THE COURT OF APPEAL

Appeal No. 2015/142

Kelly J.
Irvine J.
Hogan J.

Between/

William Connolly and Sons Ltd Trading as Connolly's Red Mills

Plaintiff/Respondent

- And -

Torc Grain and Feed Limited

Defendant/Appellant

JUDGMENT of Ms. Justice Irvine delivered on the 30th day of November 2015

1. This is an appeal against the judgement and order of the High Court (Moran J.) delivered on the 19th December, 2014, whereby he refused the defendant's application to dismiss the plaintiff's claim, which was sought first, on the ground that the same was bound to fail and secondly by reason of what it maintained was the inordinate and inexcusable delay on the part of the plaintiff in pursuing its claim. This judgment is confined to the latter issue in circumstances where the defendant did not pursue its appeal against the refusal of the High Court judge to grant the first of those reliefs.

Background facts
2. The plaintiff company, which is based in Gorsebridge in Co Kilkenny produces, supplies and distributes certain foodstuffs within the horseracing industry. The defendant is an Irish company involved in the importation and sale of bulk cereals and other raw materials required for the manufacture of animal feed and has traded with the plaintiff since 1982.

3. The plaintiff's claim relates to its purchase of a consignment of 400 tonnes of groundnut on foot of an oral agreement made in September, 2002. The consignment was delivered by the defendant to an open warehouse in New Ross on 7th October, 2002, where it was stored. On 22nd October, 2002 some 29 tonnes of this consignment were collected by the plaintiff's transport agent. Shortly thereafter, the plaintiff, for the purposes of manufacturing racehorse feed, mixed this groundnut with other ingredients and sold the finished product to racehorse owners and trainers.

4. Regrettably, a sample of this 29 tonnes of groundnut which had been retained by the plaintiff's transport agent was misplaced and consequently was never analysed.

5. Trace elements of morphine were subsequently found in the urine of a number of racehorses that had competed in racing events in October/November, 2002 as a result of which they were disqualified. These horses had been fed with the plaintiff's racehorse feed. As a consequence of these events, the plaintiff rejected the remainder of the consignment maintaining that the groundnut it had purchased from the defendant was not fit for purpose in that it contained trace elements of morphine.

6. By letter of 17th January, 2003, the plaintiff, through its then solicitors, Mason Hayes and Curran, put the defendant on notice that it would be seeking a full indemnity in respect of any claims made against it by trainers and owners whose horses were then facing or had suffered disqualification as a result of trace elements of morphine having been found in their urine. The letter further advised that the plaintiff would seek to recover from the defendant all of the costs that it had and would later incur in dealing with complaints being considered by the Turf Club and the Jockey Club in relation to the contamination. By letter dated 29th January, 2003 the defendant, while indicating that it would copy the plaintiff's complaint to its insurance company, set out in detail the reasons why it considered that it could have no liability in respect of any trace elements of morphine that may have been found in the feed that had been sold by the plaintiff to its customers.

7. For the purposes of the appeal the parties helpfully agreed a chronology which details the engagement between the parties from the date of the agreement in September, 2002 to the date of the service by the plaintiff of the notice of trial on 16th April, 2014. I have added some additional detail to this chronology and where I have done so the relevant entries appear in italics.

8. Chronology.

September, 2002: Oral agreement for supply of 400 tonnes of groundnut to the plaintiff.

7th October, 2002: Consignment of groundnut delivered to warehouse in New Ross.

15th October, 2002: Sample of groundnut sent to laboratory for testing by defendant.

22nd October, 2002: Plaintiff collects 29 tonnes of groundnut from New Ross.

25th October, 2002: Defendant receives results of sample from lab and notifies plaintiff of full quota of Aflatoxin B1.

10th November, 2002: A number of racehorses disqualified due to presence of morphine traces in urine.

November, 2002: Defendant sends further samples to second laboratory in England.

16th December, 2002: Plaintiff takes further samples of groundnut from warehouse in the New Ross. Plaintiff recalls all horse feed with groundnut from customers.

8th January, 2003: Defendant receives lab results from Hall Laboratories; no morphine detected.

15th January, 2003: Defendant facilitates plaintiff by taking further samples of groundnut from warehouse in New Ross.

17th January, 2003: Plaintiff sends first letter of complaint concerning goods to defendant.

27th March, 2003: Plaintiff receives results of tests on third sample from Louisiana and TCD showing traces of morphine.

8th November, 2006: Second letter from plaintiff reiterating its complaints re groundnut contamination.

17th September, 2008: Plenary summons issues.

14th September, 2009: Plenary summons is served on defendant.

November, 2010: Plaintiff serves notice of change of solicitor

7th December, 2010: Statement of claim is delivered.

21st March, 2011: Plaintiff's motion seeking judgment in default of defence

2nd June, 2011: Defendant raises notice seeking particulars.

13th July, 2011: Defendant delivers its defence.

9th September, 2011: Plaintiff replies to defendant's notice for particulars above.

11th November, 2011: Plaintiff furnishes replies to above notice for particulars.

2nd May, 2012: Defendants brings motion to compel plaintiff to furnish proper replies to notice seeking particulars.

9th July, 2012: Order requiring plaintiff to reply to 6 of the outstanding particulars raised.

16th November, 2012: Plaintiff furnishes further replies in compliance with above order.

7th February, 2013: Plaintiff furnishes a further copy of its replies to particulars previously furnished on 16th November, 2012, further to a request from the defendant's solicitor in circumstances where the same had been misplaced.

8 August 2013: Plaintiff makes request for voluntary discovery.

26th September, 2013: Plaintiff issues motion for discovery.

18th November, 2013: Plaintiff obtains order for discovery against defendant.

16th January, 2014: Defendant files affidavit of discovery.

16th April, 2014: Plaintiff serves notice of trial.

Judgment of High Court.

9. It is not necessary for the purposes of this appeal to focus to any great extent on the conclusions of the High Court judge delivered in his ex tempore judgement save to say that he considered that the balance of justice did not favour the dismissal of the proceedings and this was because he was not satisfied that the defendant had been prejudiced by the delay. That this is so is because this court is not confined to a consideration of whether or not the High Court judge erred in principle when he reached this conclusion. While the order made by Moran J. was what is commonly described as a "discretionary order" the issue under consideration was an extremely substantial one having regard to what was at stake for both parties. In such circumstances an appellate court, where the justice of the case so requires it, is entitled to reach its own conclusions on the evidence that was before the lower court while of course affording due deference to the decision of the judge at first instance. (See *In Bonis Morelli, Vella v. Morelli* [1968] 1 I.R.11, *Lismore Homes Ltd (In receivership) v. Bank of Ireland Finance Ltd* [1999] 1 I.R. 501 and *Collins v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2015] IECA27)

Defendant's Submissions

10. Counsel for the defendant, Mr. Murphy S.C. submitted that the delay between the sale of the goods in September, 2002 and the date of the issue of the plenary summons in September, 2008 was inordinate and inexcusable and had not been justified. Insofar as the plaintiff had sought to excuse this delay by reference to investigations that were being carried out over this period by the Turf Club and the Jockey Club and its need to deal with litigation which had been instituted against it arising out of the contaminated feed, he submitted that the proceedings should have been commenced promptly and could, if necessary, have been placed "on hold" at a later date until such time as the extent of the plaintiff's alleged losses had been fully ascertained. Further, the post commencement delay of five and a half years to the date of the service of the notice of trial, particularly having regard to the pre-commencement delay, was, he submitted, also inordinate and inexcusable.

11. Counsel maintained that the cumulative effect of the delay had been prejudicial to the defendant in that, unlike many other actions, this could not be considered to be a documents case where the passage of time would be less likely to result in an injustice to the parties. This case would be a highly contentious witness action where the recollection of witnesses would determine the outcome of the proceedings and where, as a result of the overall delay, justice would be put to the hazard.

12. Counsel also submitted that the defendant was prejudiced because the plaintiff had failed to preserve for scientific testing a sample of the original consignment which had been used in the preparation of the horse feed in question. Further, given that the first formal complaint received by the defendant concerning the alleged defect in the groundnut was not notified until 17th January, 2003, it was the unchallenged evidence of Mr. John Hayes, M Sc., forensic scientist, that any testing of the remainder of the 400 tonne consignment carried out after that date *i.e.,* more than 85 days after it had been placed in external storage, could not be relied upon because of the possibility that this groundnut had been contaminated by other products stored in the same facility over that period. It was contended that the defendant would accordingly be prejudiced in its ability to defend the claim by reference to the testing of the product as collected by the plaintiff or by reference to any reliable testing of the remaining consignment.

Plaintiff's Submissions
13. While counsel for the plaintiff, Mr. Flannery S.C., accepted that there had been significant delay in relation to the issue of the proceedings, he maintained that given that the plenary summons was issued within the permitted statutory time it was not open to the defendant as a matter of law to maintain that this period of delay was in itself inordinate and inexcusable. He nonetheless accepted that where, as in the present case, the writ was issued at the outermost limit of the permitted statutory period, there is a particular onus on a plaintiff in such circumstances to proceed with its claim with greater diligence than might otherwise be expected.

14. While counsel accepted, having regard to the pre-commencement delay, that there was what might be considered to have been a period of inordinate delay in the delivery of the statement of claim he submitted that this was excusable. In this regard he relied first upon the fact that the plaintiff was involved in defending extensive litigation which had arisen from its supply of contaminated feed. Second, it had had to deal with a range of investigations material to its reputation and the survival of its business. These included those which had been conducted by the Turf Club and the Jockey Club. Third, the plaintiff had been required to undertake significant work of a public relations nature to ensure the survival of its business reputation following the relevant disqualifications.

15. Insofar as the period post dating the delivery of the statement of claim was concerned, counsel submitted that there was no period of delay of any real significance. Further, insofar as that period was concerned, while the defendant in its defence of the 13th July, 2011 specifically pleaded that it had suffered prejudice by reason of inordinate and inexcusable delay, it had failed to follow up this plea by issuing an appropriate motion to have the claim dismissed. Not only did it not issue such a motion but it then proceeded to act as if it was prepared to meet the claim on the merits. It raised significant particulars concerning the precise nature and extent of the claim made against it. Further, it fully engaged with the discovery process. During all of this period and in reliance upon the manner in which the defendant was conducting its defence of the proceedings, the plaintiff continued to invest time and further costs in getting the action ready for trial. The application to dismiss the claim by reason of delay was not brought until after service of the notice of trial.

16. As to the prejudice advanced by the defendant, counsel submitted that the same was unrelated to the delay in the prosecution of the action. Any prejudice arising from the loss by the plaintiff's transport agent of the sample from the groundnut collected from the defendant on 22nd October, 2002 was unrelated to the delay in the prosecution of the action. Likewise, any prejudice to the defendant arising from the fact that its expert had advised that the results of any testing carried out on a sample of the remaining consignment after the date of the initial letter of complaint*, i.e.* 17th January, 2003, could not be relied upon, was again unrelated to the delay complained of.

17. While counsel accepted that it was unfortunate that the proceedings would come to trial so many years after the events in dispute had occurred, the defendant had been aware of the plaintiff's claim from the very outset and was thereby in a position to protect its interests by taking whatever steps it deemed appropriate to meet the plaintiff's claim at trial. Accordingly, counsel submitted that the balance of justice favoured permitting the proceedings to go to trial particularly where no reasoned explanation had been provided by the defendant as to why it had awaited service of the notice of trial before bringing the within application.

The principles to be applied
18. The principles to be applied by the court when exercising its inherent jurisdiction on an application to dismiss proceedings on the grounds of inordinate and inexcusable delay were laid down in some detail by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M 561. Further, that decision makes clear that the onus of proof to establish that the delay was both inordinate and inexcusable lies upon the party who asserts the delay.

19. It is only if satisfied that the defendant has discharged this burden of proof that the court must proceed to consider whether the balance of justice lies in favour or against the case proceeding. As was observed by Henchy J. in *O'Domhnaill v. Merrick* [1984] 1 I.R. 151, this is a difficult task because the court in doing so must try to "strike a balance between a plaintiff's need to carry on his / her delayed claim against the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend".

20. In *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 the principles as outlined by Finlay P in *Rainsford* were approved and expanded upon by Hamilton C.J. in the following oft quoted extract from his judgment at p. 475:-

> "The principles of law relevant to the consideration of the issues raised on 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 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 judgement 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 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 the defendant's reputation and business."

21. In addition to these principles, in many of the more recent judgments the courts have made clear first, that in considering whether or not delay should be classified as inordinate the court may have regard to any significant delay prior to the issue of the proceedings and secondly, that where a plaintiff waits until relatively close to the end of a limitation period to issue their proceedings they are then under a special obligation to ensure that the claim is prosecuted with what has been described as extra diligence. (See *Hogan v. Jones* [1994] 1 I.L.R.M. 512, *Cahalane and Another v. Revenue Commissioners and others* [2010] IEHC95 and *McBrearty v. North Western Health Board* [2010] IESC27.

22. In *Hogan* Murphy J. having referred to the decision in *Rainsford* further approved and applied a principle stated by Lord Diplock in *Birkett v. James* [1977] 2 All ER 801 at p. 808 to the following effect:

> "It follows a *fortiori* from what I have already said in relation to the effects of statutes of limitation on the power of the court to dismiss actions for want of prosecution, that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of his potential witnesses, their death or their un-traceability. To justify dismissal of an action for want of prosecution the delay relied on must relate to the time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued".

23. In recent times, in a series of decisions including those of Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.L.R.M.290, [2004] IESC98, Denham J. in *Michael McGrath v. Irish ISPAT Ltd* [2006] 3 I.R.261, [2006] IESC43, Clarke J. in *Stephens v. Flynn Ltd* [2005] IEHC148 and *Rodenhuis & Verloop BV v. HDS Energy Ltd* [2011] 1 IR 611, Hogan J. in *Quinn .v Faulkener t/a Faulkner's Garage and Another* [2011] IEHC103 and that of myself in *Collins v. Minister for Justice Equality and Law Reform Ireland and the Attorney General* [2015] IECA27, the courts have questioned whether there needs to be a recalibration or tightening up of the criteria to be applied when considering applications of this type by reason of Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

24. In *Gilroy,* Hardiman J stated as follows at p.293:-

> "…[T]he 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…. [F]ollowing such cases as *McMullen v. Ireland* [ECHR422 97/98 July 29 2004] and the European Convention on Human Rights Act, 2003 the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."

25. Of perhaps even greater significance than the State's commitment to meet the rights of parties to have a hearing within a reasonable time under Article 6 ECHR, is the growing recognition that the court itself, by virtue of its constitutional mandate to administer justice under Article 34.1, has a duty to ensure that litigation is dispatched with efficiency and within a time frame that will ensure that justice will not be put to the hazard, as may happen if cases are left to be decided at a substantial remove from the events in dispute. If the courts were to renege on their constitutional obligations in this regard, given that the rules of court leave it largely to the parities themselves to progress litigation, their ability to administer justice would be truly cast in doubt. As was so aptly observed almost fifty years ago by Diplock L.J. in *Allen .v. Sir Alfred McAlpine & Sons Ltd* [1968] 2 Q.B. 229 at page 255: –

> "The chances of the courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard"

26. Accordingly, it is clear that entirely independent of the views of the parties to litigation, the court itself must, because of its constitutional mandate, by its own conduct ensure that litigation is completed in a timely fashion. Its obligation in this regard is inconsistent with affording any undue tolerance to unnecessary delay in the course of litigation. Further, as can be seen from many recent judgments, recognition of this obligation on the part of the courts has had a significant beneficial impact in bringing to an end the culture of delay that previously bedevilled litigation in this jurisdiction. That this is so is clear from judgments such as that of Hogan J. in *Quinn v. Faulkner* where he correctly, and appropriately, criticised the past culture of delay in litigation in this jurisdiction when he stated at paragraph 29: –

> "While as Charleton J. pointed out in *Kelly v. Doyle* [2010] IEHC396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common: see, e.g., the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Ltd* [2010] IEHC 465."

Inordinate and inexcusable delay
27. Having considered the evidence of the parties as deposed to on affidavit and the written and oral submissions made in the course of this appeal, I am entirely satisfied that the plaintiff was guilty of inordinate and inexcusable delay in the delivery of its statement of claim which did not occur until 14th September, 2010. By then a period of two years and three months had elapsed since the issue of the plenary summons on 17th September, 2008 and which itself was not served on the defendant until almost one year later on the 14th September 2009.

28. Such a period of delay in any commercial claim, regardless of its complexity, would be exceedingly difficult to justify. Adopting the words of Fennelly J. in *Dekra Eireann Teo. v. Minister for the Environment* [2003] IESC 25, [2003] 2 IR 270, it may be said that these proceedings relate to "decisions in a commercial field where there should be very little excuse for delay." These observations apply a *fortiori* to the particular facts of these proceedings where the delay occurred in circumstances where the plenary summons was issued at the very outside limit of the six-year statutory period permitted for this type of claim. It was simply inexcusable and of a nature that should not be tolerated by any court save in exceptional circumstances.

29. The reason that the court must take into account pre-commencement delay in assessing whether or not post commencement delay is inordinate and inexcusable is that it cannot be disputed but that the longer the period that is allowed to elapse between the events the subject matter of the claim and the trial date, the greater the risk that justice will be put to the hazard. In these proceedings, the late start by the plaintiff in issuing its plenary summons and the delay in delivering the statement of claim meant that eight years were permitted to elapse between the date of the contract at issue and the date upon which the claim was fully particularised.

30. While it is must be accepted from paragraph 16 of Mr. O Regan's affidavit of 12th December, 2014 that the plaintiff was caught up in extensive litigation arising out of the contaminated horse feed between 2003 – 2010 inclusive, it is also clear from the original letter of complaint written on the plaintiff's behalf on 17th January, 2003, that the plaintiff's interests in the present litigation were already in the hands of a well established firm of commercial solicitors. Further, Mr. O'Regan's affidavit makes clear that the plaintiff also had solicitors acting on its behalf in the UK in respect of issues arising in that jurisdiction as a result of the contaminated horse feed. In circumstances where the plaintiff had substantial legal backup to deal with the consequences of the sale of the contaminated feed, I can find no valid reason as to why the summons, having issued on 17th September, 2008 was then not served until14th September, 2009 and the statement of claim not delivered for a further fourteen months thereafter.

31. The fact that all of the litigation concerning the contaminated feed had not been concluded as of the date of the issue of the plenary summons on 17th September, 2008 provides no valid excuse for the plaintiff's failure to deliver its statement of claim promptly. The same could have been delivered and the plaintiff's claim particularised subject to the caveat that the full extent of its losses were as yet unascertained. Indeed, from Mr. O'Regan's affidavit it appears that there were only two claims outstanding as of 2009 and even these were settled by February, 2010. That being so it is quite extraordinary how a further ten months was allowed lapse before the statement of claim was delivered.

32. As to the rate at which the proceedings were progressed following the delivery of the statement of claim, it is true to say that they were not pursued with any particular urgency by either party as the case law which I have previously described would mandate. While Mr. Flannery is correct that there is no gaping hole in the chronology of the proceedings between the delivery of the statement of claim and the service of notice of trial that period of three and a half years when viewed against the backdrop of the twenty seven month delay between the issue of the plenary summons and the statement of claim and a pre-commencement period of almost six years, makes this latter period one which, in my view, must also be considered to be inordinate and inexcusable.

Balance of justice
33. Having concluded that the plaintiff was guilty of inordinate and inexcusable delay over all of the period that followed the issue of the plenary summons in September, 2008, I must now consider whether the balance of justice favours the dismissal of the proceedings.

34. Not without considerable misgivings I have come to the conclusion that on the facts of this case the balance of justice does not favour the dismissal of the proceedings. In reaching this conclusion I am all too mindful of the recent hard-hitting judgments which rightly criticise the courts for their role in the development and maintenance of the culture of delay that has for so long been a feature of almost every type of litigation in this jurisdiction.

35. However, mindful of the guidance provided by the decision in *Primor*, there are a number of factors in this case which when taken together at this time marginally tip the scales of justice in favour of allowing the action proceed to trial. That is not to say that at an earlier point in the proceedings the facts as they then stood might not have weighed in favour of the dismissal of the proceedings. I will deal with these factors in turn.

36. First, following the delivery of the statement of claim on 7th December, 2010, no step was taken by the defendant for a period of six months. It was the 1st June, 2011 before the defendant raised particulars of the claim that had been advanced in the statement of claim. While the defence was delivered on 13th July, 2011, in advance of receipt of the replies to that letter for particulars, it is clear that this six month period of delay amounts to acquiescence on the part of the defendant in the plaintiff's delay and is therefore a factor weighing against the dismissal of the claim.

37. Second, and of much greater significance, is the plea contained in the preliminary objection to the defence delivered on 13th July, 2011 which is in the following terms: –

> "1. The plaintiff has been guilty of inordinate and unconscionable delay in the commencement and prosecution of the within proceedings, such that the Defendant has suffered irreparable prejudice in defending the claim. On that account, the defendant contends that the plaintiff's claim ought to be dismissed as an abuse of the process of the Court"

38. It is clear from this plea that the defendant when considering its defence addressed its mind to the lapse of time between the events in dispute and the date of the defence as well as to the allegedly prejudicial consequences thereof. However, rather surprisingly, it then proceeded to act in a manner entirely inconsistent with the position it had adopted in its defence. It did not bring a motion to dismiss the plaintiff's claim on the grounds of inordinate and inexcusable delay but rather elected to engage with the proceedings in a manner and at a pace that can at best be described as relaxed and leisurely until such time as the notice of trial was served in April, 2014. No pressure whatsoever was exerted upon the plaintiff to finalise any procedural steps that may have been required to enable a date be obtained for the trial of the action.

39. Recognising, of course, that I can only speculate as to the arguments that might have been advanced by the parties had an

application to dismiss the proceedings been brought in relatively close proximity to the delivery of the defence, I nonetheless find it difficult to see how, on the facts as they then stood, the balance of justice would not have favoured the dismissal of the claim.

40. Third, not only did the defendant not seek to call time on this litigation as it ought to have done following the delivery of its defence, when it was unhappy with the replies to particulars which it received on 9th September, 2011, it was not until the following May, that it issued a motion seeking to compel the plaintiff to furnish proper replies in accordance with the letter of demand which it had sent in this regard on 11th November, 2011. The defendant's delay in this regard was, to say the least, inconsistent with the plea made at paragraph 1 of its defence. Further, its conduct may also be classified as a form of acquiescence in the plaintiffs delay for the purpose of the consideration of the balance of justice issue.

41. Fourthly, given that the plaintiff's solicitors had not responded to the letter of 11th November, 2011 by May, 2012, the defendant at that stage would once again have been well placed, having regard to its defence, to have brought an application to dismiss the proceedings based upon inordinate and inexcusable delay. However, it chose not to do so but instead issued the motion seeking to compel the delivery of replies to particulars or in the alternative an order staying proceedings until such time as the particulars were delivered. Again, this conduct not only amounts to effective acquiescence but it is conduct which is only consistent with the actions of a defendant that intends to meet the claim made against it on its merits.

42. Fifth, not only did the defendant proactively engage with the plaintiff insofar as the exchange of particulars was concerned but it also engaged without objection or reservation in the discovery process. Thus, I am satisfied that the defendant's conduct over this period amounts to much more than the type of acquiescence that was stated in *Primor* to be material to the court's consideration of the balance of justice issue.

43. Sixthly, between the date of the delivery of the defence and the service of the notice of trial not only did the defendant by its conduct lead the plaintiff to believe that it would meet the claim on its merits but it also caused the plaintiff to spend a great deal of time and money in engaging with litigation long past the point at which the application to dismiss ought to have been made. While such conduct does not constitute an absolute bar to the defendant obtaining an order striking out the proceedings, it is conduct nonetheless which is very relevant to the exercise of the court's discretion as to whether the balance of justice is in favour of or against the dismissal of the proceedings.

44. Finally, insofar as the balance of justice is concerned the court must be mindful of any prejudice which the defendant maintains arises by reason of the delay. From my part I am not satisfied that the defendant has established any causal connection between the asserted prejudice and the delay in the proceedings. Any prejudice arising out of the loss of the sample from the consignment collected by the plaintiff's agent on 22nd October, 2002 has nothing to do with the delay in the prosecution of the action. Likewise, the fact that any testing carried out on the balance of the consignment, that remained in New Ross more than 85 days after it was first stored in that location, could not be considered reliable, is again prejudice that arises entirely independent of the delay on the part of the plaintiff in pursuing these proceedings.

Conclusion

45. Regardless of the fact that the plaintiff has been guilty of inordinate and inexcusable delay in the prosecution of these proceedings, in the special circumstances that exist at this point in time I am not satisfied that the balance of justice favours the dismissal of the action and, accordingly, I would dismiss the appeal.

46. It should be said that this judgment is one which is particular to its own facts and rests on the fact that the defendant by engaging at length with the plaintiff since 2010 without complaint-and particularly by requesting particulars and engaging in the process of discovery-effectively represented that it had waived its earlier objection based on inordinate delay. Independently of these particular facts, this judgment should not be understood as heralding any softening in the approach which has been adopted by the courts in more recent times to ensure that the culture of delay in litigation that was so prevalent in this jurisdiction for so many years is brought to an end.