THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 8

Appeal Nos. 2015/583

Finlay Geoghegan J.
Irvine J.
Hedigan J.

BETWEEN/

MONICA LEECH

PLAINTIFF/RESPONDENT

- AND -

INDEPENDENT NEWSPAPERS (IRELAND) LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 27th day of January 2017

1. This is an appeal brought by Independent Newspapers (Ireland) Ltd ("the newspaper") against the judgment and order of the High Court (MacEochaidh J.) (dated 3rd and 17th November, 2015, respectively), refusing its application to dismiss the within libel proceedings on the grounds of the alleged inordinate and inexcusable delay on the part of the plaintiff, Ms. Monica Leech ("Ms. Leech"), in the conduct of these proceedings.

2. In circumstances where the High Court judge was satisfied that Ms. Leech had indeed been guilty of inordinate and inexcusable delay in the manner in which she had conducted the proceedings and there is no appeal that that finding, the question for this Court is whether he erred in law when he concluded that the "balance of justice" favoured permitting her continue her claim.

3. Prior to setting out the reasons for my conclusion that MacEochaidh J. erred in law when he failed to accede to the newspaper's application, I will set out as briefly as I can the relevant background facts, the findings of the trial judge, the submissions of the parties and the relevant legal principles.

Relevant background facts

4. On 30th January, 2005, the newspaper published an article concerning Ms. Leech under a front page headline "Leech thinks Provo spies raided home". The article reported that her home had been burgled in June, 2004. Ms. Leech considered the story to be, what was described by her solicitor in a letter dated 31st January, 2005, "a work of fiction" and demanded an apology. None was forthcoming. That being so, by plenary summons dated 27th April, 2005, Ms. Leech commenced the within proceedings seeking damages for libel.

5. It is not necessary, for the purposes of this judgment, to deal in detail with the manner in which Ms. Leech cast her claim, although I will later briefly refer to the particular nature of the defence delivered on behalf of the newspaper. What is of particular importance is the speed and manner in which the parties have conducted this litigation. The following chronology is of assistance to demonstrate the action / inaction of the parties during the currency of the proceedings.

Chronology

27th April 2005: Plenary summons issues.

13th May 2005: Service of plenary summons and statement of claim.

19th May 2005: Appearance on behalf of defendant.

15th August 2005: Delivery of defence.

Defendant's request for particulars.

3rd October 2005: Plaintiff delivers reply to defence.

Replies to the defendant's notice seeking particulars also delivered.

14th November 2005: Defendant complains regarding the adequacy of the plaintiff's replies to particulars of 3rd October, 2005.

28th April 2006: Plaintiff delivers updated particulars.

4th September 2006: Plaintiff serves notice of trial.

16th October 2006: Plaintiff serves second notice of trial.

18th October 2006: Plaintiff serves notice of intention to proceed.

16th January 2008: Plaintiff serves second notice of intention to proceed.

18th February 2008: Plaintiff serves a notice seeking particulars arising from defence.

16th June 2008: Plaintiff brings motion to compel delivery of replies to letter for particulars dated 18th February, 2008.

1st July 2008: Defendant delivers reply to plaintiff's particulars of 18th February, 2008.

13th February 2012: Plaintiff serves notice of change of solicitor.

10th July 2014: Dfendant writes requesting that the proceedings be withdrawn.

16th July 2014: Plaintiff serves notice of change of solicitor and notice of intention to proceed.

1st September 2014: Defendant issues motion to dismiss proceedings for delay.

19th December 2014: Supreme Court delivered judgment in proceedings between the same parties bearing record no. 2005/513P and 2004/19853P.

26th February 2015: Supreme Court rules on the costs of the appeals the subject matter of the judgment of 19th December, 2014.

9th July 2015: Plaintiff serves notice of trial.

30th October 2015: Hearing of the defendant's motion to dismiss the proceedings.

6. The application brought by the newspaper to dismiss these proceedings spawned four affidavits, two from Mr. Daniel Coady, solicitor acting on behalf of the newspaper and two from Ms. Leech. It is not necessary to detail all of the matters dealt with in these affidavits. I think it sufficient to refer to those matters relied upon by the High Court judge in the course of his judgment and to those relied upon by counsel in their submissions to this Court on the appeal.

7. As may be apparent from the chronology set out above, it is common case that Ms. Leech instituted two other sets of libel proceedings against Independent Newspapers (Ireland) Ltd bearing record numbers 2004/19853P ("the 2004 proceedings") and 2005/513P ("the 2005 proceedings"). The 2004 proceedings were heard in June, 2009 when Ms. Leech was awarded damages of €1.872m., an award later reduced by the Supreme Court in its judgment delivered on 19th December, 2014. The 2005 proceedings, which were initially resolved in favour of the newspaper in June, 2007, were also the subject matter of an appeal to the Supreme Court. In its judgment of the 19th December, 2014, it set aside the order of the High Court and referred the proceedings back for a retrial. Ms. Leech asserts that the existence of those proceedings and her conduct in relation thereto was correctly relied upon by the High Court judge in refusing the newspaper's application to dismiss the within proceedings.

8. When taken together, the principal matters relied upon by Mr. Coady in support of his client's application were as follows. The law requires a plaintiff who brings libel proceedings to prosecute their claim with particular expedition and Ms. Leech had failed to meet that obligation. Her delay had been inordinate and could not be excused. The newspaper would likely be prejudiced by the delay. It had raised a defence of qualified privilege with the result that it bore the onus of demonstrating the evidential basis for that plea. A ten year delay between publication and trial made the defence of public interest privilege, which has a substantial factual component, harder to establish. Further, Mr. Fanning, the newspaper's editor, had died on the 17th January, 2012, with the effect that he would not be available to give evidence to establish that the article had been the subject of a proper process of editorial control prior to publication. In addition, the newspaper was liable to be further prejudiced by reason of the fact that the two journalists who had authored the article would likely find it more difficult to defend their actions as they would be relying upon conversations which they had had and enquiries which they had made with third parties, almost ten years earlier.

9. On the issue of the newspaper's culpability for any delay, Mr. Coady denied the existence of what Ms. Leech maintained was "a mutual understanding" that these proceedings might be postponed to await the outcome of her other two actions against the newspaper. No evidence had been furnished to support that proposition. Further there was no conduct on the part of the newspaper which might be considered to amount to acquiescence in the delay. Ms. Leech's actions in serving a second notice of intention to proceed and a motion to compel the delivery of replies to particulars in 2008 were inconsistent with any such understanding. Her assertion that costs would be saved or that it was in the interests of both parties that the proceedings not be heard until the outcome of her other two actions was without foundation.

10. Ms. Leech, on the other hand, maintained that she had left these proceedings in abeyance to await the determination of the 2004 and 2005 claims and that there was a mutual understanding that this was in the best interests of both parties. The postponement was aimed at minimising costs and avoiding the repetition of arguments that might be made in those proceedings. She wanted to concentrate on her other proceedings and the newspaper had acquiesced expressly or implicitly in her inaction. Ms. Leech maintained that the newspaper had not been prejudiced by any delay. It was reasonable for the Court to infer from the fact that Mr. Fanning's death was only raised in Mr. Coady's second affidavit that any prejudice arising from his death was insignificant. The newspaper should have known from the manner in which she had pursued her 2005 proceedings and had strenuously resisted the newspapers appeal on quantum in the 2004 proceedings that she would proceed with this action when they were concluded. Finally, she submitted that in considering the balance of justice, the Court should have regard to the fact that the newspaper had taken no step to bring these proceedings on for hearing and had not written to object to her delay.

Judgment of MacEochaidh J. 3rd November 2015

11. It is not disputed by the parties that the trial judge correctly set out the jurisdiction of the Court to dismiss a claim, in the exercise of its inherent jurisdiction, on the grounds of inordinate and inexcusable delay. He adopted the approach advised by Keane C.J. in *Ewins v. Independent Newspaper (Ireland) Limited* [2003] 1 I.R. 583. He referred to his obligation to first consider whether the delay in the prosecution of the claim was inordinate and if so whether it could be excused. The trial judge stated that even if he found the delay to be both inordinate and inexcusable he would still have to consider whether, in all of the relevant circumstances, the balance of justice favoured the dismissal of the proceedings or permitting them to proceed.

12. Having considered the evidence the trial judge concluded that the delay of six years which he identified as commencing in July, 2008 (the date upon which the newspaper replied to the Ms. Leech's notice for particulars dated 18th February, 2008) and ending on 16th July, 2014, (the date of service of the third notice of intention to proceed) was both inordinate and inexcusable. Of particular importance in the context of his ultimate decision on the issue of the balance of justice was his conclusion that Ms. Leech's inactivity could not be excused by the fact that she was vigorously engaged in pursing two unrelated libel claims against the same defendant. It is to be noted that there is no cross appeal against that finding

13. Having found as a matter of fact that Ms. Leech was guilty of inordinate and inexcusable delay the trial judge nonetheless concluded that the balance of justice favoured allowing the proceedings continue. The principal factors which "tipped" the scales in Ms. Leech's favour were threefold and may be summarised as follows:-

> (i) While the newspaper relied upon the specific prejudice it would likely suffer as a result of the death in January, 2012 of Mr. Aengus Fanning, the newspaper's editor at the time of the relevant publication, it was to be inferred from the fact that his death had only been raised by Mr. Coady in his supplemental affidavit that the newspaper had no genuine belief that this would occur. Any prejudice arising from Mr. Fanning's death could, he was satisfied, be overcome by the newspaper calling another witness in his stead. As to any potential prejudice to the newspaper by reason of the fact that the two journalists who had authored the article might have difficulty recalling the circumstances in which they had sourced the information for the article, he concluded that if this was a matter of real concern he would have expected them to have sworn affidavits deposing to their inability to remember how they had conducted themselves when compiling the story. Thus he decided as a matter of law that the newspaper's claim of prejudice was not properly grounded.
>
> (ii) If only the present proceedings were pending against the newspaper it might have been reasonable for it to infer from Ms. Leech's delay that she did not intend to prosecute her case. However, in seeking to resist motions for judgment in default of defence which she had brought in all three actions in 2005, the newspaper had sworn a composite affidavit and it was to be inferred from that action that it knew that the proceedings were being dealt with together. Further, from the vigorous pursuit by Ms. Leech of her other proceedings it ought to have known that she was "no shrinking violet" and that, regardless of her delay, she would likely pursue this action.
>
> (iii) Finally, the newspaper had not taken any action to progress the proceedings in the face of Ms. Leech's delay and had failed to explain why it had not sought to dismiss the proceedings at an earlier date, particularly in light of Mr. Fanning's death in 2012.

The appellant's submissions

14. Mr. Ferriter S.C., on behalf of the newspaper, submits that the High Court judge misdirected himself in law in relation to the third leg of the test in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. He submits that he ignored three relevant factors and then misdirected himself in law in relation to three more. The factors to which he submits the trial judge failed to have regard are as follows:-

> (a) The particular onus that is on a plaintiff to prosecute libel proceedings with expedition.
>
> (b) The fact that Ms. Leech pleaded malice to defeat the newspaper's claim to qualified privilege thus putting the reputation of the newspaper and its journalists at stake, a factor which warranted particular urgency.
>
> (c) His failure to properly consider periods of delay pre dating July, 2008 when considering the balance of justice, namely:-
>
> > (i) 3rd October, 2005, to 28th April, 2006, that being the period between the close of pleadings and the delivery by the plaintiff of her replies to the defendant's notice for particulars of 15th August, 2005;
> >
> > (ii) A period of 21 months between 28th April, 2006, and 18th February, 2008, (the former being the date upon which the plaintiff responded to the defendant's letter seeking particulars dated 15th August, 2005, and the latter being the date upon which the plaintiff served a notice seeking particulars arising from the defence).

15. As to the High Court judge misdirecting himself in law, Mr. Ferriter submits that he was wrong to give Ms. Leech credit, in weighing the balance of justice, for the existence of her two other claims. He had already determined in his assessment of whether her delay was excusable that her other litigation was irrelevant. The actions were not dependant on each other even though they were against the same defendant. There was no connection between the management and running of the three actions even if it was correct that in 2005 a composite affidavit had been sworn to deal with three motions which were then before the Court. To give her credit for the existence of this litigation was illogical having regard to his other findings.

16. Mr. Ferriter also submitted that the trial judge had incorrectly approached his analysis of the issue of prejudice. He should not have disregarded Mr. Coady's evidence of specific prejudice because of the manner of its presentation i.e. that he had only dealt in detail with Mr. Fanning's death in his supplemental affidavit. Further, he ignored the likely prejudice to the defendant arising from the fact that the jury, in its analysis of the newspaper's defence, would be obliged to consider what issues were of concern to the public ten years earlier. He relied upon the decision of Kearns J. in *Stephens v. Paul Flynn Limited* [2008] 4 I.R. 31 to the effect that even moderate prejudice, depending upon the other circumstances of the case might justify the dismissal of proceedings.

17. Counsel further argued that the trial judge had made a fundamental legal error in his consideration of the balance of justice. He had incorrectly focussed upon the issue of prejudice rather than on the overall circumstances of the case and all of the other material factors set out in *Primor*.

18. Finally, it was submitted that the trial judge incorrectly penalised the newspaper and treated its inactivity as acquiescence and this was unjustified as a matter of law. It was to be inferred from his judgment that he weighed against the defendant the fact that it did not move at an earlier point to dismiss the plaintiff's claim particularly after Mr. Fanning's death. This was not positive acquiescence which could be weighed against a defendant.

19. In conclusion, Mr. Ferriter submitted that the principles set out in *Primor*, when properly applied to the circumstances of the present case, would warrant this Court interfering with the decision of the High Court judge by making an order that Ms. Leech's claim be dismissed pursuant to the Court's inherent jurisdiction.

Respondent's submissions

20. Mr. Callanan, S.C., on Ms. Leech's behalf, submits that this Court is obliged to attach significant weight to the judgment of the High Court judge, which was made by him in the exercise of his discretion. It should not lightly interfere with that decision. He also urged the Court to reject the approach proposed by Mr. Ferriter, which he described as a type of "box ticking" exercise, when it came to consider the manner in which the High Court judge had dealt with the issue of the balance of justice under the third leg of the

Primor test. What the Court had to decide was where the balance of justice was to be found.

21. In deciding whether the balance of justice favoured permitting the action to proceed, counsel submitted that the trial judge was entitled to include within his consideration what he clearly considered to be a belated generic complaint of prejudice on the part of the newspaper. Further, the trial judge was entitled to conclude that if the newspaper had considered itself prejudiced by the delay, it might have advised Ms. Leech that it would not tolerate further delay or it could itself have served a notice of trial. Mr. Callanan submitted that the trial judge was correct when he concluded that the fact that the newspaper had taken neither step tipped the balance of justice in favour of Ms. Leech.

22. As to the newspaper's acquiescence in the delay, Mr. Callanan submitted that the trial judge was correct to conclude that, having regard to her conduct in the 2004 and 2005 proceedings, it ought to have known that Ms. Leech intended to pursue this action as soon as her other claims were concluded. It was clear that she was merely allowing the other actions to take precedence over the present proceedings. He complained that while Mr. Coady had stated that there was no mutual understanding that these proceedings would await the disposal of the other two actions, he had not gone so far as to state what the newspaper actually understood the position to be. Likewise he complained that Mr. Coady stated that it was "reasonable to infer" that the plaintiff had decided not to prosecute the proceedings but had not stated that the newspaper had as a matter of fact drawn that inference from Ms. Leech's inactivity. He said it was incumbent upon the newspaper, in light of Ms. Leech's assertion that there was such a "mutual understanding", to state what it understood the position to be.

Relevant principles

23. The *jurisprudence* concerning the court's inherent jurisdiction to dismiss a claim for inordinate and inexcusable delay is well established. Perhaps the most frequently cited decision is that of Hamilton J. in *Primor*. That decision proposes a three strand test. The court must first consider whether the plaintiff's delay can be described as inordinate and if it so finds it must then decide whether that delay has been excused by the plaintiff. If the delay is not both inordinate and inexcusable the application by the defendant will fail. However, even if the court decides that the delay is both inordinate and inexcusable the third strand of the test requires the court to consider whether the balance of justice would favour the dismissal of the action in all of the relevant circumstances. In considering this issue Hamilton C.J. set out, at pp. 475 to 476, matters 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.

24. The aforementioned principles have been applied in a number of libel actions including *Ewins v. Independent Newspapers (Ireland) Limited* [2003] 1 I.R. 583 and *Desmond v. MGN* [2009] 1 I.R. 737. These decisions give some additional guidance as to the approach that the court should take to delay in the context of libel actions. The first matter to note is that both of these decisions are authority for the proposition that a plaintiff who brings defamation proceedings is under a particular duty to commence and advance those proceedings without delay. The urgency proposed is based firstly on the premise that unless a plaintiff proceeds urgently they are likely to be met with a challenge that the libel could not have been of any real significance and secondly that it is to be expected that a plaintiff will want to restore the damage done to their reputation by the offending publication with all due expedition.

25. The authorities concerning the issue of delay in libel proceedings call for particular expedition on the part of the parties. However, the principal reason for this requirement appears to be to protect the plaintiff from the prejudice that may result if the proceedings are not progressed with dispatch rather than to protect the defendant's interest. It would clearly be unjust to permit a defendant to delay litigation in which a plaintiff seeks to vindicate their good name. For this reason, when it comes to the plaintiff's lack of expedition, I am of the view that their failure to progress their proceedings with urgency is perhaps of greater relevance to the issue as to whether their delay should be classed as inordinate rather than a factor of particular significance when it comes to a consideration of the balance of justice.

26. Another general principle that applies when a court finds that there has been inordinate and inexcusable delay is that the plaintiff is not absolved of that fault when it comes to a consideration as to whether the balance of justice favours permitting the action proceed unless they can point to some countervailing circumstances sufficient to cancel out the effect of such behaviour as is clear from the decision of Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510. In his judgment he approved that the following statement of Henchy J. from *O'Domnaill v. Merrick* [1984] I.R. 151 where he stated as follows at p. 157:-

> "Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a case. However, where, as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant, or inability on the part of an infant plaintiff to control or terminate the delay of his or her agent."

27. Concerning the aforementioned statement of the law by Henchy J., Fennelly J. said the following at p. 519 of his judgment:-

> "That statement of the law indicates that the author of delay which is found to be both inordinate and inexcusable will

not be absolved of fault, unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess the third consideration in the cited passage from the judgment of Hamilton C.J., namely whether "on the facts the balance of justice is in favour of or against the proceeding of the case". As I have already suggested, the plaintiffs were unable to point to any disadvantage or disability affecting them. Nor was there any delay or acquiescence of the defendants, which might redress the balance of fault.

In such circumstances, when the court comes to strike that balance of justice in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J., it will need to find something weighty to cancel out the effects of the plaintiffs' behaviour. It will attach weight to the character of the claim and to the character of the plaintiffs. When considering any allegation of delay or acquiescence by the defendants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiffs' claim dismissed."

28. The decision of Fennelly J. in *Anglo Irish Beef Processors Limited* is also of relevance to these proceedings in that it gives guidance as to how the court should view the conduct of a defendant in the context of the overall period of delay. In commenting on the decision of Ó Dálaigh C.J. *in Dowd v. Kerry County Council* [1970] I.R. 27 Fennelly J. at 519, stated:-

> "In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something "akin to acquiescence" as indicated in the judgment of Henchy J."

29. Where delay has been found to be inordinate and inexcusable the plaintiff will not be absolved of fault unless they can point to some countervailing circumstances sufficient to cancel out the effect of their behaviour, as is clear from the decision of Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510. That decision is also of relevance to these proceedings in that it gives guidance as to how the court should view the conduct of a defendant in the context of the overall period of delay. In commenting on the decision of O'Dalaigh C.J. in *Dowd v. Kerry County Council* [1970] I.R. 27 Fennelly J., at 519, stated:-

> "In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him it would have to amount in the particular circumstances to something "akin to acquiescence."

30. In the context of Ms. Leech's decision to postpone these proceedings to await the outcome of the 2004 and 2005 proceedings, the judgment of Keane C.J. in *Ewins* is also of some import. In that case he considered the consequences for a plaintiff of taking a decision for tactical reasons to postpone or delay their proceedings without formally communicating that intention to the defendant. This is what he said at p. 588 of his judgment:-

"It is not in my view open to him at this stage, some five years later, to say that he did that for tactical reasons of his own which, it is clear, he never actually formally communicated to the defendants, saying that this is why he was not pursuing the claim. He simply took that decision of his own motion and if it should transpire that as a result of his own decision as to how he would proceed, if he elected to take that course to which it cannot be said that the defendants contributed in any way, then he has also to accept the consequences if the delay he allowed to ensue is so inordinate as to entitle the defendants, unless justice indicates otherwise, to have the proceedings struck out.

> That is a risk he takes in pursuing that particular course of inaction in this case."

31. The decision of Kearns J. in *Desmond* is also of assistance insofar as that is a case in which the plaintiff issued proceedings promptly after the publication of an article which he considered to be libellous. The pleadings were closed with expedition in February, 1999 after which the plaintiff did nothing until he served a notice of intention to proceed in February, 2005. The Court was obliged to consider, *inter alia*, a period of delay of six years. The reason for that delay was that the plaintiff had decided to "park his case" to await the report of the Moriarty Tribunal on the basis that it might assist him in his action. However he did not notify the defendant that this was his intention. Due to the fact that the work of the Tribunal took much longer than had been anticipated he reactivated his proceedings only to be met with a motion to dismiss the proceedings on the grounds of inordinate and inexcusable delay. When it came to a consideration of the balance of justice and the conduct of the defendant this is what Kearns J. said at para. 41 of his judgment:-

> "It must also be stressed that this is not a case where there was any acquiescence on the part of the defendant who delivered its defence within eight months of the service of the proceedings. Had the decision to do nothing in relation to the claim been notified or communicated to the defendant, it would at least have had reason to challenge the validity of that decision in correspondence or ultimately by application to the court. The defendant was effectively kept in the dark as to the reasons for the delay while the plaintiff kept all his options open. The defendant, having no idea whether anything at all would ever happen was, in my view, entitled after a silence of six years to assume that the proceedings would not be progressing further."

32. Macken J., in the same case, also criticised the plaintiff's approach, albeit that she did so in the context of her consideration of whether or not the delay was excusable. Concerning the plaintiff's tactical decision to postpone his litigation she stated as follows at para. 58 of her judgment:-

> "It is certainly a telling factor against excusing delay, if a party retains to himself, as the plaintiff did here, the right unilaterally to take no further steps in the proceedings for an indeterminate period into the future without, as a very minimum, notifying the other party of his intention to do so. That other party has an entitlement to know the stance being adopted, so that he in turn may take all appropriate steps in his interest in relation to the proceedings. In the present case the defendant was entitled to know after a reasonably limited period of time, that the plaintiff had not abandoned his claim, so that it could, if it wished, bring an application to strike out the proceedings rather than being lured, by inactivity of the plaintiff, into the natural belief that the claim was abandoned. It does not seem to me that the defendant has to establish at this stage what steps it might have taken, and I do not think it of any value to require its counsel to speculate as to what the attitude would be, it being submitted in the present appeal by counsel for the plaintiff that even if he had notified the defendant, it in turn would or might have done nothing."

33. It is also clear from the decision of Macken J. in *Desmond* that in assessing where the balance of justice lies the court may have regard to the nature of the defence filed by the defendant. This is particularly so where a defendant raises a plea of justification. If, in the presence of such a plea, an action were to be dismissed a serious injustice might be perpetrated on a plaintiff seeking to vindicate their good name insofar as the plea of justification and the taint of wrongdoing would remain as a blot on their reputation notwithstanding the dismissal of the proceedings.

34. Regardless of the fact that Macken J. was focusing upon the potential injustice to a plaintiff in the presence of a plea of justification it would seem to follow logically from her decision that if a plaintiff, as in the present case, pleads malice against the defendant, that too ought to be a factor to be considered by the court when considering the balance of justice. After all, for so long as a plea of that nature remains live, those responsible for the article will be tainted by that alleged wrongdoing.

35. My own decision in the case of *Millerick v. The Minister for Finance* [2016] IECA 206 is also of relevance as to the manner in which inactivity on the part of a defendant should be treated when it comes to a consideration of the balance of justice. In my review of the decisions of Fennelly J. in *Anglo Irish Beef Producers* and O'Dalaigh C.J. in *Dowd v. Kerry County Council* I stated the following at para. 39 of my judgment:-

> "For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."

36. Finally, in terms of the court's own responsibilities, the duty to ensure the efficient dispatch of litigation within a reasonable time forms an important part of the judicial constitutional mandate to administer justice under Article 34.1 of the Constitution. Moreover, the Supreme Court has made it clear that an earlier culture of tolerance of and indulgence towards otherwise unacceptable delay in the conduct of litigation must come to an end: *cf.* here the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98.

Decision

37. It is not necessary, in my view, for this Court to engage with Mr. Callanan's submission as to the circumstances in which an appellate court may or ought to interfere with an order made by a judge of the High Court in the exercise of his or her discretion as the newspaper's appeal in the present case is predicated upon a submission that the High Court judge misdirected himself, as a matter of law, in a number of respects, when it came to his application of the now well established principles in relation to the court's inherent jurisdiction to dismiss proceedings on the grounds of inordinate and inexcusable delay.

38. In circumstances where there is no cross appeal against the finding of the trial judge that Ms. Leech was guilty of inordinate and inexcusable delay, I will immediately move to consider the manner in which the trial judge applied the principles to which I have earlier referred when it came to his consideration of the balance of justice.

39. Having considered the submissions of the parties, I am firstly satisfied that the High Court judge incorrectly drew an inference from the facts before him which cannot be sustained. He inferred from the fact that Ms. Leech had vigorously pursued her other actions and the mutual litigation history between the parties, that the newspaper could not reasonably have concluded that she did not intend to pursue the within proceedings.

40. The trial judge's conclusion is problematic in two respects. First, the facts from which he draws the aforementioned inference are equally if not more consistent with the opposite proposition. Why if Ms. Leech was intent on pursuing three unconnected cases against the same defendant did she leave one in abeyance? Obviously there is any number of reasons why a litigant in such circumstances might not prosecute one action. For example, they might pursue the strongest case first leaving the weaker one over for later consideration. For my part I find it difficult to understand how a defendant facing three claims from the same litigant is to understand that they should attach no relevance to the fact that while two of the cases against them are intently pursued the other is left in limbo for a period of six years without explanation. Here the three claims arose out of different sets of facts and it is not disputed that they are entirely unrelated. Thus, the outcome of the first and second actions could have no bearing on the likely success or otherwise of the third.

41. The second difficulty arises from the findings made by the trial judge when he considered the second leg of the *Primor* test. He concluded that Ms. Leech's delay could not be excused by reason of the fact that she was, during the relevant period, vigorously pursuing the 2004 and 2005 proceedings. He made clear in the course of his judgment that the actions were not dependant on each other and that in such circumstances her involvement in those proceedings could not be relied upon to excuse her inactivity in the within proceedings.

42. It is to be remembered that the third leg of the test in *Primor* requires a plaintiff to establish countervailing circumstances or something weighty to offset the court's finding that they were guilty of inordinate and inexcusable delay. If the existence of the 2004 and 2005 proceedings could not be relied upon to excuse Ms. Leech's delay under the second leg of the *Primor* test, how then could those unrelated and unconnected proceedings provide her with countervailing circumstances to be weighed in her favour for the purposes of the third leg of the *Primor* test?

43. Accordingly, insofar as the trial judge took into account, when weighing the balance of justice, the fact that the newspaper ought to have realised, from her conduct in relation to the 2004 and 2005 proceedings, that Ms. Leech was not dropping the within proceedings, I am satisfied that he erred in law.

44. For the same reason I am satisfied that insofar as he took into account what he described as the "nature and extent of the litigation relationship between the parties" when considering the balance of justice the trial judge made a further legal error. Having concluded that there was no connection between these proceedings and the 2004 and 2005 proceedings he should have excluded the same from this consideration when dealing with the balance of justice. The fact that the newspaper's solicitor, when dealing with a motion for judgment in all three sets of proceedings on a date in 2005, swore one composite affidavit in response to those motions, in my view provided no reasonable basis for the trial judge's conclusion that nine years later and eight years after the service by Ms. Leech of her first notice of trial the newspaper could not reasonably have concluded that she was uncommitted to the pursuit of her action.

Prejudice

45. Once there has been a finding of inordinate and inexcusable delay even modest prejudice may tip the scales of justice in favour of a defendant when it comes to a consideration of the balance of justice. (*See Stephens v. Paul Flynn Limited*). That being so the High Court judge was required to have regard to any prejudice which the newspaper was in a position to establish would likely arise by reason of the delay. While it was, in my view, open to the trial judge to attach modest or moderate weight to the specific prejudice sought to be relied upon by the defendant, I am satisfied that he erred in law when he effectively rejected it. First on the basis that the claim of prejudice alleged to flow from Mr. Fanning's death had been belatedly made and could in any event be satisfactorily

overcome by calling other witnesses and second by reference to the manner in which it was advanced. Further, I consider that he unfairly and incorrectly categorised the newspaper's evidence concerning prejudice as being no more than a solicitor's opinion that prejudice was inevitable.

46. It is clear that the trial judge was sceptical as to the prejudice alleged by the defendant arising out of Mr. Fanning's death because it had brought no application to dismiss the proceedings following his death in 2012 and also because it was only voiced in Mr. Coady's second affidavit.

47. It is true that if the newspaper thought it could not possibly defend the action because of Mr. Fanning's death it would probably have brought a motion to strike out the action on that basis. But that was not the case it sought to advance on the present application. It did not claim that it could not defend the action without Mr. Fanning or that his death alone warranted the dismissal of the proceedings. What it asserted was that it was less well placed to defend the action because of his death with the result that the Court should have regard to that prejudice as part of the overall circumstances when considering the balance of justice. Thus, I am satisfied that the trial judge erred in law when he relied upon the failure of the newspaper to bring a motion to dismiss the proceedings following Mr. Fanning's death as a reason to discount the prejudice alleged by the newspaper when considering the issue of the balance of justice.

48. Mr. Coady, albeit in his supplemental affidavit, set out the importance of Mr. Fanning as a witness in these proceedings. He referred to the fact that the newspaper would rely upon the *Reynolds* qualified privilege or "public interest" privilege defence. The newspaper intended to defend the claim by calling evidence to prove that the article was the result of responsible and fair reporting on a matter of public interest and that it had gone through a proper process of editorial control prior to publication. The public interest privilege defence required the newspaper to provide an evidential basis for its plea and Mr. Coady alleged that Mr. Fanning would have been a material witness in this regard and that his evidence would also have been important in the context of explaining the editorial process as it was at the time of the publication.

49. To my mind, it does not follow, as is to be inferred from the judgment of the trial judge that merely because the newspaper could call a different witness to give evidence concerning these matters that it would not have been in a stronger position to defend the claim if its editor was available to give evidence on its behalf. In libel actions against newspapers, the evidence of the editor is often considered critical to the defence of the action and their unavailability to give evidence due to delay on the part of a plaintiff in prosecuting their claim has on many occasions provided the basis for an application on the part of the newspaper to have proceedings dismissed.

50. In *Desmond*, the newspaper concerned, the Irish Mirror, claimed that it would be prejudiced by reason of the fact that due to the plaintiff's delay in pursuing his action the editor of the newspaper at the time of the allegedly libellous publication was unlikely to be available as a witness. He had left its employment, was residing in the U.K. and, according to the newspaper, was unlikely to co-operate in the defence of the proceedings. That argument was rejected by Kearns J. because he was satisfied that the article had been "lifted" from Magill magazine with the effect that the editor's evidence as to his editorial role at the time of the publication was unlikely to be of any import. However, it would appear to follow from his reasoning that had the article been authored by the newspaper's own staff he would probably have considered the unavailability of the editor prejudicial to the defendant's defence with the effect that it would have formed part of the overall circumstances to which he would have been obliged to have regard when considering the issue as to the balance of justice.

51. In *Desmond* the newspaper also argued that it was prejudiced by reason of the unavailability of the London based editor in chief of Mirror Titles at the time of publication. Kearns J. rejected that submission as he was satisfied that this witness had no editorial role regarding the content of the Irish Mirror and thus his unavailability as a witness would not prove prejudicial to the defence of the newspaper. Again, it is to be inferred from his judgment that had this witness had editorial control at the time of the publication his unavailability as a witness might have been considered prejudicial to the defendant.

52. The circumstances in *Desmond* are to be contrasted with those in the present case. It is perhaps of some significance that no notice to cross examine Mr. Coady concerning the prejudice alleged by him in his affidavit was served. Further, it was not disputed that Mr. Fanning would, if alive, have been a witness and that his evidence would have been material to the particular defence filed by the newspaper. That being so, the evidence of prejudice asserted in Mr. Coady's affidavit should have been objectively assessed by the trial judge. While he was entitled to adjust the weight that he might otherwise have attached to the prejudice alleged to arise by reason of Mr. Fanning's death on the basis that it was only referred to in Mr. Coady's supplemental affidavit, he was not entitled to wholly disregard it when he came to his consideration of the balance of justice. He was, in my view, unduly influenced by the omission of this claim to specific prejudice in Mr. Coady's first affidavit. Neither was he correct in law when he categorised the evidence of prejudice adduced on behalf of the newspaper as a solicitor's opinion that prejudice was inevitable.

53. I am also satisfied that the trial judge erred in law in concluding that the newspaper's claim of prejudice was not properly grounded. It will be remembered that Mr. Coady also claimed that the newspaper would be prejudiced by the fact that the authors of the article would find themselves giving evidence concerning who they had spoken to and what sources they consulted at the time they had authored the article some nine years earlier. That evidence was rejected by the trial judge on the basis that it was to be expected that these journalists would have sworn affidavits referring to their own lack of memory and recollection if they considered themselves prejudiced in the manner asserted by Mr. Coady. I regret to say that I disagree with the trial judge's conclusion that Mr. Coady's evidence could be rejected on that basis. If affidavits were to be required of potential witnesses stating that by reason of the passage of time they could no longer remember with clarity the circumstances in which they had compiled an article, it is unlikely that a newspaper would ever seek to have a libel action dismissed on the grounds of delay for fear that if unsuccessful on the application its substantive defence would be seriously imperilled by what had been deposed to in such affidavits.

54. There is then the issue of general prejudice to which, in my view, the trial judge should have directed his mind when it came to his consideration of the balance of justice. It is not necessary to rehearse the concerns expressed time and time again in the authorities to the effect that memories become dulled and distorted with time and that stale claims can become somewhat of a lottery in which the party with the greatest ability to give a skilful performance may win out where there are, as in the present case, disputed facts. The results may turn on the strength of presentation of individual witnesses. A jury being asked to make decisions not only on the credibility of witnesses but on what was or was not a matter of public interest ten years after the event occurred is likely to lead to a precarious result. It seems to me that a jury, because of its diversity and in particular the likely varying ages of its members, would have a particularly difficult task in fairly deciding the extent to which the public had an interest in any suspected link to the IRA of a burglary of the home of a political associate of the then Minister, Mr. Martin Cullen, a decision it would be required to make by reason of the public interest to privilege pleaded by the defendant. I am fully satisfied that a court should not condone the conduct of libel proceedings in a manner which that more than a decade after the events under scrutiny a jury should be asked to decide what was of public importance at that time. That would be, in my view, to put justice to the hazard.

55. For the aforementioned reasons I am satisfied that the trial judge erred in law when he discounted from his consideration the specific and general prejudice relied upon by the defendant in support of its application. He should have factored into his overall consideration of the balance of justice the likely less than optimum evidence available to the newspaper arising from Mr. Fanning's death and the likely difficulties to be faced by the journalists who authored this article nine years earlier. Clearly the newspaper's defence would best have been protected by the availability of Mr. Fanning and an earlier trial. While the political context relevant to the article could be given by somebody other than Mr. Fanning it is difficult to contest that it would best have been given by him. He should also have considered the difficulties faced by a jury fairly assessing a public interest defence ten years later.

Overall approach to delay

56. When the court comes to consider where the balance of justice lies following a finding of inordinate and inexcusable delay, it is required to have regard to the overall period of delay and the culpability of the parties for that delay.

57. Unlike many of the reported cases concerning inordinate and inexcusable delay, the pleadings in this action, which were commenced by plenary summons on the 27th April, 2005, were closed with commendable speed following which the first notice of trial was served in September, 2006, the year after publication of the article complained of. As is clear from the chronology set out earlier the newspaper's motion to dismiss the proceedings issued on the 1st September, 2014. That being so, in his assessment as to where the balance of justice lay, the trial judge was bound to consider the culpability of the parties in respect of any significant period of inactivity.

58. It is to be inferred from his judgment that the trial judge concluded that the newspaper had acquiesced in the delay insofar as he held that it ought to have realised that Ms. Leech was likely to proceed with her claim but yet made no complaint about it and did not issue a motion to dismiss the proceedings following Mr. Fanning's death. It would appear that the trial judge held this acquiescence against newspaper when he resolved the issue as to the balance of justice in favour of Ms. Leech. In doing so I fear that he erred in law.

59. Ms. Leech made a tactical decision to postpone these proceedings for reasons which, as already discussed, do not withstand scrutiny. The authorities make clear that a plaintiff who chooses to adopt such an approach without making their position known to the defendant bears the risk of being penalised for that delay. It is not disputed that she did not communicate her decision to the newspaper. Given that the defendant was not informed that the plaintiff had decided to park her case it can't be considered to have acquiesced in her delay.

60. In relatively equivalent circumstances in Desmond where the defendant had been kept in the dark while the plaintiff kept his options open Kearns J. held that after a gap of six years it was reasonable for the defendant to assume that the proceedings would not be progressing further. Concerning the inaction of the defendant he stated as follows

at p. 753 of his judgment:-

> "When considering any allegation of delay or acquiescence by the defendants, it [the court] will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiff's claim dismissed."

61. The judgment of the High Court in this case was delivered before the decision of this Court in *Millerick* which sets out how the court should assess any delay or inaction on the part of a defendant when it comes to consider the balance of justice. A defendant who does nothing to stimulate the action during a period of delay is not to have that fact held against them in the court's assessment. That can only happen if they acquiesce in the delay. For conduct to amount to acquiescence such that the defendant should be considered culpable in respect thereof, they must do something or take some positive step from which the plaintiff might reasonably infer that they remain willing to meet the case on its merits notwithstanding any delay that has occurred. To fail to bring an application to strike out the proceedings cannot be weighed in the balance against the defendant.

62. It would in my view be profoundly unjust if a defendant were to be penalised for taking no step to resurrect an action which, by reason of delay, it considers the plaintiff may never bring on for trial. The following is what I said on the issue in *Millerick* at paras. 37 and 38 of my judgment:-

> "…it is the plaintiff who commences legal proceedings and draws the defendant into the legal process. No defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise. In many cases the plaintiff has no valid claim and may be no mark for any award of costs that a defendant may obtain following a successful defence of the proceedings. Often times, a defendant's personal or professional reputation may be badly scarred regardless of having mounted a successful defence to the claim.
>
> Why should the defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise whither an die advance to trial?"

63. Unfortunately I am satisfied that the High Court judge erred in law when it came to his assessment of the culpability of the parties for the six year period of delay immediately prior to the issue of the defendants motion to dismiss the proceedings. As a matter of law, all of that period of delay had to be attributed to the plaintiff. It was not open to the trial judge to consider the newspaper culpable in respect of any inactivity or for its failure to issue a motion to dismiss the claim on the grounds of inordinate and inexcusable delay. The newspaper did not positively acquiesce in any of that delay. It had not been advised that Ms. Leech had made a tactical decision to suspend her claim until the conclusion of the 2004 and 2005 proceedings and neither did it take any step which might reasonably have reassured her that it was willing to meet her claim on the merits regardless of her delay.

Conclusion

64. For the reasons stated earlier in this judgment, I am satisfied that the trial judge made a number of legal errors when it came to his assessment of whether, in light of his finding of inordinate and inexcusable delay, the balance of justice favoured the dismissal of the proceedings or allowing them proceed. That being so his decision on the defendant's motion must be set aside. In those circumstances, balancing all of the considerations as they emerge from the conduct of and the interests of the parties as earlier referred to in this judgment in accordance with the principles set out above, I am satisfied that the interests of justice warrant the

dismissal of these proceedings. Accordingly, I would propose that Ms. Leech's claim be dismissed under the court's inherent jurisdiction on the grounds of delay.