THE HIGH COURT

[2017 No. 344 CA]

BETWEEN

PADDY GALLAGHER

PLAINTIFF

AND

P.W. SHAW & COMPANY LIMITED

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 31st day of July, 2018.

1. This is an appeal from an order of Her Honour Judge Flanagan made on 21st November, 2017 whereby she refused the defendant's application for an order pursuant to the Circuit Court Rules 2001, and in particular, O. 33, r. 5, dismissing the plaintiff's claim for want of prosecution and extending the time for the delivery of a statement of claim for a period of seven days.

2. The application was brought by way of notice of motion to the Circuit Court dated 3rd January, 2017.

3. The underlying proceedings arise out of an accident which befell the plaintiff on 19th August, 2003. They were instituted in the High Court but subsequently remitted to the Circuit Court by order made on 24th January, 2011.

4. The plaintiff purchased a ladder from the defendant hardware company. He had an accident while using it and pleads that the fall was caused by reason of its defective condition. A plenary summons was issued on 23rd December, 2003 – it was in the old short form, and predated the provisions and requirements of the Civil Liability and Courts Act 2004. The plenary summons was issued against P.W. Shaw Limited and was served on J.A. Shaw & Co. solicitors on 26th March, 2004.

5. By letter dated 29th March, 2004, the defendant solicitors acknowledged receipt of the plenary summons but did not at that time enter an appearance. They wrote that they had requested their client to let them have full details of the case "*so that the Plaintiff's case can progress and […] we will accept service of the Plenary Summons in the interim*". At this time correspondence was also taking place between the plaintiff's solicitor and the reputed supplier of the ladder, National Hardware. By letter of 14th April, 2004, the plaintiff's solicitor advised the defendant's solicitor that, having discussed the matter with counsel, *"it may well be the case that we may be able to re-issue proceedings against National Hardware to avoid difficulty from your Client's viewpoint"*. A further letter issued on 18th August, 2004 from the plaintiff's solicitor to the defendant's solicitor stating that nothing had been heard from the proposed other parties and requested that the plenary summons be returned with acceptance of service duly indorsed thereon. The defendant's solicitor wrote to the plaintiff's solicitor on 20th August, 2004 stating, *inter alia*, that:-

> *"I had not realised that we had the original Plenary Summons on file and on looking at the writ on today's date, it would appear that the title of the Defendant is incorrect as it should be PW Shaw & Company Limited, which is the correct title".*

He also indicated that the title could be amended by consent in the Central Office of the High Court. By letter of 8th September, 2004, the defendant's solicitor forwarded to the plaintiff's solicitor a copy of the certificate of incorporation of the defendant company (which specified the name of the company as "*P. W. Shaw and Company, Limited*"). He requested that the plaintiff amend the summons to correct the title of the defendant to "*PW Shaw & Co. Limited*". It was also confirmed that if it was intended to proceed under the plenary summons which had been served, a letter of consent to the amendment would be forthcoming.

6. By further letter dated 29th September, 2004, the solicitors for the plaintiff wrote a letter to a firm of solicitors acting on behalf of National Hardware Limited, advising that they would be joined as a "*co-defendant/third party*". By further letter of 6th October, 2004, J.A. Shaw & Co. Solicitors wrote to the plaintiff's solicitors advising them that while an insurance company had provided an indemnity to National Hardware it did not extend to P.W. Shaw & Co. Limited. They sought clarification as to whether the plaintiff had retained custody of the ladder as they wished to investigate the nature of any defect complained of and they further requested confirmation that the plaintiff's solicitors would proceed with the amendment to the summons. The insurance company which had now become involved on behalf of the suppliers of the ladder, advised the defendant's solicitors on 7th October, 2004 that they would not object to SGB Hardware Limited being named as defendant. This letter was forwarded to solicitors for the plaintiff on 18th October, 2004. It was therein confirmed that it was understood that SGB Hardware Limited traded under the title of National Hardware. The plaintiff's solicitors wrote on 19th October, 2004 stating that the ladder had been given to the manufacturers by the defendant and that nothing further had been heard from them. It appears that the ladder had been made available for inspection before the plaintiff's engineers had an opportunity to examine it. On 28th October, 2004, the solicitors for the defendant advised the solicitors for the plaintiff that the ladder would be returned and made available for inspection but, although they had understood SGB Hardware Limited traded under the name of National Hardware, this did not appear to be correct *"and they are in fact two separate Companies"*. It was suggested that SGB Hardware Limited appeared to be the supplier of the ladder to National Hardware Limited.

7. On 8th November, 2004, there was further correspondence from solicitors representing National Hardware.

8. Communication and correspondence continued throughout November, 2004 regarding the inspection of the ladder. The plaintiff's solicitor, frustrated with events, wrote to the solicitors for the defendant on 31st January, 2005 expressing unhappiness at a lack of communication from the insurers of the manufacturer of the ladder and stating that he would seek High Court orders against all parties to compel them to assist or comply with the request for the return of the ladder. By letter dated 31st January, 2005 to the solicitors representing National Hardware Limited, the plaintiff's solicitors once again sought the return of the ladder and correspondence continued in this vein for a period at least up to February, 2005. In the meantime, proceedings were neither issued nor served against the manufacturer or suppliers of the ladder.

9. By letter dated 29th March, 2005, solicitors for the defendant advised the plaintiff's solicitors that they had received confirmation that the ladder had been returned to their client and informed him that an engineering inspection was being arranged. By letter of 8th April, 2005, the solicitor for the plaintiff stated that they had no objection to such inspection taking place prior to the ladder being released.

10. Correspondence continued throughout May and June, 2005 in respect of the proposed joint inspection. This included correspondence from solicitors acting for a proposed third party concerning the inspection. Ultimately, a joint inspection took place on 18th July, 2005.

11. By letter of 20th July, 2005 the solicitors for the defendant notified the plaintiff's solicitor that the matter of rectification of the title of the plenary summons should be dealt with "*as it would appear that there will be other parties to be joined, either by the Plaintiff, or present Defendant*". By letter of 26th July, 2005, the plaintiff solicitors advised the defendant solicitors that a motion was to be served in relation to the joinder of "*co-plaintiffs"* and as soon as they heard from their town agents they would be in contact.

12. By letter of 3rd October, 2005, the solicitors for the defendant enclosed on a without prejudice basis, an engineer's report which they had received. Once again it was restated that the amendment had to be dealt with. A reminder was sent on 21st November, 2005. By letter dated 28th November, 2005, the plaintiff solicitors wrote to the solicitors for the defendant advising that "*the application to join a Third Party should be brought as quickly as possible*". He advised that he was still awaiting the report of the engineer. On 30th November, 2005, the defendant solicitors wrote to the plaintiff solicitors stating that they may have been at cross purposes because any application to join a third party would be made by the defendant but that could only be done when an application was made to amend the plenary summons. By letter of 5th December, 2005, the plaintiff's solicitor advised that he would keep the solicitors for the defendant apprised of the application to join co-defendants and any amendments required. A letter of reminder dated 6th February, 2006 was written by the solicitors for the defendant seeking confirmation that an application had been made to amend the title of the plenary summons and stating:-

> *"In the alternative, I can apply to Hibernian Insurance for a letter confirming that no issue will be made by them in regard to the title of the proceedings as issued, so that matters can progress."*

13. On 7th February, 2006, the plaintiff's solicitor advised the defendant's solicitor that the draft motion on file concerned a combined application to amend the proceedings and to join the third party but that he, the solicitor for the plaintiff, was awaiting further information before he could complete the application. He sought a letter from the defendant insurers confirming that no issue would be taken regarding the title of proceedings. A dilemma had arisen. This was explained by the solicitor for the defendant in a letter of 9th February, 2006 that in the event that it was necessary for the defendant P.W. Shaw & Company Limited to apply to join any other party, it would be open to such party to raise an issue as to the legal status of the defendant. It was for that reason that a request was made that the application to amend the title be brought. By further letter of 20th February, 2006, the solicitor for the defendant advised the plaintiff's solicitors that there was an urgency in progressing the application for amendment of the plenary summons. By letter of 28th February, 2006, the plaintiff's solicitors informed the defendant solicitors that they had received an amended motion from counsel and it would be brought before the court as quickly as possible.

14. Matters then went into abeyance for a number of months. By letter of 21st June, 2006, the defendant solicitors once again wrote in respect of the time limits. This appears to have spurred the plaintiff solicitors into action and by letter of 3rd July, 2006 they advised that they would have the motion issued without delay.

15. On 4th July, 2006 the defendant's solicitor stated his understanding that pursuant to recent discussions, the plaintiff solicitors would issue a new plenary summons against P.W. Shaw & Company Limited and the matter would progress on that basis. There was concern that a return date for the motion would not be obtained prior to the end of term and it was stressed that the limitation period expired on 18th August, 2006. The defendant solicitors stated it would be prudent to have a new plenary summons issued in the new format "*as now applicable*" (presumably referring to the new formal requirements under the provisions of the Civil Liability and Courts Act 2004).

16. However, this view was corrected by letter of 10th July, 2006, as the defendant solicitors acknowledged that the suggestion of issuing a new plenary summons might not be applicable given that the Personal Injuries Assessment Board procedure may have to be activated. He enclosed a letter of consent to the amendment of the plenary summons and also furnished a certified copy of the certificate of incorporation of the company.

17. Ultimately, on 20th July, 2006 an order was made by the Master of the High Court granting the plaintiff liberty to amend the summons to name the defendant by its correct title "*P W Shaw and Company Limited*". The order also dispensed with the requirement to re-serve the summons when amended.

18. In September, 2006 arrangements were made for medical examination and reporting.

19. The parties thereafter were in communication regarding medical examinations. By letter of 18th April, 2007, the defendant solicitors advised that in so far as their principals were concerned, liability (if any) rested with the suppliers and/or manufacturers of the ladder. It was commented that matters had advanced little as they had not yet received the amended plenary summons. They recorded their understanding that the various other defendants would be named in the proceedings. By letter dated 1st May, 2007 the plaintiff's solicitors stated that they were enclosing a copy of the amended summons, together with a copy of the Master's order. The defendant's solicitor in fact disputes that they received the letter at that time. Matters once again went into further abeyance until 11th February, 2008, when communication took place between the parties in relation to whether the summons as amended had been received. By letter of 12th February, 2008 the solicitors for the defendant advised:-

> *"In the circumstances, unless the Writ was served directly on P.W. Shaw & Co Limited, and which we understand is not the case, this claim would now appear to be Statute Barred.*
>
> *This is clearly the view of our principals also in the matter."*

The plaintiff solicitors replied on 13th February, 2008 expressing surprise and rejecting the contention that the claim was statute barred.

20. The next communication occurred over a year later. By letter of 15th July, 2009, when the solicitors for the plaintiff informed the defendant solicitors that they would apply to have the matter remitted to the Circuit Court to which reply was issued on 11th August, 2009 informing the plaintiff solicitors that they were not on record as no proceedings had been served on them. By letter of 1st October, 2009, the plaintiff solicitors protested that all appropriate proceedings had been served and they had complied with the order of the Master of the High Court. He relayed to the defendant solicitors the advice which he received from counsel to proceed to mark judgment against P.W. Shaw & Co Limited. Further communication from the defendant solicitors on 10th November, 2009 advised that they were not on record because the proceedings had never been served and that apart from the issue under the Statute of Limitations, the failure to serve the proceedings had wholly prejudiced the position of the defendant in relation to the joinder of any

relevant third party. Ultimately an order was made on 24th January, 2011 remitting the case to the Circuit Court and on 14th March, 2011, they were adopted into the Circuit Court by the County Registrar.

21. There is no evidence that anything further took place over the course of the next four years when by letter of 4th February, 2015 the plaintiff solicitors once again wrote to the solicitors for the defendant advising that further steps would be taken directly against the company.

22. A further year passed before the plaintiff solicitors wrote directly to the named defendant company on 18th February, 2016 signifying its intention to mark judgment in default of appearance and advised that if an appearance was not entered within fourteen days, application would be made to court. A reminder was sent on 31st March, 2016.

23. On 7th April, 2016, the solicitors who had been representing the interests of the defendant (but who declined to come on record up to that time on the basis that the amended proceedings had not been served upon them) wrote to the plaintiff's solicitors protesting that they had consistently and repeatedly advised that no proceedings had been served on them to enable them to enter an appearance on behalf of P.W. Shaw & Co. Limited. They sought a copy of pleadings (on a without prejudice basis) and advised that they would arrange to enter an appearance and deliver a defence accordingly. A copy of the pleadings was thereafter served on 8th April, 2016. It seems, however, that the pleadings as served were unamended and this was protested by the defendant solicitors by letter of 4th May, 2016. They also protested that the claim was now statute barred and that their client had been grossly prejudiced particularly with regard to their entitlement to join any relevant third party. It was also stated:-

> *"If it is indeed your intention to pursue this action please be good enough to amend the proceedings to reflect the proper title of the Defendant which ought to have occurred before any application was made to transfer to the jurisdiction of the Circuit Court and we are not sure how that issue can be overcome at this juncture."*

The correspondence was stated to be without prejudice to what was described as an inevitable plea of the statute and gross delay in prosecution of the claim.

24. By reply dated 5th May, 2016 the plaintiff's solicitors stated that the title had been corrected by way of application to the Master of High Court and a copy of that order was enclosed. Emphasis was placed on the order of the Master which dispensed with the requirement for re-service of the summons when amended.

25. It is not clear whether the proceedings were in fact formally amended and served thereafter. No such pleading was produced to the Court. In any event, the solicitors entered an appearance for the defendant on 26th July, 2016.

26. No further steps were taken by the plaintiff to prosecute the claim and ultimately, a notice of motion on this application was issued by the solicitors for the defendant (in fact naming P.W. Shaw & Company Limited as the defendant), seeking an order dismissing the plaintiff's claim for want of prosecution.

Grounding affidavit
27. This application is grounded upon the affidavit of Mr. Seamus Tunney, solicitor. He avers that there was an inordinate delay in the prosecution of the claim. It is now over thirteen years since the date of the accident and a number of different periods of delay have not been properly explained or excused including:-

> (i) A period of almost three years before application was made to the Master of the High Court to amend the proceedings.
>
> (ii) A delay of four years after amendment of the proceedings before bringing an application to remit.
>
> (iii) A delay of five years from the remittal of the proceedings in 2011 to the date of the application to dismiss.
>
> (iv) The failure to deliver the amended pleadings or a statement of claim after the matter was remitted to the Circuit Court and that since that time no document, whether the civil bill, personal injuries summons or statement of claim had been served on the defendant setting out the basis of the claim.

28. Mr. Tunney avers that no proceedings were ever issued against either the manufacturer or the supplier of the ladder and states that the defendant has been irreparably prejudiced in this regard. He also points out that that correspondence had indicated that proceedings would be issued by the plaintiff against a supplier.

29. Mr. Tunney avers that the correspondence demonstrates that there was a failure on the part of the plaintiff to progress the case by way of amendment of the title of the proceedings and/or joining the appropriate parties thereto and that the defendant had suffered prejudice in its defence by reason of the inordinate and inexcusable delay in the prosecution of the proceedings.

30. Mr. Tunney believes that there was no realistic prospect in pursuing the manufacturer or supplier of the alleged offending ladder at such remove, and this is due to the failure of the plaintiff to properly prosecute his claim. Other potential prejudice to which he points is the lack of ability to investigate and obtain documentary and other evidence, although this is not particularly specified. Mr. Tunney avers that the recollection of witnesses is also likely to be significantly diminished and thought it would be difficult to secure all evidence necessary to defend the action. However, again no allegation is detailed in relation to specific prejudice in this regard.

Replying affidavit
31. Mr. Gallagher has sworn an affidavit in reply on 19th May, 2017, in which he avers that it was the defendant's action and/or inaction which was the main cause of the delay. Further or in the alternative, he believes that the defendant acquiesced in any delay in the prosecution of the proceedings. The defendant was at all times aware of error in the original plenary summons. It was aware of the proceedings and the nature of the claim. He describes the defendant's solicitors as having been "*ghosting the proceedings for years claiming that the defendants were not served".* He describes that in frustration, his solicitor served copy pleadings, again, on 8th April, 2016 and that it was only on receipt of these papers that an appearance was entered on 27th June, 2016. Any misdescription of the defendant as P.W. Shaw Limited was corrected by order of the Master and that order directed that the amended summons did not require to be served. He exhibits the letter of 1st May, 2007 in this regard. Mr. Gallagher also avers that there was acquiescence by the defendant up to 12th February, 2008 and while he refers to the progression of the matter by way of application to the Circuit Court in January, 2011, no explanation is provided for the delay between 2008 and 2011.

32. He believes that no prejudice will be suffered by any parties given that engineering inspections have already taken place, as had a medical examination. Mr. Gallagher believes that the defendant has not acted in a *bona fide* manner and has continually thwarted the

plaintiff by hiding behind the name error in the original plenary summons and by the defendant's solicitor further maintaining that they were not on record for the defendant.

Order of the Circuit Court and further proceedings
33. Before dealing with the submissions of the parties, I note, in passing, that the order of Circuit Court made on 21st November, 2017 whereby the defendant's application was dismissed, describes the defendant company as "*P.W. Shaw Limited*" rather than "*P.W. Shaw & Co. Limited*", that is precisely the same title in the unamended plenary summons.

34. Following the order of the Circuit Court dismissing the defendant's application, a statement of claim was delivered on 27th November, 2017 particularising the allegations made against the defendant.

35. The defendant's notice of appeal which is dated 30th November, 2017 describes the defendant as "*P.W. Shaw & Company Limited*".

36. The title of the statement of claim reads "*The Circuit Court, Record No: 2011/78, Between, Paddy Gallagher, Plaintiff, And, by Order of the Court dated 20th July, 2006, P.W. SHAW AND COMPANY LIMITED, Defendant*".

37. It is not at all clear to me that a duly amended summons was ever issued and, if so, it was not produced in court.

Legal submissions
38. The parties rely on the decision of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where Hamilton C.J. stated at p. 475:-

> *"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:-*
>
> *(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
>
> *(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
>
> *(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;"*

39. Hamilton C.J. observed that in considering the balance of justice, the court is entitled to take into account a number of factors including the following:-

> *"(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."*

40. The defendant argues that recent decisions emphasise the requirement placed on the court to have due regard to obligations under the Constitution and Article 6 of the European Convention on Human Rights to ensure that litigation is conducted with reasonable expedition. In *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 at p. 294, Hardiman J. observed:-

> *"…following such cases as McMullen v. Ireland [ECHR 422 97/98. 29 July, 2004] and the European Convention on Human Rights Act, 2003 the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."*

41. It is submitted by the defendant that such caselaw dictates that although the overall tests and principles remain the same, there should be a recalibration of the criteria by reference to which the actions of the parties might be judged and that the courts should not excessively indulge delay. Reliance is placed particularly on decisions of Irvine J., *Granahan v. Mercury Engineering* [2015] IECA 58 and *Millerick v. Minister for Finance* [2016] IECA 206. In *Millerick*, Irvine J. determined that the delay between the date of the accident in March, 2007 and the defendant's application to dismiss the case for want of prosecution in March, 2015 was both inordinate and inexcusable and that the balance of justice favoured the dismissal of the action.

42. The defendant also places reliance in the decision of Baker J. in *O'Leary v. Turner* [2018] IEHC 7, where she stated that the approach of Irvine J. to inactivity by the defendant was not a departure from the principles espoused in authorities such as *Primor*. Baker J. stated that it was a reiteration of the authorities to the effect that such conduct is only relevant if the defendant is in some way culpable for the delay, is guilty of conduct which might be considered to amount to positive acquiescence in delay or takes steps to involve the plaintiff in incurring additional costs.

43. The defendant submits that it ought to be entitled to close its file and assume that the plaintiff had no intention of proceeding

after a delay of such magnitude bearing in mind the cumulative delay. Counsel for the defendant submits that it is not reasonable to expect his client to defend the claim at such remove. Further, given the contents of the statement of claim which has been delivered since the Circuit Court hearing, he submits that the defendant is being viewed as a producer of the ladder pursuant to the provisions of the Liability for Defective Products Act 1991 ("*the Act of 1991*"), which effectively imposes a strict liability. It is submitted that to defend such claim at this remove prejudices the defendant both in a general and specific sense. The Act of 1991 only permits a plaintiff to pursue a supplier of a product as if it were the producer in limited circumstances and as defined in s. 2(3). It is submitted that it is clear from the correspondence between the parties that the plaintiff was aware of the identity of the supplier and manufacturer of the ladder and that it is impermissible for the plaintiff to claim at this remove that the defendant is in fact the producer of the ladder.

44. In addition, it is contended that allegations of the plaintiff of breach of the implied contractual terms and representation are seemingly based on a conversation or representation made by an agent of the defendant. Paragraph 4 of the statement of claim pleads:-

> *"It was an express or alternatively an implied term of the said contract and, so as to show as was the fact that the Plaintiff relied upon the Defendant, its servants or agent's skill and knowledge, it was in the ordinary course of the Defendant's business to produce and supply such product and the said product so agreed to be supplied would be fit for the purpose for which it was required and would be of merchantable quality".*

The defendant maintains that this raises an issue as to whether a conversation perhaps took place between the plaintiff and employee of the defendant on the date the contract was entered into. This has not been specified or pleaded but in any event it is suggested that it is improbable, at this remove, that some person could be identified who might be in a position to recollect any conversation with the plaintiff and that this is an insurmountable prejudice. It must be said, however, that again the prejudice suggested here is on a general level without any indication that employees were approached and/or inquiries were made of employees in this regard.

45. Counsel for the defendant further submits that as a result of the delay and owing to the lapse of time and the failure to prosecute the claim despite copious correspondence, the defendant has been deprived of the opportunity to pursue the persons who manufactured and/or supplied the ladder. It is argued that no coherent explanation had been provided by the plaintiff for his failure to pursue the manufacturers or the suppliers or, at least to respond to numerous letters seeking an indication whether it was the intention to so do.

46. Finally, it is submitted that the plaintiff is not currently in a position to proceed with his claim and that it is likely that further significant delays will take place.

47. The defendant rejects any suggestion that there was conduct on its part or on the part of its legal team prejudicial to the plaintiff or that they in any way attempted to obstruct or delay the proceedings in a deliberate and wilful manner. It is submitted that any request made by the defendant that the title be amended was reasonable. The plaintiff has failed to provide any explanation as to why the other party or parties were not joined as co-defendants.

48. It is submitted that there is no reason why the plaintiff should have any difficulty amending the proceedings as requested. Further, if the plaintiff truly believed that the defendant was being intransigent, it was open to him at any time between 2004 and 2016 to bring an application for judgment in default of appearance – although it is submitted that any such judgment would be of no value unless the title of the defence was amended.

49. Ultimately, it is submitted that the defendant solicitors went beyond what was required of a defendant in a case such as this and that far from being obstructive, it was attempting to seek to assist and encourage the plaintiff to proceed. While an appearance had been entered on 26th July 2016, no explanation had been proffered as to why a statement of claim was not delivered for an additional period of one year and four months (until after the Circuit Court hearing in this matter). The delay in this case is in excess of thirteen years. In the light of such delay it is submitted there is an absolute duty to proceed with the greatest expedition.

Plaintiff's submissions

50. The plaintiff, on the other hand argues that the application should be refused. It is submitted that it is striking that after corresponding with the defendant's solicitors over the years, they did not enter an appearance until 26th July 2016, some thirteen years after the plenary summons was served on 26th March, 2004.

51. It is submitted that this was a complicated matter from the outset. There were several parties involved in relation to the manufacture, supply and distribution of the ladder. Every party had had the benefit of inspection of the ladder including joint inspections and the exchange of various reports. The ladder was never returned to the plaintiff having been inspected by the manufacturers, suppliers and distributors over a period of years and they had held the ladder indefinitely. It is alleged that while the solicitors for the defendant were maintaining that they had not received proceedings, the plaintiff relies in particular on letters sent to the defendant solicitors on 15th August, 2006 and 1st May, 2007 (enclosing the Master's order of 20th July, 2006) in which it stated that the title of the proceedings had been corrected in the said order and that the amended summons need not be re-served.

52. It is also pointed out that since 11th February, 2008 the defendant has maintained that the claim is statute barred. It is suggested that the solicitors for the defendant acted in bad faith. While the defendant might have been misdescribed in a minor and trifling manner by the omission of "*& Company*", nevertheless, the defendant was identifiable at 36 Pearse Street, Mullingar, Co. Westmeath. It is submitted that the defendant's attempt to hide behind the fact that the words "*& Company*" was absent, shows that they were not acting in good faith and that they were attempting to rely on a mere technicality.

53. It is further submitted that any delay is accounted for by the conduct, actions and acquiescence of the defendant's solicitors. Significant emphasis is placed on the fact that no demonstrable prejudice has been shown. The consent to late filing of an appearance was sought only in the teeth of a threat to mark judgment against P.W. Shaw & Co. Ltd. It is submitted that the defendant's solicitor had been *de facto* acting for that company for almost thirteen years.

54. With regard to the various potential other defendants, the plaintiff maintains that National Hardware and Mr. Frank Shaw, the owner of P.W. Shaw & Co. Ltd., stated to the plaintiff's solicitors that they would be dealing fully with the case.

55. Specific reliance is placed on the decision of Ó Dálaigh C.J. *in Dowd v. Kerry County Council* [1970] I.R. 27 at p. 42 as authority for the proposition that litigation is a two party operation and that the conduct of both parties must be assessed. The conduct of the defendant in this particular case, is, according to counsel's submissions, disingenuous, where the defendant seeks to hide behind a

mere technicality and at all times it was aware of the claim which it had to face. It is further argued that the defendant's conduct is culpable and contributed to any delay, with particular reference to the denial of the fact of service and the late entry of an appearance some thirteen years later. Forensic engineering reports are available to the defendant, the plaintiff was examined by a defendant's medical doctor and no prejudice can arise.

56. Emphasis is also placed on dicta of the Supreme Court in *Desmond v. M.G.N. Ltd.* [2009] 1 I.R. 737, wherein the court stated that the considerations listed in *Primor* as relevant in assessing where the balance of justice lies are not intended to be exhaustive in nature and the court must take into account particular matters which arise on the individual facts.

57. It is also submitted that in the event that the Court was to find that the delay was inordinate, any such delay is excusable in the light of the inter-party correspondence between the parties. Reliance is placed on *Tesco Ireland Limited v. McNeill* [2014] IEHC 367, that there is no universal benchmark and that each case should be decided on its own particular facts because of the unique circumstances of particular cases before the courts. The plaintiff places particular reliance on the manner in which the litigation was "*ghosted*" by the solicitors for the defendant for almost thirteen years. The plaintiff criticises the defendant for attempting to avail of an alleged confusion with regards to his its identity, when no such confusion existed.

58. It is argued that the conduct of a defendant may defeat an otherwise good application to have the case dismissed – see *Hogan v. Jones* [1994] 1 I.L.R.M. 512. Finally, it is submitted, that in any event the trial judge may make a determination on delay and prejudice on the basis of the evidence adduced at hearing.

Decision

59. In *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J. identified the principles applicable in an application such as this. She observed as follows at para. 18:-

> *"The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach."*

Irvine J. also observed that in considering where the balance of justice lay, the court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings, including matters such as delay or acquiescence on the part of the defendant and potential prejudice resulting from the delay. Relying on *dicta* of Fennelly J. in *Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510, Irvine J. observed that where delay has been found to be inordinate and inexcusable, the author of that delay will not be absolved of fault unless they can point to some countervailing circumstances as may be considered sufficient to cancel out the effect of such behaviour. She referenced the decision in *Cassidy v. The Provincialate* [2015] IECA 74 as authority for the proposition that in the presence of inordinate and inexcusable delay, while even marginal prejudice may justify the dismissal of proceedings, that is not to say that in the absence of proof of prejudice the proceedings will not be dismissed. The court is entitled to take into account all of the circumstances of the case, including the list of factors outlined by Hamilton C.J. in *Primor*.

60. Irvine J. also stated in the context of a suggestion that the defendant may have acquiesced by inaction (at para. 38):-

> *"Why should a 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 wither and die advance to a trial?"*

61. Every case must be approached on its own facts. In this case, there is little doubt that in the early days of these proceedings there was a degree of confusion and lack of clarity as to whether liability might attach to others, such as manufacturers or suppliers of the ladder. There was also a degree of confusion and doubt as to the correct title of the defendant. The copious correspondence which was exchanged not only between the parties to the proceedings but between the parties and others who have not been joined, evidences this. Any delay which may have ensued in the early stages, in my view, is clearly explicable during this period. I do not believe that any fault can be attributed to the plaintiff for any period of delay, certainly up to the time immediately prior to the expiration of the Statute of Limitations in July, 2006, and perhaps for a short period thereafter.

62. While the authorities dictate that the conduct of both parties must be examined, as Irvine J. observed in *Millerick*, the *dicta* of Fennelly J. in *Anglo Irish Beef Processors* makes it clear that it is the conduct of the litigation by the plaintiff that is the primary focus of attention. The defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another, and unless there is some behaviour on the part of the defendant that constitutes acquiescence in that delay, its silence or inactivity is not material. This only becomes relevant when it has been concluded that the delay is inordinate and inexcusable and, as Irvine J. stated, the question at that point in time is whether the defendant caused or contributed to the plaintiff's delay or in some manner gave the plaintiff to understand or led him to believe that the defendant was acquiescing in the delay. Irvine J. stated at para. 36 of *Millerick* as follows:-

> *"Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the plaintiff."*

63. It seems to me, however, that following this early period of three or maybe four years there were periods of delay which have remained unexplained. While it must be acknowledged that medical examinations were undertaken in 2006 and that engineering reports were obtained by various parties, the next and only step which appears to have been taken during the course of 2007 was when the plaintiff applied to the Master for an order amending the title of the proceedings. That occurred on 1st May, 2007.

64. Matters went into further abeyance until February, 2008, and in correspondence at that time and particularly by letter of 12th February, 2008, the defendant's solicitors raised an issue regarding the Statute of Limitations in the event that the summons had not been served directly.

65. A further seventeen months of inactivity passed, when by letter of 15th July, 2009, the plaintiff's solicitors informed the defendant's solicitors that they would apply to have the case remitted to the Circuit Court. The defendant's solicitors replied on 11th

August, 2009 informing the plaintiff's solicitors that they were not on record as no proceedings had been served. The plaintiff's solicitors protested by letter of 1st October, 2009 that all appropriate proceedings had been served and the order of the Master had been complied with. By letter of 10th November, 2009, the defendant solicitors reiterated that they were not on record for the defendant, and that quite apart from the issue under the Statute of Limitations, the failure to serve the proceedings had wholly prejudiced the defendant's position in so far as the potential joinder of any relevant third party was concerned.

66. Again inactivity descended and a further period in excess of twelve months elapsed before application was made to the Circuit Court on 24th January, 2011 to have the proceedings remitted to the Circuit Court. An order was made by the County Registrar remitting the proceedings to the Circuit Court on 14th March, 2011.

67. Further lengthy periods of inactivity ensued. There is no evidence that any step was taken for almost four years thereafter when the plaintiff solicitors, by letter of 4th February, 2015, advised that they would proceed directly against the company.

68. A further period of twelve months expired when the plaintiff's solicitors wrote directly to the defendant company on 18th February, 2016, signifying his intention to mark judgment in default. This prompted the solicitors for the defendant to come on record but it must be noted that by letter of 7th April, 2016 they protested that they had consistently and repeatedly advised that no proceedings had been served on them to enable them to enter an appearance on behalf of P.W. Shaw & Co. Limited. They sought a copy of the pleadings on a without prejudice basis at that time. An appearance was entered on 26th July, 2016.

69. Again, nothing further occurred from a procedural perspective until this notice of motion was issued by the solicitors for the defendant on 3rd January, 2017.

70. It appears to me that some of these periods of delay, on their own were excessive but more significantly when considered cumulatively, I must conclude that such constitutes inordinate delay. No excuse has been proffered by the plaintiff for many of the periods of inactivity save that the plaintiff essentially argues that there was fault on the part of the defendant's solicitors who did not enter an appearance for in excess of twelve years after the plenary summons was served and that an issue was being raised regarding the title of proceedings. In my view, to apportion blame to the defendant's solicitors for delay is not well founded in circumstances where it had been repeatedly made clear by them that the title of the company was incorrectly described and that this misdescription may have an effect on the ability of the defendant company to bring third party proceedings. I do not believe that any conduct on the part of the defendant during many of the lengthy periods of inactivity described can or should be categorised as being of a blameworthy nature.

71. I do not accept that the defendant's solicitors were "ghosting" in the background for a period of in excess of thirteen years. They made their position quite clear early on and it seems to me that if the plaintiff was concerned about the attitude being taken by the defendant, this could have been addressed many years previously, by way of motion, application or reconstitution of proceedings. Apart from instituting and serving the plenary summons, seeking an order amending the title, and then several years later remitting the case to the Circuit Court, no further procedural step was taken until the defendants entered an appearance on 26th July, 2016 and the application now under consideration was brought on 3rd January, 2017.

72. To suggest that the defendant must accept blame, be it equal or otherwise, for the delay because of acquiescence or inaction on its part, in my view, does not stand up to scrutiny. Adopting and adapting *dicta* of Irvine J., referred to above, given such lengthy periods of delay I do not think it was unreasonable for the defendant to conclude that the case was not and would not be progressed in any realistic fashion by the plaintiff. The defendant cannot be faulted for failing to stir the plaintiff into action in proceedings that may have financial and cost implications for them. In my view, the delay on the part of the plaintiff cannot be excused or minimised on this basis. Further, I do not accept that on the facts and the evidence that there was any representation made by the defendant that they would be dealing with the case on behalf of the suppliers or others on 6th October, 2004 such as excuses the delay. In my view this is not borne out by the correspondence. Even if that is the case, any such representation is one which is stated to have been made many years ago and cannot explain the lengthy delays in the progression of the case. In my view, the delay in this case over a period of at least ten years when cumulatively considered is inordinate and inexcusable.

73. Having concluded that the delay in this case is both inordinate and inexcusable, I must consider where the balance of justice lies. While the plaintiff and defendant may have the benefit of early engineering and medical reviews, in my view, the defendant is correct in its submission that the delay is such as may have, and indeed most likely will have deprived them of the opportunity to consider the joinder of potential third parties at this remove. Indeed, no realistic explanation has been given by the plaintiff for the failure to join those potential parties as co-defendants in the proceedings. It was clearly their right and entitlement not to do so, but it does not seem to me, that they can complain at this stage, of unfairness in the context of an argument advanced by the defendant that it may now have been deprived of the opportunity to join those parties. This is particularly so where it is now pleaded and alleged in the statement of claim delivered some fourteen years after the accident, that the defendant is a producer within the meaning of the Liability for Defective Products Act 1991.

74. The plaintiff submits that the defendant has been guilty of an element of bad faith in maintaining that the case against the company, not having been properly described initially, is statute barred. I do not accept that in the circumstances and on the facts there is any evidence of bad faith on the part of the defendant. This is particularly so when the solicitors for the defendant were pointing out from a very early stage that the company had been incorrectly described in the proceedings. Further, any such allegation of bad faith might have been urged at a much earlier stage. It does not explain the many periods of delay thereafter, during which period the plaintiff would have had ample opportunity to deal with such issue. Any response to a pleaded defence under the Statute of Limitations based on bad faith, should it have arisen, is one which could have been agitated and argued at a much earlier stage.

75. I do not accept that the defendant's solicitors were attempting to hide behind a mere technicality, or that they acted in bad faith. The facts point to the contrary conclusion. The defendant's solicitors had positively raised this point from an early stage. This must also be viewed in the context of the defendant's advisers having made it known that the defendant was contemplating joining the third party suppliers or manufacturers. I do not consider that it was unreasonable for the defendant and its advisers to insist on the company being correctly described in the proceedings, lest any potential third party might raise such an issue, which might be considered by the court of trial as being more than a mere technicality. When one breaks down the period of delay in this case, it is difficult to see that any conduct on the part of the defendant could be said to have caused or contributed to any significant periods of the delay including the period of delay prior to the transfer of the proceedings to the Circuit Court and for almost four years thereafter in which both parties were inactive. I can see nothing in the evidence to suggest that the defendant was responsible for such delay or that it acquiesced therein. To adopt Irvine J.'s comments, mere silence or inactivity on the defendant's part is insufficient because it does not communicate acceptance to the plaintiff.

76. Finally, the obligation of the Court, quite independently of the actions or inactions of the parties, to ensure that rights and

liabilities are determined within a reasonable time and in the context of the State's commitments under the European Convention of Human Rights, cannot be dismissed lightly in a case where the delay is of the magnitude experienced in this case.

77. In all the circumstances I must conclude that the delay in this case is inordinate and is inexcusable and in my view, the balance of justice favours its dismissal for the reasons outlined above. I must therefore allow the appeal.