> as they emerge from the conduct of and the interest of the parties to the litigation. The separate considerations mentioned by Hamilton C.J. should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just."'
>
> The reference to 'the considerations mentioned by Hamilton C.J.' is a reference to *Primor*.
>
> 3.4 It is clear, therefore, that in a case where the defendant applicant satisfies the court that there is inordinate and inexcusable delay, the court should go on to consider where the balance of justice lies by reference to the factors identified in *Primor* but with a stricter approach to compliance. Those factors are not separate tests but merely matters which need to be taken into account in the overall assessment of the justice of the case.
>
> 3.5 I should finally add that it seems to me that in coming to a conclusion as to what is just, the court also needs to give consideration to whether there are any measures, short of the striking out of the entirety of the plaintiffs claim, which might meet the justice of the case. Thus, for example, in *Rogers*, I was satisfied that part of the plaintiffs claim could properly proceed, because the prejudice applicable to that aspect of the case was not sufficient to warrant it being struck out. Similarly in *Wolfe*, Finlay Geoghegan J. was satisfied that the justice of the case lay in favour of permitting the plaintiffs to proceed, but on a conditional and limited basis involving, on the facts of that case, an "unless order". Having regard to the serious consequences for any plaintiff who may find that their case be struck out otherwise than on its merits, the court should be always mindful to ascertain whether there is some lesser order which may meet the legitimate interests of the aggrieved defendant, while falling short of a striking out of the entirety of the plaintiffs claim."

Clarke J then continued by setting out and applying the principles in *Primor* to the facts of the case before him.

21. Counsel for the defendant also relied on a further statement from Clarke J in *Rodenbuis and Verloop BV v HDS Energy Ltd* [2010] IEHC 465 at para. 2.10 of that decision to the effect that:

> "For those reasons it seems to me that the tightening up to which I referred in *Stephens* is an appropriate course of action for the courts to adopt. It does not seem to me that there is any clear or authoritative view from the Supreme Court which would bind me to take a different view. I, therefore, propose to apply the test which I identified in *Stephens* and which was approved of by Macken J., speaking for the majority in *Desmond*, but with the tightening up to which I referred in the very next paragraph of my judgment in *Stephens*."

22. Counsel for the defendant submits, on the basis of the decisions in *Guerin v Guerin* [1992] 2 I.R. 287 and *Celtic Ceramics Ltd v IDA* [1993] I.L.R.M. 248, that the court should take account of delay prior to the institution of proceedings in any decision which it makes in relation to the issue of delay. In this instance the defendants submit that there was a delay of almost two years between the time of the occurrence of the incident the subject of the complaint and the issuing of the initiating plenary summons. In addition to that twelve years have elapsed before the service of a notice of trial.

23. Counsel for the defendant also submits that the delay in this case is not only inordinate but inexcusable. Counsel relies on the statement of Hardiman J in *Gilroy v Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 to the effect that "the assumption that even grave delay will not lead to a dismissal of an action if it is not on the part of the plaintiff personally but on the part of a professional advisor, may prove an unreliable one" as indicative of the general reluctance of the courts to excuse a plaintiff's delay by reason of his advisor's purported tardiness. Counsel also submits that in *Rogers v Michelin Tyre plc and others (No2)* [2005] IEHC 294 Clarke J held that less weight should be attached to the fact that the delay is accepted as being attributable to the plaintiffs' solicitors as opposed to the plaintiff. Counsel submitted that Mr. Tierney, the plaintiff's solicitor, sought to excuse the delay in prosecuting the plaintiffs' claim (by referring to the bereavements which he had suffered and the difficulty in getting instructions from the plaintiffs since they were resident in the USA for most of the year) but that the explanation offered in this regard dealt only with delay in 2010 and 2011 and did not account for the long periods of delay which occurred prior to this point.

24. In relation to the balance of justice in this case counsel for the defendant submits that it must lie in favour of her client. Counsel submitted that the evidence in this case is oral in nature rather than documentary and therefore, since a number of key witnesses have died the balance of justice in the case favours the dismissal of these proceedings for want of prosecution and inordinate and inexcusable delay. Counsel relied on a statement of Clarke J in *Rodenhuis* at para. 3.7 in relation to such a situation where relevant witnesses had died. In that instance the court stated:

> "Furthermore, in addition to the general prejudice which any party might be likely to suffer by significant delay, it seems to me that there is specific prejudice on the part of [the defendant] established in this case…there is likely to be some prejudice in attempting to establish matters that happened between ten and thirteen years ago. In particular, there is one witness who is now deceased...a second witness who is now deceased unfortunately died very soon after the proceedings were commenced and while [the defendant] is undoubtedly prejudiced by the absence of that witness, it cannot be said that the unfortunate absence of the witness concerned is any way due to delay on the part of [the plaintiff]…I am not satisfied that any significant portion of the delay in this case, other than that which occurred between the bringing of the motion for summary judgment and the filing of the defence, can truly be laid at the door of [the defendant]. Taking an overall view I am, therefore, satisfied that there is a material prejudice to [the defendant], although not one which can be placed at too high a level having regard to the partial documentary nature of these proceedings."

25. Counsel also relied on the general prejudice to the credibility of evidence which may arise from the simple passage of time between the occurrence of the events the source of the dispute and the trial itself in support of her submission on behalf of the defendant that the balance of justice in this case favours the dismissal of these proceedings.

26. Counsel for the defendant also submitted that the fourteen year long delay in this instance was simply too long to ensure that a fair trial of the proceedings would be possible. Counsel pointed out that the defendant is seeking injunctive relief for a situation which is now fourteen years in the past. Counsel placed considerable emphasis on the comments of Clarke J in *Stephens* in relation to the need to recalibrate the traditional *Primor* factors in order to take account of subsequent developments in the law in this area and particularly the fact that the courts are increasingly aware of the general need to ensure that the parties to any set of proceedings receive a fair trial of their action within a reasonable time.

Conclusion

27. In relation to applications to dismiss proceedings for inordinate and inexcusable delay it is necessary to strike a balance between the interests of the plaintiff and those of the defendant. The plaintiffs have a right of access to justice and the defendant has a right

not to be subjected to proceedings to which he could not reasonably be expected to raise a defence due to the lapse of time between the event and the proposed trial date. This was recognised by Henchy J in *O'Domhnaill v Merrick* [1984] I.R. 151 where he stated at p. 157 that:

> "In all cases the problem of the court would seem to be to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonable be expected to defend."

In the case of the defendant the very fact of having serious litigation pending against him for an unreasonable period of time can in itself be prejudicial regardless of whether a fair trial of the plaintiffs' claim against him remains possible or not. This was recognised by Lord Denning M.R. in *Bliss v Lambeth, Southwark and Lewisham Health Authority* [1978] 1 W.L.R. 382. Lord Denning M.R. stated at p. 389 that:

> "There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial; like the prejudice to Damocles when the sword was suspended over his head at the banquet."

28. In *Rainsford v Limerick Corporation* [1995] 2 I.L.R.M. 561 Finlay P outlined the broad principles which a court should follow in the exercise of its discretion in such cases. At p. 567 of that decision Finlay P, after an examination of the Irish authority on the issue, summarised the relevant principles as follows:

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

29. These principles were developed further by Hamilton C.J. in *Primor*, as set out above at para. 14 of this decision, and this has since then been seen as the definitive path for a court to follow in any such application. The applicability of these principles has been confirmed by the Supreme Court recently in the joined cases of *Comcast International Holdings and Ors v Minister for Public Enterprise & Ors, Persona Digital Telephony Limited and Ors v Minister for Public Enterprise and Ors* [2012] IESC 50. Denham C.J. described the *Primor* principles at para.12 of her decision in that case as "the primary relevant law" and applied those principles in allowing an appeal from a decision of this Court in relation to an application to dismiss for inordinate and inexcusable delay. The other four members of the Supreme Court also applied the *Primor* principles in reaching a decision in that case. However, significant reference was made in a number of the judgments to developments subsequent to the decision in *Primor* which may need to be taken into account by a Court in the exercise of its discretion along the lines set out in the latter decision. The *Comcast* case is not the first occasion on which the courts in this jurisdiction have discussed the current debate in relation to whether there is a need to modify the principles set out in *Primor* to reflect changes in the law subsequent to that decision. This issue has received much judicial and academic commentary in recent years.

30. It is necessary first to mention those developments subsequent to the decision in *Primor* which have given rise to some of the comment in relation to the need to modify the traditional test. The primary developments of relevance to this issue are the development of the European Court of Human Rights (hereafter "ECtHR") jurisprudence in relation to Art 6(1) of the European Convention on Human Rights (hereafter "ECHR") which provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law." [Emphasis added].

This provision, in particular in relation to the question of delay before the courts, has given rise to considerable jurisprudence in recent years. Hardiman J in the Supreme Court decision in *Gilroy v Flynn* for example made specific reference to the then recently delivered decision of the European Court of Human Rights in *McMullen v Ireland* 422/97/98, 29th July, 2004 in which that Court found that there had been a violation of the right of the applicant under Art 6(1) of the European Convention on Human Rights to a trial of his action within a reasonable period of time. Other cases of relevance to Ireland in this area are the decisions of the ECtHR in *Superwood Holdings plc v Ireland* 7812/04, 8th September, 2011, *McFarlane v Ireland* [2010] ECHR 1272, 31333/06, 10th September, 2010, and *Doran v Ireland* 50389/99, 31st July, 2003, in which violations of the "reasonable time" requirement of Art 6(1) of the ECHR were found on the part of the State authorities. While these decisions are not strictly of relevance to the motion at issue before the court in these proceedings, since there is no issue as to the delay of the State authorities in this case, they do indicate a general trend of the ECtHR away from a permissive attitude to long periods of delay in the prosecution of actions and towards a lower threshold for a breach of the right of a person under Art 6(1) to a trial within a reasonable time. The ECHR has become less willing to accept long periods of delay in the administration of justice. This factor must remain in the mind of the court when exercising its discretion in relation to such a motion to dismiss.

31. A further development of relevance to the motion before the court in these proceedings is the enactment of the European Convention on Human Rights Act 2003 as set out at para. 15 of this decision.

32. Hardiman J in the course of his decision in the Supreme Court in *Gilroy v Flynn* [2005] 1 I.L.R.M. 290 at pp. 293-294 drew attention to the issue when he stated that "the courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued." Hardiman J referred to the developments which had occurred in this area, in particular the ECHR jurisprudence and

the enactment of the European Convention on Human Rights Act 2003 as set out above. Hardiman J also made reference to the recent amendment to Order 27 of the Rules of the Superior Courts by SI No. 63 of 2004. Order 27, rule 1 now provides that:

> "If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, subject to the provisions of rule 1A, at the expiration of that time, apply to the court to dismiss the action, with costs, for want of prosecution; and on the hearing of the first such application, the court may order the action to be dismissed accordingly, or may make such other order on such terms as the court shall think just; and on the hearing of any subsequent application, the court *shall order the action to be dismissed* as aforesaid, unless the court is satisfied that special circumstances (to be recited in the order) exist which explain and justify the failure…" [Emphasis added]

This amendment to the Rules effectively imposes an imperative on the court to dismiss proceedings where the rules in relation to the time for the issuing of pleadings have not been adhered to as outlined in the Rules of the Superior Courts unless there are specified "special circumstances" which warrant the exercise of the court's discretion against the ordering of a dismissal.

33. In *Stephens v Paul Flynn Ltd* [2005] IEHC 148 Clarke J made reference to the decision of the Supreme Court in *Gilroy* and stated that this decision made clear that there was a need to modify the traditional *Primor* principles in order to bring the law in this matter into line with recent developments in relation to delay. Clarke J did not deviate from the traditional two part test to be applied in such circumstances: whether the delay is inordinate and inexcusable and where the balance of justice lies. But the court went on to state:

> "However it seems to me that for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly reassessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be titled in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."

Kearns J (as he then was) in the Supreme Court appeal of this case (*Stephens v Paul Flynn Ltd* [2008] 4 I.R. 31) made extensive reference to the decision of Clarke J in the High Court. Kearns J referred to the above statements of Clarke J and also noted that Court's emphasis on the various developments which have occurred in this area since the decision in *Primor* was handed down. Kearns J stated at pp. 38-39 of the decision:

> "Accepting, as both sides to this appeal do accept, that the relevant legal principles are correctly elaborated in the judgment of the High Court, I believe for the purpose of the present application I need go no further than to refer to that passage in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 in which Hardiman J., having identified the traditional jurisprudence in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, referred to the significant development represented by the change effected by the Rules of the Superior Courts (Order 27 Amendment) Rules 2004 to O. 27 of the Rules of the Superior Courts 1986, which provides that on the hearing of a second application to dismiss, the court "shall" order the action to be dismissed unless satisfied that "special circumstances" exist which explain and justify the failure. He then continued at p. 293:-
>
> 'Secondly, the courts have become ever more conscious of the unfairness and increased possibility of injustice which attached to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. Thirdly, following such cases as *McMullen v. Ireland* (ECHR 42297/98, 29th July, 2004) and the European Convention on Human Rights Act 2003 the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.
>
> These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of plaintiff personally, but of their professional advisor, may prove an unreliable one.'"

Kearns J, applying the principles in *Primor*, and presumably having regard to the subsequent developments as set out in the decision of Clarke J in *Stephens* and as quoted by him in his decision, found that the delay in question in this case was both inordinate and inexcusable and that the balance of justice favoured the dismissal of the proceedings and therefore the appeal was dismissed. The remaining members of the court, Macken and Finnegan JJ, agreed with the opinion of Kearns J without elaborating further on their reasons for doing so.

34. The courts are increasingly reluctant to allow a delay of such a significant period as occurred in *Stephens* – twenty months for the delivery of a statement of claim – to be regarded as acceptable and easily excusable. In the proceedings currently before the court the lapse of time between the date of issuing of the plenary summons on 22nd February, 2001, and the date of issue of the notice of trial, which was 10th January, 2013, is over eleven years. The event the source of the difficulties between the parties is of even greater vintage having occurred between 1998 and 2000. Therefore the court's attitude should not be dissimilar to that of the Supreme Court and the High Court in *Stephens*.

35. It is necessary to examine extensively the recent decision of the Supreme Court in *Comcast* in relation to the proposed modification of the *Primor* test.

The Comcast Proceedings

36. In her submissions to the court counsel for the plaintiffs submitted that the Supreme Court has not yet arrived at any definitive position in relation to the issue of delay and the effect of the ECHR jurisprudence and other recent developments such as the change to the Rules which occurred after the handing down of the decision in *Primor* on the attitude which the courts must take to delay in the prosecution of proceedings. But counsel submitted that it is clear that the Supreme Court in its recent judgment in *Comcast Int. Holdings v Minister for Public Enterprise* [2012] IESC 50, a case dealing with the decision to award the second GSM mobile telephone licence in the State to ESAT Telecommunications Limited and the findings of the Moriarty Tribunal in relation to that decision, has reaffirmed the applicability of the *Primor* test. Counsel submitted that the court had reached no consensus between its various members as to the need to substantially alter that test in light of developments of relevance subsequent to the decision in *Primor*, despite some members of the court making reference to such a possibility.

37. The decision of the Supreme Court in *Comcast* is an appeal from a decision reported at [2007] IEHC 297 in which this Court held that the plaintiffs' claims against the State defendants in those proceedings, including serious claims for misfeasance in public office, fraud and deceit arising out of alleged corruption, should be dismissed for inordinate and inexcusable delay. Having quoted the relevant passages from *Primor* and the related case law as set out above this Court acknowledged the debate initiated by the statements of Hardiman J in *Gilroy* in relation to the developments subsequent to *Primor* which a Court may need to take into account in any exercise of its discretion on a motion such as that before the court. This Court also made reference to the *dicta* of Clarke J in Stephens, as set out above, in relation to the need to recalibrate the traditional *Primor* test to take account of subsequent developments in the law of delay. This Court then stated:

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

The court continued to find that in the circumstances of the case, despite the fact that the State defendants had not produced any evidence of prejudice caused to them by the delay, for example the non-availability of a crucial witness or of a crucial document, the passage of time was such that the memory of the relevant witnesses as to the events at the heart of the complaint would be dimmed and that the State would suffer a presumed prejudice. Given that the credibility of any witness testimony would have been a relevant factor for a Court to consider in the trial of the substantive action and given that such credibility would now be more difficult to test due to the delay in the bringing on of the trial, the action was dismissed against the State defendant for inordinate and inexcusable delay. In conclusion this Court, having referred in particular to developments in the law of the European Court of Human Rights in relation to Art 6 and the issue of delay, held that the delay was inordinate and inexcusable and stated that

> "the European Convention of Human Rights is an extra factor to be added into consideration by this Court but subject to the application of existing Irish law and jurisprudence."

The decision of this Court does not substantially diverge from the original *Primor* test. The approach in *Primor* was expressly applied by this Court in *Comcast* but in reaching its conclusion this Court also had regard to some of the important developments which occurred in the law in this area after the handing down of the decision in *Primor*, such as those mentioned by Clarke J in *Stephens* and Hardiman J in *Gilroy*. This approach is in line with that taken by Kearns J (as he then was) and accepted by the other members of the Supreme Court in *Stephens*.

38. The Supreme Court in the *Comcast* decision reached a different conclusion to this Court on the specific facts of the case. The members of the court were not unanimous in their approval of the approach taken by Kearns J in *Stephens* and no strict consensus was arrived at in relation to the updating of the *Primor* test. The court did reaffirm the applicability of the traditional principles to the issue of inordinate and inexcusable delay in prosecution and certain members of the court did refer to the need to recalibrate the test to take into account the recent developments in the law in this area. However, the court emphasised the unique nature of the case and the specificity of the facts and circumstances which were at issue in that case. The Supreme Court did not set out any principles of general application in relation to the exercise of judicial discretion in deciding motions for dismissal for inordinate and inexcusable delay.

39. In her decision Denham C.J. begins by stating at para. 12 that "[i]n all the circumstances, the primary relevant law is that stated in *Primor*." The Chief Justice continues by outlining the principles in that case to be applied to the facts before the court. She stated at para. 13 that:

> "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…
>
> 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*."

The Chief Justice placed considerable emphasis on the unusual nature of the claims made by the plaintiff in the *Comcast* proceedings; that the decision to award the licence to ESAT was unlawful and void and that damages were sought on a number of bases including misfeasance in public office, fraud and deceit. The Chief Justice also noted that the plaintiff was unable to explicitly particularise its statement of claim pending the conclusion of the investigations of the Moriarty Tribunal as it did not have the resources to undertake a huge fact finding mission, a task sufficiently onerous to require the establishment of a public inquiry in the form of the Moriarty Tribunal, on its own behalf but had to await the findings of that body in relation to the events surrounding the decision to award the licence. Denham C.J. found that this was sufficient, given the circumstances of the case, to render any delay caused by the plaintiffs in the prosecution of their claim excusable and therefore it was not necessary to continue to assess the other element of the *Primor*

test i.e. the balance of justice. But she then stated that if she was incorrect in her finding that the delay was excusable she would have found that the balance of justice favoured the continuance of the proceedings for reasons outlined in her decision. In the final sentence of her decision the Chief Justice again stated that her decision to allow the appeal was based "on the unique facts of [the] case" before the court.

40. Hardiman J, in allowing the appeal, also made significant reference to the unique nature of the case before the court stating explicitly that:

> "This case is absolutely unique, without precedent or parallel in the ninety year history of the State. It will be profoundly worrying, indeed alarming, in its implications for Irish public administration if the allegations made by the plaintiffs turn out to be true. But the State defendants say that the action should be stopped here and now, without the merits being decided, on account of delay by the plaintiffs.
>
> It is important to understand the uniqueness of the case. It is not merely unusual or odd. It is not simply a case of a kind rarely met with. It is unique - there is no precedent at all; I have never heard of anything like it in this jurisdiction. The quality of uniqueness is central to my analysis of the law applicable on the present application. Because the case is unique, the decided cases merely supply the general principles to be applied, rather than providing a case directly in point, or a binding precedent. Equally, because it is unique, the present case is unlikely itself to be of much value as a precedent; I do not therefore intend to make general suggestions for the development of our jurisprudence on delay in this judgment. This case does not represent a new category of case: it is simply unique and *sui generis*."

At a later point in his decision Hardiman J again stated that "[t]he subject matter of this litigation *is* truly exceptional, indeed unique. There has never been anything like it" making specific reference to the claims made by the plaintiff, the political aspect of the matter at issue and the implications of any outcome of such a case for the parties and the public at large. Hardiman J applied the general principles as set out in *Primor* and allowed the appeal, holding that the delay of the plaintiffs was excusable due to their unique situation and their lack of other available legal remedies and their need to await the outcome and findings of the Moriarty Tribunal in order to particularise their claim and proceed with the trial of the action.

41. Fennelly J also held that the delay in this case was inordinate but excusable and also referred to the fact, at para. 5, that:

> "the plaintiffs have convincingly argued that the material upon which they wish to found their claims was, of necessity and in its nature, such as was likely to be concealed and that it was most unlikely that any private litigant, who would not have the advantage of the investigative powers of the Moriarty Tribunal, would have been able to uncover it."

Fennelly J then stated that the approach taken by the court in *Desmond v MGN Limited* [2009] 1 I.R. 737 is the path usually followed by a Court for the exercise of its discretion in relation to such a motion for dismissal and agreed with the reasons for the decision of the court given by the Chief Justice and McKechnie and Clarke JJ.

42. McKechnie J, in allowing the appeal of the decision from the High Court, made extensive comment on the current issues in relation to delay. After setting out the general principles from *Rainsford* and *Primor* McKechnie J continued by outlining the comments of Hardiman J in *Gilroy* and Clarke J in *Stephens* and subsequent cases in relation to the need to recalibrate or modify the test in *Primor*. McKechnie J then referred to the decisions of Geoghegan J in *Desmond v MGN Limited* [2009] 1 I.R. 737 and *McBrearty and Ors v The North Western Health Board and Ors* [2010] IESC 27 in which the Supreme Court affirmed the continued relevance of the *Primor* principles. McKechnie J then continued at para. 30 of his decision in *Comcast* as follows:

> "30. I have looked closely at this issue in the instant case, only because the absence of comment may otherwise be taken, as representing a view which I do not hold. My views coincide with those referred to in the previous paragraph. I therefore see no reason, at least at this stage, for any formal reassessment of how *Primor* should be applied. No-one, so far as I am aware, has suggested that the three limb approach established in such cases should be substantially altered or that any matter or factor heretofore relevant, should be omitted from future consideration. In fact it should immediately be said that Clarke J. in *Rogers* acknowledged that his suggested shift of emphasis did not envisage any change in the matters to be considered but rather involved an adjustment within the existing practice. Even so, in my view, when both inordinate and inexcusable delay is being considered and when the balance of justice is being looked at, the court always has a discretion in its evaluation of the presenting circumstances, from which the ultimate decision is made. That discretion is, and in my opinion should remain, sufficiently flexible to deal with any situation or event: in its application to date I know of no case where it could be legitimately argued or suggested that the result arrived at was the wrong one or was an unjust one.
>
> 31. My concern with any such formal adjustment, or "recalibration" as it has been described, can be illustrated by reference to the facts in *Guerin v. Guerin* [1992] 2 I. R. 287 ("*Guerin*"). It will be recalled that the plaintiff in that case met with a road traffic accident in 1964 when aged 4, but that the proceedings were not issued until 1984, more than 20 years later…[T]he learned judge decided the issue by reference to *Primor*. In a powerful understanding of the disadvantaged and with a deep insight of the deprivation under which they labour, Costello J. excused the delay by reference to the plaintiff and his family's destituteness in virtually every aspect of their existence, including their living, financial, and educational circumstances. As stated by him they survived in a "world from which the world so familiar to lawyers in which people sue and are sued was remote and arcane". Given their particular circumstances it was held that the delay, although undoubtedly inordinate, was in the judge's view excusable. Any contrary result in *Guerin* I believe would have been unjust, but nonetheless may have been possible if weight reassessment was in place.
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> 32. In addition I ask whether such an alteration as a matter of principle could, at least to some extent, disregard from consideration or affect the appraisal of, circumstances such as those outlined by Fennelly J., at p. 518 of *Anglo* where he said "[t]here may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of a claim." The learned judge offered such circumstances as examples of what may be excusatory. One wonders at the extent to which such matters would be undermined in the alternative situation? Could such be still accommodated in a just and fair way? Maybe, but in the absence of compelling reason I see no necessity to test that proposition. Therefore, whilst I entirely agree that delays should be avoided wherever possible, and that such delays may be scrutinised with more vigour and less understanding than previously, nonetheless, there is sufficient capacity within the existing principles and their application to underpin this level of vigilance, but not such that unduly influences an outcome at the potential cost of justice. Consequently, whilst not foreclosing on the possibility that events may arise which would require a

reconsideration of this current approach, nonetheless, I do not believe that such has, at this stage, arisen.

33. In expressing this opinion may I immediately disown any interpretation which suggests that the old days of "endless indulgence" have returned. I hold no such views. It is not what I convey or intend to convey. My point is utterly simple. In the situation under discussion justice is best achieved by letting it react to given facts. The same period of delay, in different cases, may demand different treatment. Justice is not always referenced to the highest bar. If that were the case the wealthy, powerful, and the influential would set it. That should not be allowed. Justice sets its own bar. A failure of the average man and his average lawyer to match the gold standard of their opposite in society and in practice must not be necessarily condemned….

This opinion of McKechnie J in *Comcast* is *obiter* given that the facts of this case were consistently described as unique or exceptional by all members of the court. These views diverge from the opinion of Clarke J as set out below. However, the opinion of Clarke J is similar to the majority decision of Kearns J in the Supreme Court decision in *Stephens*. Therefore this Court adopts the approach of Clarke J and Kearns J in *Comcast* and *Stephens* as the appropriate path to follow in the exercise of its discretion in a case which is not exceptional in the nature of the facts in *Comcast*.

43. In his judgment in the *Comcast* Clarke J stated at para. 3.2 of his judgment that, in relation to the *Primor* and *Rainsford* he did "not understand any of the recent jurisprudence in this area to question that those tests represent the appropriate questions to be considered by the court." Further at para. 3.3 Clarke J continued to discuss the relevant developments in this area and stated that:

"3.3. However, it does have to be accepted that there has been what might, at a minimum, be considered to have been a difference of emphasis apparent from certain recent judgments in both this court and in the High Court, as to the manner in which those tests should be applied and in particular whether there was to be, as I put it in *Stephens v. Flynn Limited*, a re-calibration or as others have described it, a tightening up, in the application of those tests."

Clarke J continued by outlining the origins of the debate on this issue including the comments of Hardiman J in *Gilroy* and his own comments in various cases including *Stephens* and *Rodenhuis*. He stated at para. 3.8 of his decision:

"3.8 In the light of the, at least potentially, conflicting jurisprudence on the question of whether there ought properly be a re-calibration or tightening up of the criteria by reference to which the actions or inactions of parties might be judged, I suggested an overall approach in *Rodenhuis and Verloop B.V. v. HDS Energy Ltd.* [2011] 1 IR 611, at pp.616-617, in these terms:-

'As long as it remains the case that the procedure in this jurisdiction is left largely in the hands of the parties, then it follows that the pace at which litigation will progress will be highly dependent on the initiative shown by those parties. To the extent that it becomes clear that parties will be significantly indulged even though they engage in delay, then that fact is only likely to encourage delay. If parties feel they can get away with it, and if that feeling is justified by the response of the courts, then there is likely to be more delay. It seems to me, therefore, that it is necessary, in a system where the initiative is left largely up to the parties to progress proceedings, for the courts to make clear that there will not be an excessive indulgence of delay, because if the courts do not make that clear, it follows that the courts' actions will encourage delay and, thus, will encourage a situation where cases will not be completed within the sort of times which would be consistent with compliance with Ireland's obligations under the European Convention on Human Rights.

As I pointed out it is correct to say that there is no jurisprudence of the [ECtHR] dealing with the circumstances in which proceedings must be dismissed for delay. However, it does seem to me that if the courts in a common law jurisdiction, and in the absence of case management for any particular category of case, to use the words of Hardiman J., "endlessly indulge" delay then that fact is only likely to increase delay and increase a failure to comply with Ireland's Convention obligations. It seems to me that that analysis justifies the view which I expressed in [Stephens] (and which was approved of by the division of the Supreme Court which heard the appeal in that case) which was to the effect that there needed to be a tightening up or recalibration of the application of the long established principles in the delay jurisprudence, without altering the tests to be applied.

For those reasons it seems to me that the tightening up to which I referred in Stephens is an appropriate course of action for the courts to adopt. It does not seem to me that there is any clear or authoritative view from the Supreme Court which would bind me to take a different view. I therefore propose to apply the test which I identified in [Stephens] and which was approved of by Macken J., speaking for the majority in [Desmond], but with the tightening up to which I referred in the very next paragraph of my judgment in [Stephens].'

3.9 I see no reason to depart from the views which I expressed in Roddenhuis. The overall test remains the same. That has been the consistent position adopted in all the cases. However, it seems to me that the factors first identified by Hardiman J. in Gilroy do require that the application of that test be approached on a significantly less indulgent basis than heretofore."

Clarke J agreed with the decision of McKechnie J on a number of points, but not on the main issue of whether the test in *Primor* required modification. He stated that the circumstances of the parties and, in particular, any disparity in the resources available to the parties must always be a factor which the court takes into account and compared the differences between the resources of large corporations and disadvantaged individuals in approving the comments of McKechnie J in relation to the decision in *Geurin* as set out above. Clarke J stated that any legitimate tightening up of the *Primor* test must give all due consideration to the difficulties with which such parties are faced in progressing litigation. Clarke J also agreed with McKechnie J to the effect that any tightening up of the *Primor* test would have to apply equally to delay caused by defendants also. There would have to be an element of mutuality in such a reform of the test. Clarke J concluded by stating that the overall approach of the courts, if unduly relaxed, has the potential to create injustice across a large class of cases whose facts may never come to be determined by a judge, but whose progress is adversely affected by delay. Clarke J held on the facts that the explanations of the plaintiff went some way towards excusing the delay in their prosecution of the claim but that they were not sufficient to provide an entire excuse for the delay and therefore the court was required to examine the balance of justice in this regard. Clarke J held that having regard to the partial excusability of the delay, the significant public interest in having matters of such high public controversy determined in a Court of law and to the mild level of prejudice caused to the State defendants, the balance of justice lay in favour of allowing the proceedings to continue and that the appeal be allowed. Clarke J at para. 6.7 also described the facts of the case before the court as "truly unique."

44. Each of the decisions of the members of the Supreme Court in the *Comcast* proceedings make clear that the case is one which is likely to be confined to its own specific facts. Each member of the court reaffirmed the applicability of the *Primor* test to the facts at issue. A number of members of the court stated that any recalibration or modification of those principles would not be so great as to question the applicability of those tests to such a situation as presents itself to this Court but would rather be merely in the nature of a shift in emphasis towards a *prima facie* reluctance to excuse delay without reasonably adequate explanations being presented to the court.

45. However, a number of members of the court did refer to the debate in the jurisprudence in relation to the modification of the *Primor* test. Fennelly J appeared to be reluctant to accept that any modification was necessary. Clarke J appeared to be in favour of such a tightening up and the three other members of the court, while making reference to the debate to varying degrees, did not appear to believe it necessary to take any particular stance in relation to the issue given the unique nature of the case at issue before the court. Therefore, counsel for the plaintiff is to a certain degree correct in her submission that no consensus was reached in the Supreme Court in relation to this issue. However, it is also true that while the court may not in this instance have referred to such an approach, it did on a number of occasions underline the unique nature of the case before it in allowing the appeal from the decision of this Court. Any comments in relation to this issue are therefore, in all likelihood, strictly *obiter*. Kearns J, in the Supreme Court decision in *Stephens*, appears to have accepted the proposition of Clarke J in the High Court in that case as to the need to recalibrate the test in *Primor*. Macken and Finnegan JJ agreed with that view and *Comcast* does not change that majority position. This was not done at the expense of the survival of all of the elements of the *Primor* test and that remains the case.

46. Therefore, this Court is of the view that the appropriate test to be applied is to be found in the traditional principles set down by Hamilton C.J. in *Primor* in relation to the delayed prosecution of proceedings, in order to come to a conclusion on the facts as presented. It is clear that the facts of this case are not unique in the manner in which that word was ascribed to the facts at issue in *Comcast*.

47. Having regard to the above principles it is necessary to deal with a number of the ancillary submissions on behalf of the plaintiff in relation to the delay. Mr. Tierney, in putting forward an explanation for delay on his part in the prosecution of the proceedings, namely the unfortunate bereavements suffered by him in 2010 and 2011 as set out on affidavit, attempts to render the delay excusable. However the court must also take into account the responsibility of the plaintiffs themselves for the delay and must recognise that they cannot entirely hide behind the actions of their legal representative. The court accepts the comments of Hardiman J in *Gilroy v Flynn* [2005] 1 I.L.R.M. 290 at p. 294 to the effect that "the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one." The explanation for the delay put forward by Mr. Tierney is not sufficient to render the delay excusable within the meaning of the *Primor* test on the basis of this statement from Hardiman J. In *Rogers v Michelin* Tyre plc [2005] IEHC 294 Clarke J also stated that "less weight should, as a result of *Gilroy*, be attached to the fact that the delay is accepted as being attributable to the plaintiff's solicitors." A similar view is taken by this Court of the explanation put forward by Mr. Tierney in this regard.

48. The fact that the plaintiffs reside in the USA and that the plaintiffs solicitors found getting instructions was more difficult than with an Irish based client is not, in the view of this Court, an acceptable excuse having regard to modern day methods of communication.

49. Further, this Court does not consider that correspondence up to August, 2009 seeking a without prejudice meeting with the defendants solicitors which was either ignored or given a non-committal response of "seeking instructions" is an acceptable excuse. The reality of the situation is that if the defendant wished to enter into without prejudice negotiations he could have done so, but clearly not having indicated a willingness to do so, the onus rested on the plaintiffs to bring the proceedings to trial and to satisfy the trial judge on the balance of probabilities that the plaintiffs were entitled to the relief as sought.

50. Further, this Court does not consider that the preparation of the plaintiffs case or the fact that the plaintiffs always wished to proceed with the case, an acceptable excuse in the particular circumstances.

51. The contention of the plaintiff that the issues in this case will be dealt with in the main on documentary evidence rather than oral evidence and that the oral testimony of Mr. and Mrs. Gaughan and Mr. Browne, now all deceased, is not of any great relevance, does not find favour with the court particularly having regard to the approach of Clarke J to this issue in *Rodenhuis*. The issues in this case will require oral evidence and will not be capable of decision purely on the basis of documentary sources. Mc Guinness J also stated in *Carroll Shipping Ltd v Matthews Mulcahy & Sutherland Ltd* [1996] IEHC 46 at para. 26 that "where matters are at issue which are not, or are not fully, covered by documentary evidence, there is a greater likelihood of prejudice resulting from delay." In this instance, given the alleged importance of the oral evidence which it is not now possible to adduce, there is a greater likelihood of prejudice towards the defendant arising if the plaintiffs' claim is permitted to proceed to trial rather than being dismissed for inordinate and inexcusable delay.

52. While the court appreciates the unfortunate circumstances of this case, it cannot be in doubt, and it is accepted by the plaintiff, that the delay is inordinate. It is also clear that the delay is not capable of reasonable excuse and no explanation has been presented which would satisfy the court that the delay was excusable or even partially excusable. The onus of proof in relation to this aspect, which lies with the plaintiff, has not been discharged. There are no exceptional circumstances such as those which existed in *Comcast* which would render the delay excusable.

53. Even where the delay has been both inordinate and inexcusable the court must exercise its discretion in order to decide whether the balance of justice is in favour of or against the case proceeding. Hamilton C.J. in *Primor* set out a non exhaustive list of factors which the court is entitled to take into account in any assessment of the balance of justice. The delay which has occurred in this case now means that a number of witnesses in the case have died and their testimony is unfortunately no longer available to the court. In addition the period which has elapsed since the events which are the source of these proceedings occurred is sufficiently substantial to impact the ability of the witnesses in the case to have an accurate recollection of the details of those events.

54. It is true that litigation is a two party operation, as stated by Ó Dálaigh C.J. at p. 42 in *Dowd v Kerry County Council* [1970] I.R. 27 and that the defendant is not without fault in relation to his part in the delay in this case. Hamilton C.J. in *Primor* also mentioned the contribution of the defendant to the delay as a factor to be considered by the court in its assessment of where the balance of justice lies. The defendant, despite the substantial delay on the part of the plaintiffs, waited a significant period of time before bringing this motion to dismiss the proceedings. It would have been open to the defendant to bring such a motion a much earlier stage, such as when the earlier notices of intention to proceed were served on 29th June, 2010 or 16th June, 2011 rather than wait until the notice of trial was served on 10th January, 2013. But this contribution by the defendant is more in the nature of passive inaction and does not amount to an active delay in bringing on the proceedings by for example delaying in the service of pleadings. Murphy J in *Hogan v Jones* [1994] 1 I.L.R.M. 512 stated that delay on the part of the defendant in delivering a defence will be

considered in conjunction with what may be perceived as a defendant's failure to exercise his right to bring a motion to dismiss for inordinate and inexcusable delay at an earlier stage in the proceedings. However in that case there was a delay of four years on the part of the defendant in delivering the defence. Such a delay in the service of pleadings did not occur here and this case must be decided on its specific facts. In the case currently before the court the defendant served a notice of particulars and defence on 28th June, 2002, only a short period after the plaintiffs issued their statement of claim on 22nd April, 2002. It was at the discovery stage that the plaintiffs caused the most significant delay. It was more than two years after the draft replies to the defendant's notice of particulars were issued by the plaintiffs that a request for voluntary discovery was made by the plaintiffs. Nothing further occurred for two and a half years since the defendants refused to make voluntary discovery. It was not until 8th June, 2007, that a motion for discovery brought by the plaintiffs was dealt with by the High Court. Discovery affidavits were sworn by the defendant on 6th February, 2008, and 7th April, 2008, but no further steps were taken by the plaintiff in relation to the case until a number of successive notices of intention to proceed were served in 2010, 2011 and 2012. It was not until 10th January, 2013, that a notice of trial was served by the plaintiffs. Given these circumstances the main source of the delay lies with the plaintiff rather than the defendant and the minimal contribution to the delay caused by the inaction of the defendant in not issuing a notice of motion for dismissal at an earlier date is not sufficiently significant to amount to acquiescence on the part of the defendant such that the balance of justice is in favour of allowing the case to proceed. The facts of this case are not sufficient to permit the court to take the view that the defendant acquiesced in the plaintiffs' conduct of the proceedings.

55. There has been no conduct of the defendant in this case which induced the plaintiff to incur further expense in pursuing the action and therefore this element of the factors set down in *Primor* is not relevant on the facts of this case.

56. The court is of the view, having regard to the factors outlined above, that there is a substantial risk that it is not possible to have a fair trial of the action and that there is likely to be serious prejudice to the defendant in the conduct of his defence. The court must take account of the damage to the defendant's reputation and business caused by the existence of the long-pending litigation against him. The proceedings have been in being against the defendant for more than twelve years at the time of the hearing of this motion for dismissal. The very fact of having litigation pending against a defendant must be taken into account by the court in its assessment of the balance of justice given the prejudice which this in itself causes. This Court is satisfied that having regard to the particular facts of this case, the balance of justice does not favour the case proceeding to trial.

57. For the reasons as set out in herein, it is the view of this Court that the balance of justice favours the dismissal of the plaintiff's proceedings.