Neutral Citation: [2013] IEHC 519

THE HIGH COURT

[1999 No. 10181 P.]

BETWEEN

CLARE MANOR HOTEL LIMITED

PLAINTIFF

AND

THE RIGHT HONOURABLE, THE LORD ALDERMAN AND BURGESSES OF DUBLIN

DEFENDANT

JUDGMENT of Ms. Justice Dunne delivered the 14th day of November 2013

The plaintiff in these proceedings claims damages for maladministration including negligence, negligent misrepresentation and abuse of the discretionary powers and breach of the statutory duties provided for in the Local Government (Planning and Development) Acts 1963 to 1992, exercised by the defendant touching and concerning the plaintiff's lands at the Clare Manor Hotel, Balgriffin, in the County of Dublin.

The background to this matter is set out to an extent in the Statement of Claim herein which was delivered on the 17th January, 2001. The plaintiff company operated a hotel in Balgriffin, Co. Dublin, until the hotel was destroyed by fire in November in 1980. The hotel stood on approximately 31 acres of land. On the 8th September, 1982, the defendant granted the plaintiff planning permission for the development of an 88 bedroom hotel upon the lands. The hotel was not built. Subsequently on the 17th December, 1986, the plaintiff applied to the defendant for planning permission for 156 houses upon the lands, which application bore the reference No. 2284/86. The zoning classification of the lands was Residential A1 at that time.

The application for planning permission was refused by the defendant on the 12th May, 1987 for the following reasons:-

> "1. The existing public sewerage system would not have sufficient capacity to facilitate the discharge of foul sewage from the proposed development. Furthermore, there are no sewers in existence at the outfall point from the site. Consequently the proposed development would be premature by reason of the said existing deficiency in the provision of sewerage facilities and the period within which such deficiency may reasonably be expected to be made good.
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> 2. The proposed development would be premature due to the fact that the Northern Fringe Route, from which it is intended to provide access to the proposed development, is not yet constructed.
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> 3. The proposed public open spaces, which are designed to serve the housing development, are located in backland locations at the rear of the proposed houses and would have little amenity or utility value in the housing layout. Consequently, the proposed housing layout is unacceptable and would be inconsistent with the proper planning and development of the area.
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> 4. The proposed carriageways in the housing layout would not be of sufficient width to serve a development on the scale proposed. Consequently, the proposed development would be substandard."

The refusal of planning permission was appealed to An Bord Pleanála and on the 41h November, 1987, An Bord Pleanála refused planning permission for the following reasons:-

> "1. The proposed development would be premature by reference to the following deficiencies in the provision of sewerage facilities and the period within which such deficiencies may reasonably be expected to be made good:
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> (a) The sewerage system in the area (Kilbarrack Road catchment area) does not have sufficient capacity to accommodate the foul sewage which would be generated by the proposed development, and
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> (b) There are no public sewers in existence at the sewage outfall point, indicated on the lodged plans and particulars, and the applicant has not demonstrated the ability to provide a connection from the said outfall point to the nearest, or any, public sewer.
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> 2. The proposed development is considered to be premature because the section of the North Fringe Route from which it is intended to provide access to the site has not yet been constructed and is indicated as a long term road proposal in the Dublin County Development Plan 1983."

The plaintiff has pleaded in the statement of claim that the reasons given by the defendant for the refusal of planning permission were not the true reasons and it was only following the public hearings of the Flood Tribunal that it became aware of same, namely, "the failure of the plaintiff to bribe the relevant officials and employees of the defendants and/or the corruption of such officials/employees by an interested third party".

Complaint is made by the plaintiff that on appeal to An Bord Pleanála, the defendant introduced two irrelevant matters, namely, that there was a proposal to rezone the lands as agricultural and secondly, the fact that the plaintiff had brought a claim for compensation arising from the refusal. It was pleaded that by introducing these points the defendant compounded the illegality and secured a decision from An Bord Pleanála on "non compensatable" grounds. The plaintiff went on to contend that the refusal of the defendant to grant planning permission, the proposal to rezone as agricultural and the conduct of the defendant's employees in connection with the plaintiffs appeal to An Bord Pleanála were all corrupt and that the truth of the situation "was fraudulently concealed from the plaintiff'.

It is pleaded by the plaintiff that subsequent to the refusal to grant planning permission and given that the plaintiffs land were the

subject of a proposal by the defendant to rezone them as "agricultural", the plaintiff on the 11th May, 1990, sold the land to the owners of the adjacent lands at agricultural land values. The purchaser or his successors in title subsequently obtained permission for the building of 750 houses on an enlarged site comprising the lands purchased together with the neighbour's lands.

The plaintiffs then solicitors, B. Garvan and Company, brought a motion before the High Court on the 16th December, 2002, seeking to come off record as the solicitor for the plaintiff. This was for a number of reasons involving funding, the complexity of the case, the requirement to restore the company to the register having been struck off and for health reasons relating to the solicitor. Rutherfords Solicitors carne on record on behalf of the plaintiff in January 2004, some time after the order had been made to restore the company to the register.

A notice for particulars dated the 8th April, 2004, was sent to the solicitors for the plaintiff by the law agent of the defendant. There was no reply to the notice for particulars at that stage.

Subsequently, on the 17th June, 2011, Neil M. Blaney and Company, Solicitors came on record on behalf of the plaintiff. A notice of intention to proceed was served on the 4th July, 2011. The present solicitors for the plaintiff delivered replies to the notice for particulars dated the 8th April, 2004 on the 19th August, 2011.

A notice of motion seeking judgment against the defendant was issued on behalf of the plaintiff on the 28th May, 2012 and was listed first hearing on the 30th July, 2012. By way of response a notice of motion was issued on the 26th June, 2012 on behalf of the defendant seeking the following relief:-

> 1. An order pursuant to the inherent jurisdiction of the court striking out or otherwise dismissing the plaintiff the plaintiffs claim on the grounds of inordinate and inexcusable delay on the part of the plaintiff in the commencement and prosecution of these proceedings which delay has prejudiced the defendants such that the balance of justice requires that the claim be dismissed.
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> 2. In the alternative, an order pursuant to the inherent jurisdiction of the court striking out or otherwise dismissing the plaintiffs claim in the interests of justice by reason of significant lapse of time since the accrual of the plaintiffs cause of action which give rise to substantial risk that it is not possible to have a fair trial and/or it would be contrary to fair procedures to require the defendant to defend the plaintiffs claim."
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> Further ancillary relief was also sought.

Affidavits

A number of affidavits were sworn in respect of the defendant's motion. The first of those was an affidavit of Leonora Mullett, solicitor of Dublin City Council Law Department. In the course of her affidavit, she said that there had been a significant delay of almost twelve years on the part of the plaintiff in commencing the proceedings and that there had been inordinate and inexcusable delay in the prosecution of the proceedings. She identified three periods during which there was substantial delay. The first of those occurred between the 4th November, 1987, when planning permission was refused by An Bord Pleanála and the 19th October, 1999, when the proceedings were issued. The second period was between the issue of the proceedings on the 12th October, 1999 and the delivery of the statement of claim on the 17th January, 2001. The third period occurred between the 17th January, 2001, and the 4th July, 2011, when a notice of intention to proceed was served on the defendant. There had previously been a notice of intention to proceed served on the 9th January, 2004, but no steps were taken after that by the plaintiff to progress the action. She also pointed out that there had been no letter before action sent by the plaintiff to the defendant prior to the 12th October, 1999 and she complained that the statement of claim was pleaded in very general terms and fell short of the requirements of the Rules of the Superior Courts that pleas of fraud and misrepresentation must be supported by detailed particulars.

She noted that the replies to the notice for particulars were not furnished for some seven years and six months after the request for particulars had been made. A period often and a half years had elapsed between the delivery of the plaintiff's statement of claim and the delivery of replies to particulars.

She added that the plaintiff's current solicitors wrote to the defendant's law agent on the 4th November, 2011, calling for the delivery of a defence. The law agent responded by letter dated the 20th January, 2012, indicating that he had instructions not to deliver a defence on the grounds that the defendant intended to issue a motion to strike out the plaintiffs claim on the grounds of inordinate and inexcusable delay.

Ms. Mullett complained that no explanation has ever been proffered on behalf of the plaintiff for the significant delay in issuing proceedings in the first instance or for the twelve year delay in the prosecution of the proceedings. She noted that the claim relates to planning decisions made on the plaintiffs planning application in May and November 1987. She said that having regard to the lapse of time between the final decision of An Bord Pleanála and the issue of the plenary summons some twelve years later, there was a greater onus on the plaintiff to move with expedition once the proceedings were issued. That did not occur.

Ms. Mullett went on to say that despite the statement of claim and the fact that a reply to the notice for particulars has now been received, the defendant is still not fully aware of the claim it has to meet or of the identities of the officials/employees who are alleged to have been involved in the alleged corrupt practices complained of by the plaintiff in these proceedings. She pointed to the difficulty for the defendant in carrying out appropriate inquiries about events alleged to have occurred some twenty four years ago. The position of the plaintiff appears to be, according to the replies to particulars, that the plaintiff intends to rely on the report of the Tribunal of inquiry into Planning Matters ("the Tribunal") to contend that corruption was widespread and systemic within the planning process. It does not appear that the plaintiff was able to identify any of the defendant's employees or officials as having engaged in any wrongdoing in respect of the planning application.

Ms. Mullett continued by saying that the defendant is prejudiced by the significant delays that have occurred. She pointed out that there would have to be witness testimony as to what was said and done in the period between 1987 and 1991 and she pointed out that this would create prejudice in that memories would have faded since the events in issue and that it was unlikely that by October 1999, when the proceedings were issued, anyone would have retained a detailed recollection of events in 1987 and that further prejudice has occurred in the twelve year period since the issue of the proceedings.

She noted that the plaintiff identified two individuals as being persons alleged to have introduced new matters on the appeal to An Bord Pleanála and they are identified by the plaintiff as persons whose conduct is alleged to be corrupt. I will refer to those individuals

by initial only. One of those was PC and the other was TG. PC was not employed in the defendant's Planning Department in 1987 but there was an individual of a similar name who was Assistant Principal Officer at that time. He retired in the late 1980s and died some years later. Reference was also made in para. 11 of the replies to particulars to another individual, the then Assistant County and City Manager, but only in the context of being the person in charge of the Water and Sewerage Department when the plaintiffs planning application was refused. No other persons have been identified by the plaintiff. Ms. Mullett noted the difficulty that has occurred given the death of PC and the fact that the then Assistant County and City Manager is very elderly. She did not indicate what the position of TG was. She added that there may be other persons who may be relevant witnesses to the plaintiffs claim in the period immediately following the refusal of planning permission and for a period thereafter, but the ability to locate and identify such witnesses is severely hampered by the passage of time. She added that it was extremely difficult for the defendant in those circumstances to carry out the appropriate inquiries about events which occurred some 24 years ago, to find planning files and to locate individuals who were involved on the planning application, but who have since retired. In the circumstances she went on to say that she believes that it is no longer possible to have a fair trial and that the plaintiff's action should be struck out.

An affidavit was sworn on behalf of the plaintiff by Gerard Bresnan on the 5th December, 2012. He is a director and shareholder in the plaintiff company. He noted that the plaintiff was in serious financial difficulties at the time of the decisions made by the defendant and An Bord Pleanála. He too was in similar difficulties. He pointed out that the lands in question, once sold, were granted planning permission by the defendant despite the fact that it was suggested during the course of the appeal to An Bord Pleanála that the lands were to be rezoned from residential A1 to agricultural zoning. He stated that he subsequently became aware of rumours of corrupt activity within the defendants planning department which culminated in the establishment of the Tribunal. He sought representation before the Tribunal, but this was not granted. He did however cooperate with the Tribunal as is evidenced by correspondence between the plaintiff and the Tribunal. He stated that it was only in the course of the setting up of the Tribunal that it became apparent to him that there might exist a cause of action against the defendant.

Mr. Bresnan went on to state that following the raising of the notice for particulars he had difficulties in obtaining files from the defendant and An Bord Pleanála and "conscious of the likelihood of the Tribunal of Inquiry into Certain Planning Matters, being in a position to deal with the matter of the plaintiffs complaints, the plaintiff decided to await the outcome of the findings of the Tribunal before seeking to advance matters". He expressed the view that it was the plaintiffs hope and expectation that the issue relating to the lands of the plaintiff would have been investigated by the Tribunal. He added that the defendant was aware from the plaintiff's statement of claim that the plaintiff was reliant on the workings of the Tribunal to ground its claim.

Over the course of time, he corresponded with the Tribunal in relation to the status of the issue of the plaintiff's lands. He stated that by letter dated the 20th September, 2010, he was made aware for the first time that the Tribunal would not be in a position to investigate the matter of his lands. He exhibited a letter of the 29th September, 2010, from the Tribunal in which it was stated, *inter alia*:-

> "I can confirm that the Tribunal has considered Mr. and Mrs. Bresnan's submission and have decided not to investigate the matters raised as it is satisfied they are outside its terms of reference.
>
> The Tribunal continues to retain the files and same will be returned subsequent to the publication of the final report."

He also referred to a letter of the 5th October, 2011, noting that as the Tribunal's inquiry work had now ceased "it will not be possible to investigate the matters to which you refer in your correspondence". Documentation was returned to Mr. Bresnan and it was pointed out that it was open to him to provide information to any other appropriate State agency. He said that as it was apparent there would be no further assistance to be obtained from the workings of the Tribunal he instructed the plaintiff's solicitors to proceed and to reply to the notice for particulars. Insofar as complaint was made as to three periods of delay, he stated that between the 24th November, 1987 until the 19th October, 1999, the plaintiff had no knowledge of the torts affecting it until the Tribunal was set up causing the plaintiff to believe it had been wronged. He explained the second period of delay between the issue of the plenary summons and the delivery of the statement of claim as being not inordinate and a period which reflected the complexity of the matter. The third period of delay was explained by the plaintiff's hope that the lands involved would be included in the Tribunal's terms of reference and he stated that this was a justifiable reason for the plaintiff staying its hand whilst it awaited the workings of the Tribunal. He pointed out that it had been open to the defendant at any time to bring an application seeking to have the plaintiffs dismissed, but this was not done. It was only subsequent to the request to lodge a defence that the defendant indicated it would apply to have the plaintiffs claim dismissed. There was some delay on the part of the defendant in making such application and indeed, the application was not issued until the plaintiff issued its motion for judgment in default of defence. Mr. Bresnan went on to explain that subsequent to the plaintiff being advised in September 2010, that the issue of the plaintiff's lands would not be investigated by the Tribunal, the plaintiff sought to advance the proceedings. In the expectation that a final report was imminent, the plaintiff did not reply to the defendant's particulars immediately. When it became clear that the report would not be available immediately, replies to particulars were furnished and the plaintiff sought to move matters on.

Mr. Bresnan noted that the final report of the Tribunal found that there had been "endemic and systematic corruption in the planning process". He added that he, his wife and the plaintiff were on the 5th June, 2012, awarded costs in respect of their cooperation with the Tribunal. Mr. Bresnan in his affidavit disagreed with the contention that the defendant would have difficulties in respect of facing a trial of the issues in this matter, by pointing out that the defendant was required under the terms of reference of the Tribunal to consider all aspects of the actions of its Planning Department for a greater period than that required by these proceedings. The defendant therefore was aware from the inception of the Tribunal that the actions of its Planning Department were to be the subject of intense scrutiny by the Tribunal.

He referred to correspondence by the plaintiff's then solicitor seeking documentation and asking for liberty to inspect files in the defendant's offices arising from the requirements of the Tribunal. It was indicated in September, 1999, that a large number of the documents sought had been furnished to the Tribunal.

Mr. Bresnan then dealt with the complaint to the effect that there had been no warning letter prior to the commencement of the proceedings. He stated that the plaintiff's representative, Mr. Paul McKay, Chartered Accountant, wrote to the defendant in 1994 outlining the plaintiffs concerns and seeking an explanation as to why, having indicated that the lands were to be rezoned to agricultural, that that rezoning was not proceeded with and that planning was subsequently granted for a development to a third party. In the course of the reply from Dublin Corporation of the 21st October, 1994, it was noted that the reason for the grant of the second application for permission for 700 houses granted on the 19th July, 1991, was as follows:-

> "The essential difference between the previous applications and that lodged by Gannon Homes, was that Gannon Homes proposed to provide the necessary services to enable the development to take place at their own expense, notwithstanding that additional financial conditions were attached to the decision to grant permission by the Corporation,

for improving roads in the vicinity of the area and other associated works."

In the course of that letter it was explained that there was to be construction of a surface water sewer, a number of foul sewers and additional water mains. Improvement works were to be carried out to a further sewer to the Santry Valley sewer. In addition the application provided for the construction of an extension of a road which was to be constructed as part of the development. These works were to be carried out by the developer or with a contribution of funds provided by the developer as part of the planning application.

Mr. Bresnan concluded his affidavit by saying that whilst it could be argued that the delay was inordinate, he expressed the belief that the delay was excusable by reason of the plaintiff having a reasonable expectation that the Tribunal could assist its claim by carrying out investigations which would be beyond the power of the plaintiff. He added that the delay was also excusable having regard to the nature of the plaintiffs claim alleging corruption and the fact that such cases are difficult to particularise, the complexity of the case, the acquiescence of the defendant in not taking any steps to advance the proceedings and on the basis that the defendant was aware that the plaintiff was reliant on the workings of the Tribunal to advance its case. He also said that no prejudice was attached to the defendant due to delay given that it was on notice for many years as to the issues. He concluded that even if it was found that there was delay which was inordinate and inexcusable, the balance of justice required that the proceedings would be allowed to be continued.

A replying affidavit was furnished by Carol McEntee, solicitor, who had taken over from Ms. Mullett in relation to this matter. She explained that, in relation to the complaint made by the plaintiff, Mr. Bresnan and his wife to the Tribunal in respect of the planning application, Mr. Scully of the defendant met with counsel for the Tribunal and furnished requested planning files to the Tribunal. Having furnished a further report to the Tribunal on the 15th October, 1998, no further communications were received from the Tribunal in relation to the matter.

Ms. McEntee makes the point that insofar as Mr. Bresnan explained in his affidavit that the reason for not responding to the notice for particulars in April 2004 was that the plaintiff decided to await the outcome of the findings of the Tribunal, the plaintiff did not inform the defendant of this decision. No further correspondence was received on behalf of the plaintiff from the date of service of the notice for particulars in April 2004 until the 17th June, 2011, when a notice of change of solicitors was received. At no stage was it ever indicated to the defendant that the plaintiff was unable to give detailed particulars of the defendant's alleged wrongdoing until the conclusion of the work of the Tribunal.

Ms. McEntee proceeded to explain the terms of reference of the Tribunal which were expanded at different stages. She noted that although the plaintiff sought to have the Tribunal inquire into the matters at issue in these proceedings, the Tribunal did not grant the plaintiff representation at the Tribunal or investigate its complaint or hear any evidence concerning the various planning applications. It was noted that the letter seeking to inquire of the Tribunal as to the status of the complaint was not sent until February 2010, some twelve years after the complaint was first made to the Tribunal and some seventeen months after the public hearings of the Tribunal had concluded. On that basis, Ms. McEntee stated that the letter from the Tribunal of the 29111 September, 2010, confirmed that the work of the Tribunal had no relevance whatsoever to the subject matter of these proceedings.

She took issue with the contention of Mr. Bresnan that the ten and a half year period of delay between January 2001 and July 2011, could be excused on the basis that the plaintiff had a genuine and realistic hope that its lands would be included in the Tribunal's terms of reference. She expressed the view that it was unnecessary and unreasonable of the plaintiff to await the findings of the Tribunal, given that the plaintiff's complaint was outside its terms of reference, that its inquiries did not touch upon or concern the complaints made in these proceedings and that the plaintiff never indicated to the defendant that it had made a decision to defer the proceedings to await the outcome of the Tribunal. She maintained that it was not possible to "park these proceedings for such a lengthy of period of time" given that the circumstances referred to in these proceedings occurred between 1987 and 1990 and predate the issue of the proceedings by a considerable period of time.

Ms. McEntee stated that the first notice the defendant had of the proceedings was upon service of the plenary summons twelve years after the events giving rise to the plaintiffs claim. She reiterated the point that the pleadings fall manifestly short of the requirements of the Rules of the Superior Courts to the effect that pleas of fraud and misrepresentation must be supported by detailed particulars in the statement of claim.

She referred to the correspondence of Mr. McKay and noted that in his letter of the 13th September, 1994, he simply queried why Gannon Homes had succeeded in obtaining planning permission. There was no indication that the plaintiff was contemplating an action against the defendant. Indeed, this is to some extent confirmed by Mr. Bresnan's averments to the effect that no action was contemplated against the defendant prior to the establishment of the Tribunal.

She then disputed the contention that the defendant had acquiesced in the delay. She noted that on the 16th December, 2002, when the application was made to restore the company to the register, the defendant requested the Court to dismiss the proceedings. That was not done at that time. Following the delivery of the notice for particulars asking for precise details of the corruption alleged, the defendant believed that the claim had been abandoned as the plaintiff failed to respond to that notice. The failure to make an application to strike out the proceedings at an earlier stage does not amount to acquiescence.

Ms. McEntee reiterated the view that there was prejudice attaching to the defendant due to the delay. She noted that the plaintiffs action is a highly speculative, unparticularised claim based on unsubstantiated allegations and that the proceedings were deliberately left in abeyance in the hope that something might emerge from the investigations of the Tribunal which could be used by the plaintiff to ground a claim for damages against the defendant. She noted that a number of people who did work in the Planning Department at the relevant time have since retired or died. Mr. Joe Scully to whom reference was made previously has been retired for many years. The Principal Officer in the Planning Department is deceased, as is the City and Chief Engineer in the Drainage Division and PC to whom reference was made previously. She referred to a number of other officials who have long since retired.

Submissions

I have had the benefit of oral and written submissions from both sides. In the course of submissions, Ms. Butler, S.C., on behalf of the defendant examined the background to this matter and noted that in 1982, the defendant granted permission to the plaintiff for the construction of a hotel on the lands. That permission was not implemented. Subsequently, permission was sought in 1986 for the construction of houses. That was refused for four stated reasons as set out above but relating principally to the inadequacy of existing sewage facilities in the area and the lack of access to the proposed development. The defendant's refusal to grant planning permission was appealed to An Bord Pleanála but refused for similar reasons. Those decisions were not challenged by the plaintiff at that stage by way of judicial review. It was noted by Ms. Butler that the plaintiff has not made any claim against An Bord Pleanála in these proceedings.

Ms. Butler highlighted the delay in these proceedings; twelve years from the decision of the defendant to refuse permission to the date of issue of the plenary summons; fifteen months between the plenary summons and the date of delivery of the statement of claim in January 2001; subsequently, there was a notice of intention to proceed in January 2004 which prompted the notice for particulars in April 2004 served by the defendant which was then followed by a seven and a half year delay until replies to those particulars were delivered in September 2011.

Ms. Butler stated that the receipt of the replies to particulars did not help matters as the replies to particulars relied on general allegations of widespread, systemic corruption. Very little additional information was provided and it was apparent that the plaintiff intended to rely on the report of the Mahon Tribunal which was then awaited. It was contended that the plaintiffs claim was vague, incomplete and did not state who, on the part of the defendant, is alleged to have been corrupt. She pointed out that the plaintiffs claim arises out of events alleged to have occurred some twenty four years ago.

Mr. Fogarty, S.C., on behalf of the plaintiff has stated that it was not until the public hearings of the Flood (later Mahon) Tribunal that the "true reasons" for the refusal of planning permission became known to the plaintiff. The plaintiff sought representation at the Tribunal in 1998 but was unsuccessful in this. The plaintiff was in correspondence with the Tribunal at that time. Ultimately, the plaintiff was advised by its legal advisers to await the conclusions of the Tribunal according to the plaintiff's legal submissions but I note that there is no averment to this effect by Mr. Bresnan. The point was made that there was always a possibility that the Tribunal would comment on the planning history of the lands in question. The plaintiff was informed subsequently in September 2010 that the matters concerning the plaintiff's planning permission would not be investigated as they were outside the terms of reference of the Tribunal. It was also indicated at that stage that the Tribunal would retain the plaintiff's files until the publication of its final report. Essentially it is the plaintiffs case that:

> (a) it was not aware of any alleged wrongdoing which might have affected the unsuccessful application for planning permission until the establishment of the Tribunal;
>
> (b) it was appropriate to await the conclusions of the Tribunal before actively pursuing the proceedings.

Discussion

Any discussion on an application to dismiss an action for want of prosecution must commence with the decision in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 in which Finlay P. set out a number of general principles to be applied, namely, that the Court should first inquire into whether delay on the part of the person seeking to proceed has been inordinate and, even if inordinate, whether it has been inexcusable. It was pointed out that the onus of establishing that the delay has been inordinate and inexcusable rests on the party seeking the dismissal of proceedings. The Court went on to hold that even where the delay has been both inordinate and inexcusable the Court must further proceed to exercise a judgment on whether in its discretion on the facts the balance of justice is in favour of or against the proceeding of the case.

In the course of submissions, counsel for the plaintiff and the defendant placed reliance on the well known decision in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in which Hamilton C.J. set out the principles to be followed in considering whether or not to dismiss an action for want of prosecution. The *Primor* principles are so well known that I do not think it is necessary to set them out here.

Ms. Butler on behalf of the defendant observed that the position of the plaintiff was to accept that the delay on the part of the plaintiff in this case was inordinate but to deny that the delay was inexcusable. Ms. Butler contended that the delay was not just inordinate but also inexcusable. She noted that it is contended on behalf of the plaintiff that, even if the delay was inordinate and inexcusable, the balance of justice favoured the plaintiff such that the action should not be dismissed for want of prosecution. Ms. Butler relied on the Supreme Court decision in the case of *McBrearty v. North Western Health Board* [2010] IESC 27. In the course of the judgment in that case, (Geoghegan J.) the Court came to the conclusion that there had not been inordinate and inexcusable delay. The Court went on to consider the inherent jurisdiction of the Court. At page 34 of the judgment it was stated:

> "Most legal practitioners regard, and in one sense, quite reasonably regard the judgment of Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 combined with the judgment in this court by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] I.R. 459 as the seminal case law on applications to dismiss for want of prosecution and particularly on the inherent jurisdiction of the court to grant such an order quite apart from breaches of time limits under the Rules of the Superior Courts. Those cases, however, have an older ancestry that is worth considering for the purposes of this appeal. There is also an important and partly overlapping jurisprudence deriving, in the main, from decisions of this court in *O'Domhnaill v. Merrick* [1984] I.R. 151, *Toal v. Duignan* (No.1) [1991] ILRM 135 and *Toal v. Duignan* (No. 2) ILRM 140. The importance of this latter jurisprudence is that even in a case where there has been no fault on the part of the plaintiff, the court, in certain circumstances, in the interest of justice may accede to a defendant's application to have the proceedings struck out."

Geoghegan J. then went on to refer to the decision of Finlay P. in *Rainsford* and to a number of principles set out by Finlay P. in the course of that judgment including the following:

> "Where a delay has not been both inordinate and inexcusable it would appear that there are no real grounds for dismissing the proceedings."

Having referred to the principles identified by Finlay P. in *Rainsford*, Geoghegan J. commented at page 39:

> "At this point, I think it appropriate to enter a caveat. It seems clear to me from later decisions to which I will be referring that the second of those four principles [set out above] is applicable only to what is technically an order dismissing proceedings for want of prosecution. It does not mean that, having regard to the provisions of the Constitution, the court does not have an inherent jurisdiction in certain special cases to hold that it would be unfair in all the circumstances to force a defendant to defend a case even if there has been no inexcusable delay on the part of the plaintiff. This distinction will become relevant later on in this judgment. Interestingly, major support for making that distinction comes from two later Supreme Court judgments of Finlay C.J. (as he then was)."

The appeal in that case involved three parties seeking to have the proceedings dismissed against them. One was the Health Board and the other two defendants were doctors. Geoghegan J. noted at page 45:

> "If I am right in my view that there was not inordinate and inexcusable delay then the action must be allowed to proceed unless it would be fundamentally unfair to any particular defendant because of his special circumstances to have to defend the action thereby legitimately invoking the inherent jurisdiction of the court which can be exercised even in the absence of fault on the part of the plaintiff."

He went on to consider that aspect of the matter and he concluded in that case that there was a difference between the position of the Health Board and that of the two doctors. He concluded that it would be fundamentally unfair that the two doctors should have to face a trial and stated at page 46:

> "Therefore, in my view, it is fundamentally unfair that they should have to face a trial and, it is a circumstance in which the court can exercise its inherent jurisdiction irrespective of the fact that there is not a finding of inordinate and inexcusable delay by the plaintiff."

He indicated that for that reason he did not have to consider "the balance of justice" issue but that if he did have to consider that issue he would have taken the view that the balance of justice favoured striking out the action as against those two defendants.

It is clear from the decision in that case that the Court's inherent jurisdiction does not depend on a finding of inordinate and inexcusable delay. In other words, the Court is not restricted to considering only the *Primor* principles.

The background to the McBrearty case concerned an alleged negligent mishap at the birth of the plaintiff in 1981 who suffered from severe cerebral palsy.

Proceedings were initiated some twenty years after his birth. In 2005 an application was made to join two doctors as co-defendants and, subsequently, they were joined as co-defendants. By that time a difficulty has arisen with the professional indemnity of the two doctors as they had been members of the Medical Defence Union and that body had ceased to provide indemnity for its members. That was a significant factor in the Court in that case relying on its inherent jurisdiction to strike out the plaintiffs proceedings as against those two doctors.

It is contended by the defendant that given the delay in commencing the proceedings, the plaintiff was obliged to conduct the proceedings expeditiously, citing as authority for this proposition a passage from the Supreme Court judgment in *Stephens v. Paul Flynn Limited* [2008] 4 I.R. 31, which was in turn referred to in the High Court judgment in that case, quoting from Lord Diplock in *Birkett v. James* [1978] AC 297 at page 322:

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

Geoghegan J. in *McBrearty* commented at page 25:

> "First of all, the learned High Court judge, correctly in my view, considered that in applying the 'inordinate and inexcusable delay' test, he was concerned in the main with what happened after the commencement of the proceedings and not with what happened before the commencement. I have used the expression 'in the main because as is clear from case law, it has been well established for a long time that even in cases where the court is only concerned with delay post the commencement of the proceedings, it will view the obligation of expedition after the commencement much more strictly when there has been a considerable lapse of time before the commencement. That is the approach the learned High Court judge expressly adopted and I believe it to be correct."

An application to dismiss proceedings for want of prosecution necessarily involves the Court in examining the conduct of the proceedings from the commencement of the proceedings. Therefore, the Court is involved in a consideration of delay from the time of the commencement of the proceedings. That does not mean, as is clear from the decisions referred to above, that pre commencement delay is not of some relevance. Its relevance derives from the fact that the longer the delay there is in the commencement of proceedings the more it is necessary to ensure that the proceedings, once issued, are prosecuted expeditiously.

Reference was then made to decisions in two further cases of relevance. The first of those is the decision in the case of *Comcast International Holdings Incorporated and Ors. v. Minister for Public Enterprise and Ors.* [2012] IESC 50 and the second case is the decision of the Supreme Court in the case of *Desmond v. MGN Limited* [2009] 1 I.R. 737. The plaintiff relies heavily on the Supreme Court decision in *Comcast* in seeking to argue that the delay in prosecuting these proceedings is excusable.

Having argued that pre-commencement delay should not be considered for the purpose of an application to dismiss for want of prosecution, it was submitted that while the delay in the prosecution of these proceedings is inordinate it is not inexcusable. The plaintiff seeks to excuse its delay by saying that it was awaiting the outcome of the inquiry being conducted by the Planning Tribunal. The point was made on behalf of the defendant that the plaintiff never notified it of that decision and it is contended that the plaintiff made a unilateral decision to "park" the proceedings for a period of more than seven years to await the final report of the Tribunal.

A number of points are relied on by the defendant in arguing that the plaintiffs delay is not excusable. They are as follows:

> The plaintiff's complaint was communicated to the Tribunal in February 1998. The complaint did not fall within the Tribunal's terms of reference. Although the Tribunal's terms of reference were expanded on four occasions in July 1998, October 2002, July 2003 and December 2004, they were not expanded so as to include the plaintiff's complaint.
>
> The complaint was not investigated by the Tribunal.
>
> The public sittings of the Tribunal concluded in September 2008.
>
> The plaintiff did not query the status of the complaint with the Tribunal until February 2010, some twelve years after the

> complaint had been made to the Tribunal by the plaintiff and seventeen months after the public hearings of the Tribunal had concluded.

The plaintiff, as I have said, relies very much on the decision in Comcast. That was a case in which the plaintiffs commenced proceedings in relation to the award of a mobile telephone licence which subsequently was the subject of inquiry by the Moriarty Tribunal. There was no issue but that the plaintiffs decided to await the outcome of that Tribunal. The High Court dismissed the proceedings for want of prosecution but Comcast's appeal was allowed by the Supreme Court. Denham C.J. at page 20 of her judgment noted as follows:

> "It is clear from the evidence before the High Court and this Court that the primary reason for the delay in the proceedings was the decision taken by Comcast and Persona to await the completion of the investigative section of the Tribunal into the granting of the licence.
>
> Usually a deliberate decision by a party to delay proceedings is not excusable, but this case is unique for a number of reasons. These reasons include the following:
>
> (i) The facts which form the foundation for the claim were being investigated by a Tribunal of Inquiry at the same time as the proceedings were contemplated and then commenced.
>
> (ii) The nature of the facts alleged are very serious and rare, i.e. a claim of corruption of a Minister of the Government.
>
> (iii) In addition, the facts in such proceedings are of their nature very difficult to expose and particularize.
>
> (iv) Also, the case is complex....

" Hardiman J. in his judgment in that case at page 4 stated:

> "I wish to emphasise that the present case is not unique simply because it is based on a claim that a Government Minister acted corruptly, that a public administrative process, designed to be 'impermeable to politics' was allegedly corrupted. The principal relevant unique factor is that Dail Eireann and the Taoiseach, decided to set up a Tribunal oflnquiry which itself decided to investigate the very matter which is at the heart of these proceedings, the award of the second mobile telephone licence. Its inquiry was estimated by the sole member of the Tribunal to be capable of concluding in a year: in fact it took thirteen times that long. But it produced evidence of a money trail which, if capable of being established in legal proceedings, would be extremely valuable to the plaintiffs which evidence (I am satisfied for reasons given below) would not have been available to them by any other means."

McKechnie J. in his judgment also concluded that the delay in that case was excusable (see paras. 62 and 63 of the judgment). A slightly different approach was taken by Clarke J. in that he concluded at page 28 as follows:

> "However, in assessing the extent to which delay might nonetheless be blameworthy it seems to me that the court must take into account the fact that, in the context of an allegation of covert wrongdoing where a public tribunal with significant powers of compellability was conducting a highly relevant investigation, it was, at least in general terms, reasonable to await developments. It is the failure to make sufficiently clear that that course of action was being adopted that leads me to conclude that the delay is not fully excusable...."

Clarke J. on the basis that the delay was not fully excusable in all the circumstances went on to consider the balance of justice and found that the balance of justice favoured the plaintiffs.

I now want to consider the decision in *Desmond v. MGN Limited* [2009] 1 I.R. 737. That case was relied on by the defendant in the course of submissions. The background to that case was that the plaintiff issued proceedings for libel in May 1998 in respect of certain articles published in the defendant's newspaper in January 1998. A defence was delivered by the defendant in February 1991 which included a plea of justification. No further steps were taken by the plaintiff until a letter was sent to the defendant in February 2005 indicating that a notice of intention to proceed would issue. The plaintiff claimed that the reason for the delay was that he had acted on legal advice not to progress the proceedings given that the matters to which the proceedings related formed a substantial part of the subject matter of the Moriarty Tribunal. The decision not to progress the proceedings was not communicated to the defendant who had taken the view that the proceedings were dormant. An application was brought by the defendant seeking an order striking out the proceedings on the grounds of inordinate and inexcusable delay. The defendant claimed that the defence would be seriously prejudiced for a number of reasons set out in the application. The High Court held that while there had been inordinate delay by the plaintiff the delay was excusable. It was further held that there was nothing to suggest that the balance of justice lay anywhere other than with the plaintiff in proceeding with the claim. The decision was appealed to the Supreme Court. The Supreme Court followed the decision in *Rainsford v. Limerick Corporation* and *Primor plc v. Stokes Kennedy Crowley* referred to above and held that the delay was inordinate and inexcusable, having regard to the requirement of the plaintiff in a libel action to progress his claim with real diligence and the unilateral decision by the plaintiff to stay the proceedings for an indeterminate period into the future, without at a very minimum notifying the defendant of his intention to do so, thereby depriving it of its entitlement, *inter alia*, to apply to the Court for appropriate relief and luring the defendant into the natural belief that the claim had been abandoned.

The Court went on to consider the balance of justice and found that it lay in favour of the plaintiff being permitted to proceed with the action, especially in light of the plea of justification.

A minority judgment was delivered by Kearns J., as he then was, and his observations in certain respects were not the subject of any disagreement. He stated, at page 752, as follows:

> "This is not a case where there has been any delay in issuing proceedings. Rather the delay has occurred because the plaintiff elected to park the proceedings pending the determination of certain matters by the Moriarty tribunal in a particular module of that tribunal's work. An approach whereby a litigant in a defamation action opts to await to see which way the ball hops in the course of a tribunal of inquiry is not proceeding with his litigation in the manner outlined in the citation from Keane C.J. In fact the approach adopted by the plaintiff is the complete antithesis of that to which Keane C.J. was referring and I see no distinction between a requirement to institute proceedings speedily and a requirement to prosecute them vigorously and expeditiously. To my mind the excuse offered is not a valid one for the delay which has occurred in this case, amounting to a period of approximately seven years from the inception of proceedings, a delay which must in tum be referenced to the fact that the matters about which complaint is made

occurred as far back as the late 80s or early 90s. I also see that period of delay as quite unacceptable having regard to the requirements of the Convention elaborated above. This is not a consideration to which the trial judge appears to have adverted.

Secondly, the defendant was never informed of the plaintiffs decision to "park" the case nor was it invited to acquiesce in it. The lengthy delay almost certainly gave them reasonable grounds to believe that this litigation had simply "gone away" and would never be brought before any court."

Macken J. in the course of her judgment made the following comments, at page 759:

"I would wholeheartedly endorse such an approach. If a plaintiff in defamation proceedings has decided, even, as here without any suggestion of *mala fides*, although the defendant suggests it was a wholly tactical decision, and even on the recommendation or advice of his legal advisors, not to progress his proceedings at least within the normal time limits prescribed, the delay thereby caused may not be excusable. 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."

Macken J. went on to comment in the same paragraph as follows:

"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 is interesting to contrast the approach in *Desmond* with that in *Comcast*.

The Supreme Court in *Comcast* concluded that the delay in that case was excusable and the Court was at pains to point out the unique circumstances of that case. The observations of McKechnie J. on the *Desmond* decision in his judgment in *Comcast* at paragraph 65 of his judgment are of relevance:

"The State defendants also rely on *Desmond* as indicating that the plaintiffs should have specifically informed them of their intention to hold off until the evidence unfolded at the Tribunal. In *Desmond*, on legal advice, the plaintiff took a deliberate decision to stand down from further progressing his action until the Moriarty Tribunal had investigated an aspect within its remit, relevant or at least potentially relevant, to such action. The Supreme Court held that his unilateral decision in this regard could not be excusatory of the inordinate delay which had occurred. At a very minimum it was considered that he should have notified the defendants of his intention so that they could decide how best to respond, if at all. Instead they were 'lulled, by the inactivity of the [plaintiff] into the natural belief that the claim was abandoned'.

The instant case is entirely distinguishable from *Desmond* in a number of respects, including the fact that evidence of a potentially decisive nature was always available to the plaintiff, being that of himself, but more significantly because the State defendant was never "lulled" as *MGN* was in *Desmond*. On the contrary, it was fully aware of the plaintiff's deep interest in the Moriarty Tribunal, as evidenced:

(i) by the fact that Persona's legal representatives were in attendance at all public sittings of the Tribunal; and

(ii) that when under cross-examination Mr. Tony Boyle, a director of the company, denied that he was using the Tribunal as a "kind of stalking horse" for his company's civil proceedings.

In fact, he asserted that such an action would proceed irrespective of the Tribunal's outcome."

It is also helpful to look at the short judgment of Fennelly J. where he deals with the case of *Desmond* at paragraph 3 of his judgment in *Comcast* in the following terms:

"3. The case of *Desmond v. M.G.N. Limited* [2009] 1 I.R. 737 indicates the approach that will normally by taken by this Court. The plaintiff issued proceedings for libel against a newspaper in January 1999. He took no further step until February 2005, when he notified the defendant that he would give notice of intention to proceed. The defendant issued a notice of motion seeking an order striking out the proceedings on the grounds of inordinate and inexcusable delay. The plaintiff claimed that the reason for the delay was that he had acted on legal advice not to progress theproceedings, given that the matters to which the proceedings related formed a substantial part of the subject matter of the Moriarty tribunal. This decision was not communicated to the defendant, who had taken the view that the proceedings were dormant.

4. Although the three members of the Court were divided on the question of where the balance of justice lay and the fact the action was for defamation in which a plea of justification had been filed was the determining consideration for the majority, the Court was unanimous in its view that the delay had been both inordinate and inexcusable. All three judges strongly criticised the plaintiff for 'failing to proceed with his action for his own tactical reasons ... without giving any notice of his intention to the defendant ...'(Geoghegan J page 741); for the fact that 'the defendant was never informed of the plaintiffs decision to 'park' the case nor was it invited to acquiesce in it.' (Kearns J page 752). Macken J said at page 759:

'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'."

Fennelly J. then went on to say that he would have been strongly disposed to dismiss the claims of the plaintiffs on the grounds of inordinate and inexcusable delay. However, he distinguished the *Comcast* case, for the reasons given by the other members of the Court, from the decision in *Desmond*. He identified three matters apparent from the other judgments in that case. They were as follows and I quote:

> "Firstly, the plaintiffs have convincingly argued that the material upon which they wish to found their claims was, of necessity and in its nature, such as was likely to be concealed and that it was most unlikely that any private litigant, who would not have the advantage of the investigate powers of the Moriarty Tribunal, would have been able to uncover it. ... Secondly, there is strong evidence to suggest that the defendants, in particular the representatives of the State, were fully aware and conscious of the fact that the plaintiffs were awaiting the investigations of the Tribunal, but took no action to compel the plaintiffs to proceed with their claims or to have them dismissed for want of prosecution. Thirdly, in the Persona case, the State Solicitor wrote a letter seeking delivery of a statement of claim, which must be read as consenting to the action proceeding to that stage."

I think it is fair to conclude from the judgments in the *Comcast* case that the decision in *Desmond* represents what could be described as the normal approach to be taken on an application such as this but there may be unique circumstances that would necessitate the Court departing from the normal approach.

I was also referred to the decision in the case of *Redmond v. Mr. Justice Fergus Flood and Ors.* [2012] IEHC 253. That case was decided after the decision in *Desmond v. MGN Limited* and subsequent to the decision in the High Court in *Comcast* but was decided before the decision of the Supreme Court in Comcast. For that reason, the decision in that case is not of great assistance in advancing the arguments before me.

In the course of his submissions, Mr. Fogarty on behalf of the plaintiff, highlighted a number of matters which he contended, made the delay on the part of the plaintiff in prosecuting these proceedings excusable. He relies heavily on the fact that the Tribunal was set up to inquire into alleged corruption in the planning process. He noted that while the plaintiff in this case was refused planning permission to build on the site, the subsequent purchaser obtained permission for a much larger development. When the Tribunal was set up, the plaintiff sought representation before the Tribunal and the Tribunal, by letter dated the 8th February, 1998, sought details of the plaintiff's complaint. The plaintiff co-operated with the Tribunal and in the meantime commenced these proceedings.

Mr. Fogarty relied heavily on the judgment of Denham C.J. in the *Comcast* case where she outlined the reasons for concluding that the circumstances that arose in that case were unique and made the delay excusable. Mr. Fogarty pointed out the similarities between the matters identified by Denham C.J. in *Comcast* and the facts of this case, namely:

> (i) The facts of the claim were potentially being investigated by the Flood Tribunal at the same time as the proceedings were contemplated and then commenced.
>
> (ii) The nature of the facts alleged are very serious and rare, that is, a claim of corruption.
>
> (iii) The facts in these proceedings are of their nature very difficult to expose and particularise and the case is complex.
>
> (iv) The plaintiff was not in a position to prosecute the claim in any wholly informed way until it was educated by the investigative hearings of the Tribunal.
>
> (v) During the time in issue/the delay, the defence took no active step to advance the case themselves and acquiesced in the plaintiffs delay, notwithstanding an early application by the defendant to have the matter dismissed.
>
> (vi) The parties, to one degree or another, were engaged in a monitoring of the Tribunal's investigation.
>
> (vii) Evidence will have been gathered because of the investigative hearings of the Tribunal.
>
> (viii) The defence was on notice of the plaintiffs approach.
>
> (ix) Because of the nature of the claims of corruption, where it is alleged that the wrongs in this case were concealed and covert, the approach was understandable. The Tribunal had the resources to investigate the wrongs claimed.
>
> (x) The investigations of the Tribunal have exposed information, facts, documents and witnesses of assistance to the plaintiff.

Mr. Fogarty in his submissions argued that the reasons cited by Denham C.J. in the *Comcast* case as to why that case was unique and therefore excusable were similar to those to be found in the present case.

Two further matters are relied on by the plaintiff, namely, the fact that the activities underlining the allegations were almost exclusively known only by the defendant who it is alleged took part in a deceitful cover up to prevent the discovery of the true facts and the fact that the High Court had refused previously to dismiss the plaintiff's proceedings.

I find it difficult to accept the plaintiff's contention that the defendant was on notice of the "plaintiff's approach". It is true to say that the plaintiff in the statement of claim indicated that it was only with the benefit of the public hearings of the Flood Tribunal that it became aware of "the true reasons for the refusal" but there is nothing in any averment on the part of the plaintiff to support the contention that the plaintiff communicated to the defendant that it had decided to await the outcome of the Tribunal's investigations. It was never suggested, for example, that the plaintiff was unable to give particulars of the defendant's alleged wrongdoing until the conclusion of the Tribunal's work.

It is also noteworthy that while the plaintiff made a complaint to the Tribunal at an early stage, and although the remit of the Tribunal was extended on a number of occasions during its course to allow for the investigation of all payments to politicians and local authority officials in connection with rezoning in Dublin, the Tribunal's terms of reference were not expanded to include the plaintiffs complaint. While the Tribunal made initial inquiries into the plaintiff's complaint, the plaintiff was not granted representation at the Tribunal and its complaint was not investigated. Although Mr. Bresnan in his affidavit commented that it was the plaintiffs hope and expectation that the issue of the plaintiff's lands would have been investigated by the Tribunal, this did not happen and it is difficult to understand how that hope and expectation could have been sustained with the passage of time. He stated that it was only by letter dated the 20th September, 2010 that he was first made aware that the Tribunal would not be in a position to investigate the matter of the lands. He exhibited a letter of the 29th September, 2010 from the Tribunal in which it was commented:

> "I can confirm that the Tribunal has considered Mr. and Mrs. Bresnan's submission and have decided not to investigate the matters raised as it is satisfied that they are outside its terms of reference."

Nonetheless, it is relevant to point out that at that stage, the public hearings of the Tribunal had already concluded. It is all the more difficult to understand how the plaintiff could have anticipated at that stage that there was any possibility that the Tribunal was going to embark on an investigation of the complaints of the plaintiff.

It seems to me that the circumstances in this case cannot be said to fall into the unique or exceptional circumstances described in the *Comcast* case. While the allegations involved in this case are allegations of a most serious nature, given that they involve an allegation of corruption and that such claims by their nature are "very difficult to expose and particularise", I cannot accept that the plaintiff in these proceedings was justified in taking no steps whatsoever in the proceedings, particularly in the period following the delivery of the notice for particulars on the 8th April, 2004 and June 2011 when a notice of change of solicitor was furnished followed by the replies to particulars of the 1st September, 2011. It has to be borne in mind that the last step in the proceedings by the plaintiff was the delivery of the statement of claim on the 1ih January, 2001, and while I accept that there were difficulties in relation to legal representation on the part of the plaintiff during which his former solicitors came off record, and relating to the necessity for the company to be restored to the register of companies, nevertheless there is a long period of time during which there was no communication whatsoever from the plaintiff to the defendant about the status of the proceedings and, more importantly, no steps taken in the proceedings.

To use the language that was used in the case of *Desmond v. MGN Limited*, it appears that the plaintiff took a unilateral decision to "park" the proceedings pending the outcome of the Tribunal's investigations.

It may well be that the plaintiff was entitled at the commencement of the Tribunal to hope that its complaint would be investigated by the Tribunal, which if that had occurred, would, no doubt, have been of considerable assistance to the plaintiff. It is the case that the plaintiff co-operated with the Tribunal and ultimately was awarded costs in that respect. However, there is no question that the plaintiff took part in any of the public hearings or that the subject of its complaint was discussed at any public hearing. It is without doubt that the Tribunal did not investigate its complaint. It is further the case that the plaintiff was not granted representation by the Tribunal. It has to be said that at the very latest, by the time the Tribunal concluded its public hearings in September 2008, any hope or expectation on the part of the plaintiff that the Tribunal would investigate complaint must have evaporated. Thus, by September 2008 at the very latest it must have been obvious to the plaintiff that no part of the Tribunal's investigation related to the plaintiff's former lands and accordingly, it is difficult to see what purpose there was in waiting for almost three further years before furnishing replies to the notice for particulars.

One of the differences between the facts of this case and those in *Comcast* is that following the conclusion of the Planning Tribunal, there appears to be little of evidential value that emerged in the final report of the Tribunal that can assist the plaintiff, given that its complaint was not investigated by the Tribunal. In the Comcast case the issues investigated in the relevant module of the Tribunal's inquiry were central to the claims of the parties in those proceedings. As McKechnie J. stated at paragraph 62 of his judgment in the *Comcast* case:

> "Given the extraordinary nature of the background to these proceedings and the almost undoubted fact that the plaintiffs could never have progressed their actions without drawing on the Tribunal, I believe that they were entitled to have regard to the activity of this body, within the timeframe under discussion in this case."

It could not be said of the plaintiff in these proceedings that the plaintiff could never have progressed its action without drawing on the Tribunal. It is true to say that the final report of the Tribunal found that there was "endemic and systematic corruption in the planning process" but that finding alone does not, in my view, justify the plaintiff in having waited so long for the Tribunal to conclude its inquiry which did not touch on the plaintiff's complaint in any way.

Accordingly, I have come to the view that this is not a case involving unique or exceptional circumstances such as those found to exist in *Comcast* and accordingly, the normal approach to the consideration of delay is appropriate. In the circumstances, the period of delay from the delivery of the statement of claim but particularly the period from the receipt of the notice for particulars to the delivery of replies to particulars is inordinate and inexcusable. This is all the more so bearing in mind the fact that these proceedings concern matters alleged to have occurred as long ago as 1987.

The balance of justice
It is now necessary to consider where the balance of justice lies in this case. The defendant relies on a number of matters in its submissions as to why it is said that the balance of justice warrants the dismissal of these proceedings. They are as follows:

> (1) The failure to furnish detailed particulars of the fraud and misrepresentation alleged despite the requirement contained in the Rules of the Superior Courts that a plaintiff making such allegations should set out detailed particulars thereof in their statement of claim.
>
> (2) There will be a requirement for oral evidence in this case given the likelihood that there will be no paper trail relating to allegations of bribery and corruption.
>
> (3) Former employees of the defendant will have difficulty in giving evidence as to events which occurred more than twenty six years ago.
>
> (4) There is a lack of information from the plaintiff as to the identity of those alleged to have been corrupted.
>
> (5) Two officials of the defendant alleged to have introduced "irrelevant" factors to An Bord Pleanála were identified by the plaintiff in the replies to particulars. One of those is now deceased. Reference is also made in replies to particulars to the then Assistant County Manager and City Manager who was in charge of the Water and Sewerage Department of the defendant, Mr. George Redmond, and it is pointed out that he is now very elderly and unlikely to give evidence on behalf of the defendant.
>
> (6) The passage of time is likely to have dimmed the recollection of the defendant's employees, thus impairing the quality of evidence to be given by them.
>
> (7) The defendant anticipates that it will not have witnesses available to it, given that a number of senior officials have retired, are very elderly and that two senior officers in the planning department are now deceased.

The defendant has also complained that the proceedings have reputational issues for the Council.

On the basis of the matters referred to above, it is contended that there is a substantial risk that it is not possible to have a fair trial of the issues between the parties or, in the alternative, that the delay is likely to cause prejudice to the defendant.

The plaintiff by way of response maintained that the defendant acquiesced in the delay. It was pointed out that the defendant in a letter dated the 17t August, 2011 consented to the extension of the time for delivery of replies to the particulars within a period of twenty one days from the date of that letter. That letter was a response to the receipt of the notice of change of solicitor together with a notice of intention to proceed. In fact, the letter also went on to enclose a copy of the notice of particulars served on the plaintiff on the 8th April, 2004. This notice of motion was subsequently issued on the 15th October, 2012 as pointed out previously.

It was contended on behalf of the plaintiff that the defendant had not shown that it would suffer prejudice if the case continued. Criticism was also made of the defendant for not progressing the matter. It was pointed out that the defendant took three years to raise particulars, having received the statement of claim, and that there was a delay of twelve years in bringing the application to dismiss the proceedings for want of prosecution. In addition, it was pointed out that no defence has been filed notwithstanding the delivery of the statement of claim in 2001. The plaintiff contends that there is no risk to a fair trial by reason of a delay.

It is also contended that the nature of the plaintiffs claim is such that there is a public interest in the case continuing being a case relating to maladministration claims in public office.

Discussion and decision on the balance of justice
In considering the balance of justice in this case, I think two questions of importance arise, namely, the issue of prejudice to the defendant and the question of whether there was any conduct on the part of the defendant which would preclude the Court from granting the reliefs sought.

There is no doubt that the allegations made against the defendant are of the utmost seriousness. There is an allegation that the refusal of planning permission was based on a failure to bribe officials and/or employees of the defendant and/or corruption of those officials and/or employees by third parties. This is the core of the plaintiff's complaint. The plaintiff's application for planning permission was finally refused by An Bord Pleanála in 1987. Very little information has been provided by the plaintiff in either the statement of claim or the replies to particulars as to the facts relied on by the plaintiff to support the allegations. It was pointed out on behalf of the plaintiff that the defendant still had some witnesses available to it and also had documents available relating to the planning applications at issue.

The defendant, on the other hand, says that the allegations against it are very broad and general and that the plaintiff has not named one employee/official who may be implicated in any wrongdoing.

The essence of the plaintiff's complaint is that it was refused planning permission for a development for a number of houses. The reasons given for that refusal, it is contended now, were not the true reasons. The lands were subsequently sold and planning permission was thereafter granted for a larger development on the lands. It was found by the Tribunal that there was corruption in the planning process. Accordingly, the plaintiff contends that the refusal of planning permission in the plaintiff's case, and the grant of permission to the subsequent owner of the lands, had to be corrupt. The plaintiff does not give any credence to the significant differences in the respective planning applications as explaining the different outcome.

The prejudice to the plaintiff in dismissing these proceedings is obvious. Such an order would bring to an end any hope of recovering damages for the wrongs alleged herein. The prejudice to the defendant is also clear to see. Three of its former officials who might have been of assistance to the defendant in the defence of these proceedings are now deceased. Another individual who might be a potential witness is Mr. George Redmond, then the Assistant County and City Manager of the defendant. He is very elderly and it is stated on behalf of the defendant, someone who is unlikely to give evidence on behalf of the defendant. Other senior officials have retired and are elderly.

The fact that the claim against the defendant has been set out in broad and general terms, and the failure of the plaintiff to identify with any clarity those officials/employees of the defendant who were alleged to have been bribed or corrupt, adds another layer of difficulty for the defendant in dealing with these proceeding. I accept that the passage of time since the events complained of is so great that even if the defendant can identify potential witnesses who may be of assistance to it, it is inevitable that the memories of any such witnesses as to what occurred in 1987 will undoubtedly have faded by the time of a trial.

It is also important to consider the question of the conduct of the defendant in the litigation. It was pointed out on behalf of the plaintiff that the defendant could at any stage have brought an application to dismiss the proceedings for want of prosecution but did not do so until after the service of the notice of intention to proceed and the delivery of replies to particulars. This is one of those cases where it seems to me that the defendant was entitled to take a view that the proceedings were dormant. There is nothing to suggest that the defendant should have been aware that the plaintiff proposed to await the outcome of the Tribunal before continuing with the proceedings. It is not unreasonable for a defendant in proceedings which have become dormant to take the view that the proceedings will not be re-activated. It is understandable that defendants faced with proceedings in which no steps have been taken for many, many years will be inclined to let "sleeping dogs lie". It does not seem to me that the defendant could in any sense be said to have acquiesced in the delay on the part of the plaintiff. I should add that I do not think the letter of the 17th August, 2011, in which the defendant consented to the extension of the time for delivery of replies to the particulars within a period of twenty one days from the date of that letter following the receipt of the notice of change of solicitors, amounts to acquiescence to the delay on the part of the plaintiff so as to preclude the defendant from seeking the relief sought herein.

In all the circumstances of this case I have come to the view that the balance of justice in this case favours the dismissal of the proceedings given the inordinate and inexcusable delay on the part of the plaintiff since the delivery of the statement of claim or, at the very least, following the receipt of the notice of particulars from the defendant. That delay has inevitably caused prejudice to the defendant. To use a phrase that has been used previously in some of the older cases on this topic, justice delayed is justice diminished.

In the light of this conclusion, it is not necessary to consider whether the proceedings should be dismissed on foot of the inherent jurisdiction of the court in the interests of justice.

Accordingly, I feel there is no option but to dismiss the proceedings.