

## THE HIGH COURT

2001 15389 P

BETWEEN

ATLANTIC SHELLFISH LIMITED AND DAVID HUGH-JONES

PLAINTIFFS

AND

THE COUNTY COUNCIL OF THE COUNTY OF CORK, THE MINISTER FOR THE MARINE AND NATURAL RESOURCES, IRELAND AND  
THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 20th day of May, 2010.

**1. Proceedings and applications in outline**

1.1 As pleaded in the statement of claim, the plaintiffs brought these proceedings as the owners and operators of an oyster fishery in Cork Harbour near Rathcoursey, Midleton, County Cork. Since the proceedings were initiated, the plaintiffs have ceased to operate the oyster fishery. That, apparently, occurred in 2002. The first defendant (Cork County Council) is sued as the local and sanitary authority for County Cork with responsibility for the construction, operation and maintenance of a sewage scheme and treatment plant at Midleton, County Cork. In broad terms, the second defendant (the Minister) is a defendant in the proceedings as the grantor of foreshore licences under the Foreshore Act 1933 on foot of which Cork County Council operated the Midleton Sewage Scheme. The third and fourth defendants are sued on the basis that the third defendant is vicariously liable for the wrongful acts and omissions of the Minister. The second, third and fourth defendants will be referred to collectively as "the State parties".

1.2 While, in the statement of claim, which was delivered before the plaintiffs ceased to operate the oyster fishery, the plaintiffs sought various declaratory and injunctive reliefs, as I understand it, the current position is that, the oyster fishery having ceased to operate, their claim is primarily, if not exclusively, a claim in damages for the losses which the plaintiffs have sustained in relation to the operation of the oyster fishery and in consequence of its closure by reason of the alleged conduct of Cork County Council in operating the Midleton Sewage Scheme and by the State parties in facilitating such operation. In broad terms, the plaintiffs allege that Cork County Council discharged, and that the State parties facilitated the discharge, into Cork Harbour near Rathcoursey of untreated sewage effluent which contaminated the oyster fishery and caused outbreaks of food poisoning as a result of consumption of oysters harvested from the oyster fishery, which resulted in damage to the plaintiffs' business and goodwill and ultimately to the closure of the oyster fishery.

1.3 The aspect of the claim in these proceedings which gives rise to the applications with which the Court is concerned in this judgment is that it encapsulates the revival by the plaintiffs of a claim for damage to the oyster fishery and to their business in the period from December 1988 which was litigated in earlier proceedings (Record No. 1992/7445P) brought in this Court by the plaintiffs against Cork County Council and the Minister (the 1992 proceedings). The 1992 proceedings came on for hearing on 26th November, 1996. They were compromised on 27th November, 1996. On that day the Court made an order by consent that a form of consent (the 1996 consent) which had been signed on behalf of the parties be received and filed, and also dealing with the plaintiffs' costs against the defendants and striking out cross-notice for indemnity or contribution between the defendants *inter se*. The 1992 proceedings were then adjourned for mention and eventually they were struck out by consent with liberty to re-enter. The nub of the defence of Cork County Council and the State parties to the plaintiffs' claim for damages in respect of the period from 1988 to 1996 is that the plaintiffs are bound by the 1996 consent and cannot go behind it. That is rejected by the plaintiffs. Arising from that, one issue which will require to be determined in these complex proceedings is which side is correct and whether the plaintiffs are or are not precluded from claiming damages and other reliefs for the period from 1988 to 1996.

1.4 This judgment deals with two applications, one brought by Cork County Council and the other by the State parties, which seek, in broad terms, to have that issue determined either as a preliminary issue or as a separate module in the proceedings.

1.5 The Court was informed that the plaintiffs have recently re-entered the 1992 proceedings and that the State parties have threatened to bring a motion striking out the re-entry. Counsel for the plaintiffs confirmed that that step was taken on a "belt and braces" basis. Be that as it may, the status of the re-entry is a separate issue and has no bearing on the matters to be determined by the Court in this judgment.

**2. Pleading of pre-1996 consent claim in these proceedings**

2.1 The Court has been furnished with copies of the pleadings in the 1992 proceedings. However, it seems to me that the issues now before the Court fall to be determined by reference to what is pleaded in these proceedings.

2.2 In their statement of claim, which was delivered on 20th August, 2002, having narrated the grant by the predecessor of the Minister to Cork County Council of a foreshore licence on 5th March, 1986, and the discharge by Cork County Council of raw untreated sewage into the sea at Rathcoursey Point at some time in or prior to December 1988, purportedly in pursuance of the Midleton Sewage Scheme, which was officially opened on 16th December, 1988 and/or the 1986 foreshore licence, and the resulting contamination of the plaintiffs' oyster fishery and outbreaks of food poisoning and the commencement of the 1992 proceedings, the following matters are pleaded in relation to the 1992 proceedings:

(a) That it was claimed therein that the 1986 foreshore licence was *ultra vires*, null and void and of no force or effect on various grounds, that Cork County Council ought not to have operated the Midleton Sewage Scheme without providing for a treatment plant to treat the sewage prior to its discharge into the sea, and that the continued operation of the Midleton Sewage Scheme and consequent deterioration in the water quality and contamination of the plaintiffs' oyster fishery amounted to and was caused by negligence, breach of duty, breach of statutory duty and nuisance on the part of Cork County Council and the Minister, as a consequence of which the plaintiffs suffered financial loss and damage and damage to their business and reputation.

(b) That the 1992 proceedings were settled between the plaintiffs and Cork County Council and the Minister on 26th November, 1996 on terms set out in the 1996 consent, outlining what were described as "express conditions or alternatively, fundamental terms" thereof. Reference is made to clauses 1, 2 and 3 under which Cork County Council and the Minister agreed to pay damages aggregating IR£500,000 to the plaintiffs as damages for loss of goodwill and to pay the costs of the proceedings. Reference is also made to:

(i) clause 4 under which Cork County Council undertook that it should, on or before 30th June, 2000, bring into operation a secondary waste water treatment plant incorporating ultra-violet disinfection facilities for the town of Midleton,

(ii) clause 5 by virtue of which Cork County Council was entitled, pending the bringing into operation of that plant, to continue to operate the sewage outfall then situate at Rathcoursey Point subject to the provisions of clause 6, and

(iii) clause 6, which provided that the plaintiffs would have no right of action in respect of events thereafter occurring arising from the operation by Cork County Council of the outfall save insofar as the operation of the outfall should be proved to have caused a specified level of deterioration in the fish quality of the plaintiffs' oysters and illness in one or more human beings resulting from that deterioration.

2.3 The basis on which the plaintiffs plead their entitlement to go behind the 1996 consent in these proceedings is as follows:

(a) It is pleaded that the undertaking given by Cork County Council in clause 4 of the 1996 consent was a condition, or, alternatively, a fundamental term of the 1996 consent and went to the root of the agreement between the parties under which the 1992 proceedings were settled and without the undertaking the plaintiffs would not have agreed to settle or executed the 1996 consent. Alternatively, Cork County Council and the Minister knew or ought reasonably to have known that the plaintiffs would rely on the undertaking, that the plaintiffs did so rely, and were induced by the undertaking in agreeing to settle the 1992 proceedings.

(b) It is narrated that certain statutory regulatory requirements were dealt with in 1997, 1998 and 1999, including the grant of a new foreshore licence to Cork County Council in 1999.

(c) As regards the applications with which the Court is concerned, the core plea is that, in breach of clause 4 of the 1996 consent, Cork County Council did not bring into operation a secondary waste water treatment plant incorporating ultra-violet disinfection facilities for the town of Midleton on or before the 30th June, 2000. As a result of that failure the plaintiffs were entitled to treat, and have treated, the agreement comprised in the 1996 consent "as at an end and/or as repudiated by" Cork County Council and the Minister, which said repudiation has been accepted by the plaintiffs. It is pleaded that, accordingly, the plaintiffs are entitled to continue the prosecution of the 1992 proceedings and to seek the reliefs sought therein together with the further reliefs sought in these proceedings. In broad terms, the further reliefs are grounded on alleged invalidity of the 1999 foreshore licence and on alleged continued wrongdoing in the form of nuisance, negligence and breach of duty, including breach of statutory duty, on the part of Cork County Council and the State parties, and in the case of Cork County Council, on breach of the 1999 foreshore licence.

(d) As an alternative to, and without prejudice to, their contention that the 1996 consent is at an end, the plaintiffs in these proceedings plead that the defendants are in breach thereof and seek to enforce the terms of the 1996 consent by way of specific performance, or damages in lieu of specific performance and, additionally, they seek damages for alleged breach by the plaintiffs of clause 4 thereof.

2.4 In the prayer in the statement of claim the plaintiffs seek declarations that Cork County Council and the Minister have repudiated the 1996 consent and that the repudiation has been accepted by the plaintiffs and further that the 1996 consent is at an end. On the assumption that such declarations will be granted, the plaintiffs seek injunctive and declaratory reliefs, including declarations as to the invalidity of the 1986 foreshore licence on the various grounds pleaded. On the premise that the 1996 consent is not at an end, as an alternative, the plaintiffs seek specific performance, or damages in lieu thereof, of the 1996 consent and damages for breach of contract. In either event, they also seek damages for nuisance, negligence and breach of duty (including breach of statutory duty) and the claim for damages relates to the period both before and after the coming into effect of the 1996 consent.

2.5 The defence of Cork County Council delivered on 6th August, 2003 comprehensively traverses all of the allegations contained in the plaintiffs' statement of claim. In particular, in addition to denying that there was any breach on its part of the 1996 consent, which is referred to as "the Compromise", Cork County Council deny that any such breach –

- "a. Went to the root of the Compromise as alleged or at all.
- b. Deprived the plaintiffs of a fundamental element of the Compromise as alleged or at all.
- c. Constituted a repudiation of the Compromise as alleged or at all.
- d. Entitled the plaintiffs to treat the Compromise as at an end as alleged or at all.
- e. Entitled the plaintiffs to continue the prosecution of [the 1992 proceedings] as alleged or at all.
- f. Entitled the plaintiffs to seek the relief sought in [the 1992 proceedings] as alleged or at all.
- g. Entitled the plaintiffs to the further reliefs sought in these proceedings as alleged or at all."

Further, at the end of its defence, it is pleaded that, insofar as it may be necessary so to do, Cork County Council shall contend at the hearing that, by reason of the 1996 consent, the plaintiffs are not entitled to claim any relief and will rely upon the performance by it of the 1996 consent acquiesced in and/or accepted by the plaintiffs.

2.6 In their defence delivered on 12th February, 2003, the State parties admit the 1996 consent and plead that the claims of the plaintiffs for losses prior to the 1996 consent are merged in the 1996 consent, which was implemented by the State parties. Having denied that the State parties repudiated the 1996 consent or all or any of its terms, and having asserted that the plaintiffs are not entitled to a declaration that it is at an end, it is pleaded:

"The matters raised in the [1992 proceedings] merged in the Consent as against [the State parties] and [the State

parties] reserve the right to seek a stay or dismissal of the within Proceedings insofar as they claim to re-open or re-litigate the matters pending in the [1992 proceedings].

2.7 It is against the background of those pleadings that the applications of Cork County Council and the State parties the subject of this judgment fall to be considered.

### 3. Application of Cork County Council

3.1 The application of Cork County Council was initiated by a notice of motion dated 10th December, 2009 wherein, without invoking any particular jurisdiction, Cork County Council seeks an order directing "the preliminary trial" of an issue formulated as follows:

"Where the Plaintiffs claim that there was a breach of [the 1996 consent] which settled [the 1992 proceedings], whether the Plaintiffs are entitled in such circumstances to revive or continue such earlier proceedings and seek the reliefs sought therein including damages for losses prior to the [1996 consent] or whether the Plaintiffs are only entitled to sue for breach and/or enforcement of [the 1996 consent] (it being assumed solely for the purposes of the preliminary trial, that all facts alleged by the Plaintiff relating to the [1996 consent], including the facts said to constitute a breach of the [1996 consent], are correct)."

3.2 In their written submissions, counsel for Cork County Council invoked certain provisions of the Rules of the Superior Courts 1986 (the Rules), namely, Order 25, rule 2 and Order 34, rule 2. The issue is perceived as an issue of law. However, at the hearing of the applications, counsel for Cork County Council also adopted the submissions made on behalf of the State parties as to the proceedings being heard on a modular basis under the Court's inherent jurisdiction and the issue being heard as the first module in the proceedings.

### 4. Application of the State parties

4.1 The State parties' application is on foot of a notice of motion dated 5th February, 2010 in which they seek, first, an order for directions in the proceedings and, secondly, specifically an order directing that the following questions be tried as a preliminary issue pursuant to Order 25 and/or Order 34, rule 2 of the Rules:

"(1) Whether, assuming for the purposes of the hearing the facts alleged by the plaintiffs in respect of the failure to comply with the [1996 consent], those facts give rise to a repudiation ... or a breach of the [1996 consent];

(2) The effect in law of a repudiation on the one hand, or breach on the other, of the [1996 consent] and in particular whether the said repudiation on the one hand or the breach on the other merely entitles the Plaintiffs to sue for breach and/or enforcement of the consent or whether it means that the consent is at an end and matters covered by the [1992 proceedings] may be re-opened by the Plaintiffs and litigated in the within proceedings."

4.2 In their written submissions, in reliance on the application for directions in their notice of motion, the State parties invoke the inherent jurisdiction of the Court to order a modular trial and cite as authority for so doing the following decisions:

(a) the decision of this Court (Kelly J.) in *P. J. Carroll & Co. v. The Minister for Health and Children* [2005] 3 I.R. 457;

(b) the decision of this Court (Clarke J.) in *Cork Plastics Manufacturing & Ors. v. Ineos Compound U.K. Ltd. & Ors.* [2008] IEHC 93;

(c) the decision of this Court (Clarke J.) in *Kalix Fund Ltd. & Anor. v. HSBC Institutional Trust Services (Ireland) Ltd. & Anor.* [2009] IEHC 457; and

(d) the recent decision of this Court (Charleton J.) in *McCann v. Desmond* (Unreported, High Court, 11th May, 2010).

### 5. Progress of the proceedings

5.1 As one of the bases on which the plaintiffs have contended that neither application should be acceded to was that both applications were much too late because enormous work has been done by the plaintiffs to prepare the case for full trial, it is necessary to consider what, in fact, has occurred in the proceedings up to the time the applications before the Court were initiated.

5.2 The proceedings were initiated by plenary summons which issued on 16th October, 2001. As I have already stated, the statement of claim was delivered on 20th August, 2002 and the defence of the State parties was delivered on 12th February, 2003 and that of Cork County Council on 6th August, 2003. Replies were delivered by the plaintiffs in early 2006 – to Cork County Council on 24th January, 2006 and to the State parties on 25th January, 2006. I assume that at that stage the pleadings were closed because particulars were raised and responded to through 2002, 2003 and 2004.

5.3 Contemporaneously with and following the foregoing, the most significant step in the proceedings for present purposes was that there was a process in being in which the plaintiffs were seeking discovery from 5th April, 2004, when the plaintiffs brought a motion before the Master of the High Court, until 15th November, 2006 when, on an appeal from the order of the Master, an order for discovery was made by this Court (Budd J.). Budd J. delivered a comprehensive judgment on the matter on 15th August, 2006, the neutral citation of which is [2007] IEHC 215. The judgment specifically addressed the issues arising from the plaintiffs' contention that the 1996 consent was at an end and the plaintiffs' entitlement to discovery in relation to those issues. Budd J. stated (at p. 88):

"The Plaintiffs have pleaded their case in the alternative and Counsel for the Plaintiffs have taken the stance that discovery should be made on the basis of each contingency, namely first on the basis that the Consent has been repudiated by both Defendants and also then, secondly, on the premise that the terms of the Consent have been breached by the Defendants but the Consent still has some continuing validity. Counsel also made the practical point succinctly that since the delivery of the Statement of Claim on 20th August, 2002, both Defendants have known about the dilemma facing them with regard to this pleading in the alternative and have chosen not to bring a motion in respect of any preliminary issue with regard to the Consent. Indeed, when Counsel for the Defendants were faced with the stark reality of this point, while Counsel for the State Defendants did air the notion that he might bring a motion for a preliminary issue in relation to this aspect of the Plaintiffs' claim, no such motion was brought despite the passage of time during which the hearings of the appeals were so vigorously fought, with intervals because the court and Counsel had other commitments at times."

5.4 Notwithstanding those comments, more than three years elapsed before Cork County Council initiated its application and almost three and a half years elapsed before the State parties initiated their application. In the interim, discovery was eventually made on foot of the orders of Budd J. In August 2009 Cork County Council furnished its affidavit of discovery to the plaintiffs and the State parties did likewise on 21st December, 2009.

5.5 The plaintiffs also made discovery in the interim – on 1st April, 2009, on foot of an order obtained by Cork County Council on 27th June, 2006, and on foot of an order obtained by the State parties on 14th November, 2006.

5.6 The factor which seems to have precipitated the application of Cork County Council now before the Court, which is deposed to in the grounding affidavit of Stephen McDevitt, the solicitor for Cork County Council, sworn on 25th September, 2009, was the furnishing by the plaintiffs of a copy of an Expert Report prepared by William O’Riordan FCA of Pricewaterhouse Coopers of 15th May, 2009, in which the plaintiffs’ combined alleged losses, both future and historic, are estimated at approximately €20m. The historic losses, that is to say, the losses in respect of the period prior to the date of the 1996 consent, after giving credit for the sum of IR£500,000 paid by the defendants to the plaintiffs under the 1996 consent, are estimated at €946,544 inclusive of interest. It is not inaccurate, in my view, to characterise the applications before the Court as, in substance, an attempt to procure the dismissal of 5% in quantum of the plaintiffs’ claim on the basis of a determination by the Court that the defendants do not, as a matter of fact or law, have any liability to the plaintiffs for losses which pre-date the coming into effect of the 1996 consent by reason of the compromise of the claim in the 1992 proceedings for those losses in the 1996 consent.

5.7 Although all of the defendants deny any liability to the plaintiffs, the fact is that, whatever view the Court takes of these applications, these proceedings will remain in being in relation to the plaintiffs’ claim for the remaining 95% of the alleged losses incurred by the plaintiffs. Those claims are being pursued by the plaintiffs on the basis of post-November 1996 new causes of action arising from the alleged breach of the 1996 consent, as well as the allegations of wrongdoing on the part of the defendants after November 1996, including unlawful conduct in relation to the regulatory requirements dealt with by the defendants thereafter, for example, the grant of the 1999 foreshore licence.

## **6. The submissions and the law**

6.1 The Court has had the benefit of comprehensive written submissions from all of the parties. While I have had regard to the written submissions, and the oral submissions, I do not consider it necessary to outline them here. Suffice it to say that the law in relation to the trial of preliminary issues, whether of law or fact, is well settled. There is a useful résumé of the applicable principles in Delany & McGrath on *Civil Procedure in the Superior Courts* (2nd Ed., at p. 505 *et. seq.*). The jurisprudence on the Court’s inherent jurisdiction to direct that the trial of an action be conducted on a modular basis has developed over the past decade, both in relation to cases to which Order 63A of the Rules applies and cases which are not regulated by that Order. Although the jurisprudence is developing, I am satisfied that the authorities relied on by the State parties reflect the existence and extent of the Court’s jurisdiction.

6.2 The applications were resisted by the plaintiffs on the basis that the issue the defendants seek to have tried either as a preliminary issue or on a modular basis, which was perceived by counsel for the plaintiffs as a trial within a trial of the issue, could not be appropriately dealt with on either basis. However, counsel for the plaintiffs made clear that, if the other parties were so disposed, the plaintiffs would consent to an order that the case be case managed by the Court, I assume by analogy to the case management process incorporated in Order 63A. I will return to that suggestion later.

## **7. Conclusions**

7.1 The formulation of the preliminary issue by Cork County Council and the State parties, although differently worded and more analytical in the case of the State parties’ formulation, in essence is the same. Each raises the issue of the effect of the breach of the consent, which, for the purposes of the exercise, is assumed to have happened, by raising the distinction between discharge by repudiation, on the one hand, and an action for enforcement and for remedies for breach, on the other hand. As I understand it, the cause of action pleaded and the claims for the enforcement and remedies for breach of the 1996 consent are recognised by the defendants as continuing to full trial. Therefore, it seems to me that it does not serve any useful purpose to include those matters in the formulation of the issue. The issue as formulated, net of those considerations, raises two questions: whether, on the assumption that it occurred, the breach of, or failure to comply with, the 1996 consent by Cork County Council and the State parties gave rise to a repudiation of the 1996 consent; and, if it did, whether the effect is that the 1996 consent is at an end and the plaintiffs are entitled to re-litigate the issues raised in the 1992 proceedings and now pleaded in these proceedings.

7.2 It is accepted by Cork County Council and the State parties that a preliminary issue cannot be tried *in vacuo*. In the case of Cork County Council it is averred in the grounding affidavit of Mr. McDevitt sworn on 25th September, 2009 that, for the purposes of the preliminary issue (and solely for these purposes and without prejudice to disputing them at the trial) the facts alleged by the plaintiffs relating to the 1996 consent, including the facts alleged to constitute a fundamental breach, are accepted. Mr. McDevitt reiterated that position in an affidavit sworn on 3rd March, 2010, stating that the facts alleged by the plaintiffs in the statement of claim are accepted for the purposes of the trial of the preliminary issue. Counsel for Cork County Council elaborated on that averment at the hearing, stating that the same applies to the other pleadings, including particulars.

7.3 The position of the State parties is written into the notice of motion, in that they raise the issue as to repudiation on the basis of the assumption, for the purposes of the hearing, of the facts alleged by the plaintiffs in respect of the failure to comply with the consent.

7.4 There is no doubt but that Cork County Council and the State parties, as the moving parties, have indicated acceptance, for the purposes of the trial of the preliminary issue, of the facts as alleged by the plaintiffs, as required by the decision of the Supreme Court in *McCabe v. Ireland* [1999] 4 I.R. 151 (at p. 157). Counsel for the plaintiffs, however, submitted that such acceptance will not enable the Court to determine the issue without going into the factual matrix. It was submitted that the issue raises mixed questions of fact and law. In the statement of claim, the plaintiffs lay emphasis not only on the alleged status of clause 4 as a condition or a fundamental term, but they also rely on the nature and effect of what was represented by Cork County Council in entering into clause 4 of the 1996 consent and how it impacted on the plaintiffs. While the breach or non-compliance of the 1996 consent relied on by the plaintiffs as entitling them to treat Cork County Council and the State parties as having repudiated is identifiable as a breach of the undertaking in clause 4 to bring into operation a secondary waste water treatment plant on or before 30th June, 2000, the reliance by the plaintiffs on it is premised on the undertaking having gone to “the very root of the agreement” and as having deprived the plaintiffs of “performance of a fundamental element” of the agreement.

7.5 The State parties have relied on the judgment of Clarke J. in the *Cork Plastics* case referred to above ([2008] IEHC 93) in support of their contention that the issue should be tried first on a modular basis. However, there was an earlier decision of Clarke J. in that case in which the Court refused to give directions for the trial of a preliminary issue for reasons which, in my view, render the trial of a preliminary issue as sought in this case inappropriate. In the *Cork Plastics* case, there were four plaintiffs, *Cork Plastics* and three

related companies, who were seeking damages against two defendants, EVC Compounds Ltd., which subsequently became known as Ineos Compound U.K. Ltd. (Ineos), and Tioxide Europe Ltd. (Tioxide). The claim arose out of the supply of a product by Ineos, finished white rigid PCV extrusion compound, which was used by Cork Plastics for the purposes of manufacturing fascia boards. The plaintiffs alleged that the product was defective and not fit for purpose, resulting in loss to, and claims, by third parties against Cork Plastics. The issues which the defendant applied to have tried as preliminary issues were –

(a) whether a clause of the standard terms of conditions of Ineos applied so as to limit the damages that could be claimed by Cork Plastics against Ineos;

(b) whether Tioxide owed a duty of care to all or any of the plaintiffs and whether any of the plaintiffs could succeed in a claim for pure economic loss against Tioxide; and

(c) whether Ineos owed a duty of care to the second, third and fourth plaintiffs (the nature of whose claim, save in the case of the second plaintiff who was supplied with the compound for the purposes of manufacturing fittings, was not clear) and/or whether those plaintiffs could succeed in a claim for pure economic loss against Tioxide.

Having outlined the relevant legal principles and referred to the caution with which the authorities suggest that the Court should approach directing the trial of a preliminary issue, Clarke J. continued:

“That caution stems in part from the difficulties of disentangling a preliminary issue where it proves at trial to be more connected with other issues than anticipated. On the other hand, a judge conducting a single trial in a sequenced way under case management has greater flexibility.

In this case it seems to me that the issues of the legal relationship between the second and fourth named plaintiffs and the defendants, or either of them, or the legal issues between any of the plaintiffs and the second named defendant, the contractual terms between the parties and the entitlements, if any, of any of the plaintiffs to secure damages for pure economic loss, as against the second defendant, have, on the facts of this case, insofar as they are clear at this stage the potential to be dependent at least in part and on one view, on an analysis on the course of dealing between all of the parties over a protracted period of time.

In those circumstances I am not persuaded at this stage that any of the proposed preliminary issues are necessarily ones solely of law though this may, of course, turn out to be the case. Nor am I satisfied that it is sufficiently clear that those issues should conveniently be separated from all the other possible issues in the case for the preliminary trial.”

I should point out that the foregoing is based on a stenographer’s note of the judgment, which is described as “Draft Judgment” on the front sheet.

7.6 While I do accept that the 1996 agreement constituted a watershed in the dealings of the plaintiffs and Cork County Council and the State parties, so that what preceded the 1996 consent may be viewed separately from what followed thereafter, I am not satisfied that the issue which Cork County Council and the State parties seek to be tried is solely an issue of law and can be determined on the basis of acceptance of the facts pleaded without evidence of the dealings between the parties both before and after the execution of the 1996 consent.

7.7 I have reached that conclusion notwithstanding the submission of counsel for Cork County Council that the decision of the Supreme Court in *Murphy v. Roche* [1987] I.R. 106 illustrates that the plaintiffs’ contention that the Court would have to have recourse to the factual matrix in determining the issue is erroneous. Based on an analysis of that case, I disagree with that submission. In that case, the plaintiff was a member of an unincorporated members’ club. While attending a dance at the club premises, to which he had paid an admission fee, he was injured as a result of a fall, which he alleged, was caused by the negligence of the organisers of the dance and he commenced proceedings for damages against the trustees of the club. The trustees denied liability and specifically pleaded that the plaintiff, as a member of the club, was estopped from maintaining proceedings against the club or against the defendants as trustees of the club. By way of special reply, the plaintiff denied that he was estopped and he further contended that any estoppel was as a matter of law repugnant to the Constitution. That contention necessitated that notice be served on the Attorney General. The plaintiff applied under Order 25 to have the points of law raised by the defence and reply determined as preliminary issues. The defendants were satisfied to have the issues determined as preliminary issues but the Attorney General objected on the grounds that, as the question of negligence was in issue, it was inappropriate to have a question of constitutional law determined in the form of what might ultimately prove to be a moot.

7.8 The Supreme Court held, on the point on which the decision is most frequently cited, that, where the issues between the parties can be finally disposed of by the resolution of an issue of law other than constitutional law, the Court should consider that issue first and, if it determines the case, should decline to express any view on the constitutional issue which may have been raised. Of relevance for present purposes is that it was also held that the balance of justice, convenience and economy in that case was in favour of the determination of the legal issues as a preliminary issue rather than subsequent to a jury trial (jury trials in personal injuries actions not having been abolished at that time). It was held that the appropriate order was to direct the trial of the issue of “club law” (using the terminology in the headnote) alone and to adjourn the constitutional issue until such time as that issue had been finally determined. It seems to me that the issue of club law, that is to say, whether the plaintiff, as a member of the club could sue the club, was, in truth, an issue solely of law, the only relevant fact being that the plaintiff was a member of the club, which was accepted.

7.9 Turning to the reliance of the State parties on the later judgment of Clarke J. in the *Cork Plastics* case, in my view, that judgment ([2008] IEHC 93) delivered on 7th March, 2008, does not support the State parties’ application for the direction to have the issue treated as a separate module. It was concerned with a difference which had arisen between the parties as to whether there should be a single trial of all issues or a modular trial whereby all issues of liability and questions of principle concerning the approach to quantum should be first tried, with questions concerning any calculation of any damages which might be due as a result of the first hearing being left over for subsequent determination. The defendants, Ineos and Tioxide, had questioned the jurisdiction of the Court to direct a modular trial in the absence of the agreement of all the parties. By 2008 the matter was complicated by the fact that there was a second set of proceedings in which FloPlast Limited was suing Cork Plastics on the basis that it had purchased the defective product from Cork Plastics. Ineos and Tioxide had been joined as third parties in those proceedings, and issues arose between Cork Plastics, on the one hand, and Ineos and Tioxide, on the other hand, which appeared to be similar to those raised in the main proceedings between Cork Plastics and its related companies, as plaintiffs, and Ineos and Tioxide, as defendants. Clarke J. dealt with the jurisdiction issue and held that the Court has inherent jurisdiction to direct a split or modular trial. He outlined why most straightforward litigation is unlikely to be justly or conveniently tried in a modular fashion. While counsel for the State parties relied on

that analysis, which gives very useful guidance when the Court is determining whether a modular approach should be adopted to the hearing of an action, in my view, it is not necessary to consider it in this case because, as I will demonstrate, I do not believe that what is proposed here is in fact a modular approach of the type envisaged by Clarke J. In any event, on the complicated scenario before him, Clarke J. found that there was a very strong case for taking the view that the logistical advantages of the modular trial, which had been proposed by Cork Plastics, were likely to significantly outweigh any possible disadvantages. Therefore, he split the trial in the main proceedings between liability and quantum and he also held that in the FloPlast proceedings liability issues should be dealt with separately from quantum issues. He also held that the liability issues in the FloPlast proceedings should be tried at the same time as the liability issues in the main proceedings.

7.10 As I understand it, in seeking to have the issue as formulated on their notice of motion treated as the first episode in a modularised trial of the action, the State parties are proposing that that episode should involve a determination on the issue on the basis of the assumption as to the factual situation reflected in their notice of motion and that it is not intended to have the preliminary issue tried on oral evidence. It is on the basis of that understanding that I have concluded that the State parties are not proposing a modular approach to the hearing at all. On the basis of the affidavit grounding the application of the State parties, the affidavit of Derek Elliott sworn on 5th February, 2010, and, in particular, at paragraphs 12 and 13 thereof, it is clear that, when the application of the State parties was initiated, it was not intended that evidence would be adduced at the hearing of the preliminary issue.

7.11 The written submissions on behalf of the State parties, while focusing on the development of the jurisprudence on the modular approach, do not seem to me to suggest that what is proposed is a trial within a trial of the issue as formulated on the basis of oral evidence adduced by whichever party the Court should direct to be the moving party on the trial of the issue and oral evidence adduced in response by the respondent on the trial of the issue. The written submissions suggest to me that the proposal is that the module would proceed on the basis of the acceptance, for the purposes thereof, of the facts pleaded by the plaintiffs insofar as they are relevant to the issue. Indeed, one of the advantages which it is suggested in the written submissions the direction of a trial on a modular basis would achieve is that it would bring clarity in advance of the trial and would enable the parties to prepare for the trial on the basis that they would know the evidential burden they will have to bear. Nothing in the oral submissions suggested to me that the State parties envisage a trial of issues on oral evidence of the type which was directed by Charleton J. in his recent judgment in *McCann v. Desmond* cited by the State parties. It was suggested that a trial of a very discrete and narrow issue, as proposed – as to whether the breach was of so fundamental a nature as to result in the termination of the 1996 consent – could be dealt with in a day or so. In commenting on the affidavit of Richard Martin, solicitor for the plaintiffs, sworn on 4th March, 2010 in response to the application of the State parties, counsel for the State parties rejected Mr. Martin's objection that the application had no regard to "the complete factual matrix" and that the Court was being asked to determine the issues where the underlying facts had not been agreed and Mr. Martin's contention that, in the absence of evidence relating to the surrounding circumstances of the transaction and the nature of the breach of the consent, the Court could not properly determine the issue .

7.12 A finding by the Court that, as a matter of fact and law, the conduct of Cork County Council and the State parties after the coming into effect of the 1996 consent did not amount to a repudiation of the 1996 consent which entitled the plaintiffs to treat it as being at an end, so that the claims in these proceedings which are posited on the 1996 consent being at an end could not be pursued by the plaintiffs, would undoubtedly result in a saving of preparation time, of court time and of costs in the prosecution and defence of the plaintiffs' action. However, given that the claims arising from the alleged breach of the 1996 consent would remain in the action in that event, it is difficult to form a view as to how significant the saving of time and costs would be proportionately to the overall time and costs involved in prosecuting and defending the action. I think that the likelihood is that the greatest saving would be in the area of the quantification of the plaintiffs' pre-1996 losses. While adopting a modular approach, as was adopted in the *Cork Plastics* case, whereby the liability issue would be dealt with in the first module, would have more potential to be time and cost effective, I am not convinced that, even if the issue as formulated, which Cork County Council and the State parties propose should be tried first, were tried in a truly modular fashion on oral evidence, there would be a significant saving of time and costs.

7.13 That brings me to the issue of delay. The consequence of the delay in bringing these applications, which could have been initiated after the statement of claim was delivered in August 2002, is that all of the parties, including the plaintiffs, have expended a considerable degree of effort and time and incurred a considerable degree of cost in addressing all of the issues, including the issue which the defendants want to have dealt with in advance of the full action, particularly in making discovery. A constant theme throughout the jurisprudence on the direction of the trial of preliminary issues is that the Court should act in the light of what appears to be fair, proper and just in the circumstances. In determining what is fair, proper and just, it seems to me that some guidance can be obtained from the principles laid down by the Supreme Court in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in relation to considering where the balance of justice lies where there has been inordinate and inexcusable delay in prosecuting an action and a defendant is seeking to have the action dismissed for want of prosecution. Having said that, it has to be borne in mind that these applications are substantially different from the type of application under consideration in the *Primor* case, because the objective of the defendants here is to have an element of the plaintiffs' action dismissed on a preliminary and separate adjudication by the Court. Nonetheless, the fact that, notwithstanding the observations of Budd J. in August 2006, which I have quoted earlier, the defendants by their conduct, induced the plaintiffs to incur further expense in dealing with all of the issues in the action, must be a relevant factor to be taken into account. However, it is not a factor to which I attach considerable weight. The primary basis on which I consider that the defendants' applications should not be acceded to is that I think it is probable that the trial of the issue in the manner proposed would not be capable of producing a fair and just result, because it involves questions of mixed law and fact and the factual issues are much more subtle than an acceptance, for the purposes of the trial of the issue, that the defendants were in breach of the 1996 consent would be.

## **8. Orders**

8.1 There will be an order dismissing the application of Cork County Council and the application of the State parties.

## **9. Case management**

9.1 It is obviously in the interests of all the parties that these proceedings be case managed and steps will be taken to ensure that that is done. However, it seems to me that it would be in the interests of all of the parties to consider having the issue of liability determined first and leaving the issue of quantum over pending a decision on liability.