THE HIGH COURT

[2014 No. 10735 P]

BETWEEN

RICHARD DINEEN

PLAINITFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED

(IN SPECIAL LIQUIDATION)

DEFENDANT

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 7th day of May, 2019.

1. By notice of motion dated 21st March, 2018, the defendant makes application to the court for an order pursuant to O. 27, r. 1 of the Rules of the Superior Courts:-

> (i) Dismissing the plaintiff's action for failure to deliver a statement of claim;
>
> (ii) In the alternative, an order pursuant to O. 122, r. 11 of the Rules of the Superior Courts dismissing the plaintiff's action for want of prosecution;
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> (iii) Further or in the alternative, an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay;
>
> (iv) In the alternative an order pursuant to the inherent jurisdiction of the court striking out the within proceedings on the basis that they amount to an abuse of the process and that they are *res judicata* or, alternatively are in breach of the rule in *Henderson v. Henderson*.

2. At the commencement of the hearing of the application, counsel for the defendant indicated that he would not be proceeding with the application insofar as it related to the striking out of proceedings on the grounds that they are *res judicata*.

3. The application is grounded upon the affidavit of Mr. Mark Traynor, solicitor for the defendant, sworn on the 21st March, 2018. The defendant was placed into special liquidation on the 7th February, 2013, pursuant to Ministerial order, S.I. 36 of 2013. Joint special liquidators were appointed. Pursuant to s. 6(2)(a) of the Irish Bank Resolution Corporation Act 2013, on the making of the special liquidation order, a stay was placed on any proceedings involving Irish Bank Resolution Corporation Limited ("*IBRC*") with no further proceedings being permitted to be issued without the permission of the court.

4. In November, 2014, the defendant was served with a notice of motion and affidavit by the plaintiff seeking permission of the court for leave to bring proceedings against the defendant. This was grounded on an affidavit sworn by Mr. Barry Sheehan, the plaintiff's then solicitor, sworn on the 10th December, 2014. Mr. Sheehan averred that in 2010 the defendant obtained judgment against the plaintiff for €21.3 million. The plaintiff consented to judgment in that sum. In those proceedings, the plaintiff's proposed cause of action was described as being an action in tort and for breach of contract arising out of certain events which occurred in and around January, 2009. It was stated, in particular, that the defendant had failed in its obligations to the plaintiff under the Markets in Financial Instruments Directive regarding a *'swap product'*. The plaintiff claims that he had suffered loss and damage in consequence of the defendants negligence and breach of duty, which damage included the fact that judgment had been entered against him. It was stated that he did not become aware that he had such a cause of action until he sought legal advice in recent times. The plaintiff had been a customer of the defendant who is the successor in title to Anglo Irish Bank Corporation Ltd. At para. 7 of Mr. Sheehan's affidavit he avers:-

> *"I say the said cause of action broadly relates to the failure on the part of the respondent to properly implement or apply the terms and compliance standards as laid down in the European Banking Industry law by the Markets and Financial Instruments Directive, which was transposed into Irish law on the 1st November 2007 by the Markets in Financial Instruments and Miscellaneous Provisions Act 2007. In relation to the inclusion of a swap product on their offer letter to the plaintiff in February 2009".*

Mr. Sheehan expressed concern that if the proceedings were not issued on or before the 31st December, 2014, that they may become statute barred. Of some note in this regard, is a letter which was exhibited to Mr. Sheehan's affidavit from the solicitors for the defendant which stated, *inter alia*, that from the information in their possession, Mr. Dineen had entered into two swaps with Anglo in 2007 and that therefore any cause of action which he may have had was now statute barred. They disputed that the knowledge obtained by the plaintiff was of recent origin and referred to correspondence which they had received from previous solicitors for Mr. Dineen in 2012 in relation to an allegation of potential mis-selling. Indeed, in a letter of 17th December, 2014, Mr. Sheehan advised Messrs A&L Goodbody, solicitors for the defendant, that at the time he swore the affidavit he was unaware that his client had been represented by previous solicitors. His client was out of the jurisdiction at that time. A letter from the plaintiff's former solicitors dated 26th November, 2012, directed to the secretary of IBRC, referred specifically to the swap derivative agreements which had been entered into in March, 2007 and November, 2007. Queries were raised as to whether appropriate inquiries had been conducted by the bank to establish the suitability of these derivative products for the plaintiff.

5. In the events which transpired, leave of the court was obtained and a plenary summons issued on the 19th December, 2014 in which the plaintiff claimed damages for negligence, breach of contract, breach of duty, breach of statutory duty and misrepresentation, and recision of and restitution of any payments made pursuant to any contract between the plaintiff and the defendant.

6. No statement of claim has been delivered to date.

7. Mr. Traynor, solicitor for the defendant, in an affidavit sworn 21st March, 2018, avers that despite correspondence the summons was not served on the defendant until the 17th December, 2015. By then a different firm of solicitors was acting for the plaintiff.

Service was effected a matter of days before the expiration of the time allowed for service under the Rules of the Superior Courts.

8. An appearance was entered on the 17th December, 2015 and the defendant called upon the plaintiff to deliver a statement of claim.

9. Mr. Traynor avers that, thereafter, as nothing further was heard from the plaintiff, he was instructed by his client to write to the plaintiff's advisors consenting to the late delivery of a statement of claim within 21 days and threatening a motion seeking to dismiss the claim for want of prosecution. He did so by letter of the 25th September, 2017, wherein it is stated:-

> *"We note that your client has not delivered a statement of claim within the period prescribed by the Rules of the Superior Courts. We hereby consent to the late delivery of your clients' statement of claim within 21 days from the date of this letter. If your client fails to deliver the statement of claim within this further 21-day period, we will without further notice to you issue a motion to dismiss your clients' claim for want of prosecution pursuant to O. 27, r. 1 A of the Rules of the Superior Courts 1986 as amended by the Rules of the Superior Courts (O. 27) (Amendment) Rules 2014 (SI 63 of 2004)".*

The within motion issued on 21st March, 2018.

10. The defendant contends that the plaintiff has been guilty of inordinate and inexcusable delay and highlights at least three periods of delay. The first is that between the accrual of the cause of action and the institution of the proceedings in December, 2014. A second period of delay occurred between the date of issuing of the plenary summons on the 9th December, 2014 and the date of its service on the 17th December, 2015. A third is identified as the period between the service of the summons on 17th December, 2015 and the bringing of this motion.

11. Mr. Traynor avers that the defendant has been seriously prejudiced as a result of the delay and that the passage of time makes it more difficult for the defendant to adduce evidence to rebut any assertions that may be made by the plaintiff. The issues between the parties, it is contended, are heavily reliant upon the evidence of witnesses as to fact and it is suggested that recollections will have diminished in the intervening 10 years. He states that no explanation for the delay was forthcoming prior to the issuing of the motion.

12. Mr. Traynor avers that the inherent prejudice to the defendant arises not only from the natural effect of the effluxion of time but that specific prejudice arises because witnesses have left the employment of the defendant. They may or may not be available to give evidence. Further, the plaintiff's loans were transferred to a financial asset management agency in 2010. Thus a period of seven years elapsed between any contact or correspondence in relation to the product, and the institution of the proceedings.

13. Mr. Traynor avers to his belief that the claims as articulated primarily in correspondence as a statement of claim has not yet been delivered, relate to borrowings with IBRC which were the subject of proceedings brought by Anglo Irish Bank, the defendants' predecessor in 2010 in which Mr Dineen was a co-defendant: *Anglo Irish Bank Corporation v. Richard Dineen, John Egan & Dineen & Egan Developments Ltd.*, Record No. 2010/1709S. Mr. Dineen's co-defendants contested the proceedings but Mr. Dineen consented to judgment. Mr. Traynor avers that the plaintiff was legally represented and no explanation had been furnished as to why the matters now raised could not have been raised as part of those proceedings, the defendant harbours suspicion that the plaintiff is attempting to reopen a judgment against him. The defendant therefore maintains that these proceedings constitute an unlawful collateral challenge and are an abuse of process. Reliance is placed on the decision in *Henderson v. Henderson* in this regard.

14. At para. 18, Mr. Traynor avers that:-

> *"Should the plaintiff deliver a statement of claim prior to the hearing of this motion, the defendant reserves its right to refer to same and, if necessary, file a supplemental affidavit in support of its application to have the proceedings struck out on the grounds of res judicata and/or the fact that they are in breach of the rule in Henderson v. Henderson".*

15. It emerged in the course of the hearing that, although not referred to in Mr. Traynor's affidavit, correspondence had been exchanged between the parties in December, 2015 and January, 2016. The defendant's solicitors in a letter of the 23rd December, 2015, wrote that they had been contacted by solicitors previously acting on behalf of the plaintiff and that it was clear from his letter that the solicitors acting for Mr. Dineen at the time of service of the proceedings did not have authority to effect service. It was suggested that service was not validly effected. The letter proceeded:-

> *"At the time that this firm entered an appearance in the Central Office, it was not aware of what had transpired and the fact that you did not have authority nor did you serve correctly IBRC. In those circumstances, we are considering with counsel the options to withdraw the appearance in this matter."*

16. It was also stated that plaintiff was now required to make an application to extend the time for service. The letter continued:-

> *"Please note that if this is not done, then our instructions are to take whatever steps are necessary to bring this matter before the court at the earliest opportunity and to ensure that the court is aware that your firm acted without authority in trying to effect service of the proceedings. We therefore call upon you and your client to confirm that the proceedings have not been served in accordance with the Rules of the Superior Courts and that you will be bringing an application to the court at the earliest opportunity".*

The solicitors for Mr. Dineen replied by letter dated 15th January, 2016, in which the necessity to apply for an extension of time for the service of the summons was contested, given that an appearance had been entered. It was stated that:-

> *"Should it be the case that you nonetheless require these offices to make the said application on behalf of our client, we shall also be required at this time to make an application to deem a copy of the summons as an original. Should this be required it is our view that same shall result in an unnecessary cost exercise and we shall be making an application to the court to fix you/your client and/or Mr. Sheehan with the costs of the application, should same be required. However, should you confirm that the application is required, we shall make the application at the next available opportunity".*

17. In a replying affidavit sworn on the 1st May, 2018, Mr. Dineen, avers that the proceedings arise in circumstances in which he had entered into a series of interest rate swap contracts as a result of the negligence, breach of duty and breach of contract on the part of the plaintiff. He describes how his previous solicitor had failed to serve the plenary summons and that he had been in dispute with him in relation to the payment of fees. The solicitor client relationship broke down and he avers to the difficulty he experienced in

obtaining his file. He engaged new legal representation and Mr. O'Neill served the plenary summons on 15th December, 2015. He avers that the affidavit of Mr. Traynor, perhaps unintentionally, gives a misleading impression of the attitude taken by the defendant; that it was keen to have the case disposed of as quickly as possible. He states that correspondence illustrates that the defendant's solicitors refused to accept that the proceedings had been validly served. The defendants did not communicate with his solicitor until 25th September, 2015, almost two years after entering an appearance, where for the first time proper service had been acknowledged. Mr. Dineen avers:-

> *"I say that when the 21 days specified in the aforementioned letter elapsed and I did not deliver a statement of claim, the defendant's solicitors made no immediate move to have my claim struck out and sent no further correspondence warning me or my solicitors. Rather, the defendants stayed entirely silent for a further six months or so before issuing this motion in March of this year. The above demonstrates, that to the extent that these proceedings have been prosecuted in an unduly leisurely manner, the defendant has acquiesced completely to that leisurely pace and is now claiming to have been prejudiced by delays which have made no attempts whatsoever to prevent other than a single letter sent nearly two years after entering an appearance to the proceedings".*

18. Mr. Dineen maintains the defendants made no attempt to bring the alleged prejudice to his attention in advance of the receipt of Mr. Traynor's affidavit and states that prejudice is not specifically identified. He contends that as there is no suggestion as to what the defendants intended date of liquidation is, there is no objective benchmark for determining whether this is a real factor in the assessment of such prejudice. Mr. Traynor makes no suggestion that any material witness has died or become infirm or is otherwise unable to give evidence. Reference to potential difficulty of recall is vague. He further maintains that as of the 25th September, 2017, the defendant was insufficiently concerned about prejudice arising from delays that it was willing to accept service the statement of claim and then delayed before making this application.

19. Referring to the additional grounds, based on *Henderson v. Henderson* and *res judicata*, Mr. Dineen states that these contentions dramatically escalate the gravity of the situation relative to what pertained in September, 2017. He believed the position to be that even he goes to the expense of delivering a statement of claim the defendant will continue to seek to have the claim struck out.

20. Mr. Dineen accepts that the defendant obtained judgment. He states that he has engaged litigation on a number of fronts. He has been in an ongoing dispute with a receiver appointed by the defendant in respect of his assets. He has been attempting to obtain information from the receiver, to seek to prevent the continuing mismanagement of his properties. He has given priority to the proceedings which have been instituted against the receiver. Further, he avers that Promontoria, which acquired his debts from the defendant has now stepped into its shoes and has commenced bankruptcy proceedings against him. Both he and his legal advisers have been put to considerable expense, effort and time in defending those proceedings, which, he avers, has compromised his ability to focus on the proceedings at hand. Due to what he described as his accountant's "*massive scale of negligence and breaches of duty, catastrophic losses have been suffered by me*" in the sale and management of the properties, he states at para. 18:-

> *"Bluntly, with Grant Thornton and Mr. Costello pressuring me to progress my proceedings against them and with Promontoria putting me through an even more stressful back – and – forth in the bankruptcy list, I have taken the defendant's lack of any ostensible desire to progress these proceedings that my scarce resources could and should be prioritised to dealing with my other legal problems. I believe and am advised that the lack of any engagement from the defendant and my extremely pressing situation rendered this decision entirely sensible".*

21. He further states that if the defendants had made "*reasonable efforts commensurate with the supposedly egregious prejudice that it now claims to have suffered*", he would at least have had the opportunity to rearrange and prioritise his scarce time and resources.

22. With regard to the issue of the application of the rule in *Henderson v. Henderson*, this presents a different challenge and he states that neither he nor his lawyers could have been aware of the defendant's wrongs against him when proceedings were taken against him. It was only in 2014 when he obtained a report from a London based derivatives expert, Mr. Sachdev, that he became fully aware of the wrongs which he alleges have been perpetrated against him. While not exhibiting the report of Mr. Sachdev, he summarises the advices he has received. Those advices refer to the alleged unsuitability of the swap transactions, an alleged breach of the Market in the Financial Instruments Directive and a breach by the Central Bank Code in relation to Investment Firms published pursuant to s. 117 of the Central Bank Act 1989. Had he been aware of the situation in 2009 or 2010 he would have counterclaimed against the defendant but he was not so aware. He therefore believes that the decision in *Henderson v. Henderson* is of no application to his claim. Should the defendant drop what he describes as its entirely unmeritorious and unreasonable application, Mr. Dineen states that he is willing to deliver a statement of claim with reasonable dispatch, although he further comments:-

> *"I can see no merit in doing so in circumstances in which the defendant contends that even if I am put to the time and expense of doing so, it will still seek to have my claim struck out regardless".*

23. In reply to Mr. Dineen, Mr. Traynor in an affidavit sworn on 30th May, 2018 avers that regardless of any dispute which the plaintiff may have had with his then solicitor, he, personally and at no cost, could have served the plenary summons or he could have made arrangements to effect service at a far earlier stage. Mr. Traynor describes the concerns raised in the letter of 23rd December, 2015, as a legitimate query in circumstances where the defendants had received a letter from the plaintiff's former solicitor raising issues as to whether his current solicitors had authority to serve proceedings on his behalf. While he also states that the plaintiff could have readily clarified that he had properly authorised Mr. O'Neill to serve the proceedings, Mr. Traynor fails to see the relevance of this to the plaintiff's delay in choosing not to deliver the statement of claim during such period. The fact that this legitimate query was raised did not in any way detract from the plaintiff's obligations to deliver the statement of claim.

24. Having been called upon to deliver a statement of claim, Mr. Traynor states that the plaintiff did not articulate to the defendants that he was busy with other litigation. He believes that in truth, the plaintiff has chosen not to prosecute these proceedings when it was entirely possible for him to do so. While the defendant apprehends that it could suffer prejudice it has not been in a position to positively claim particular prejudice until it is apprised of the allegations made against it. In light however, of the affidavit of the plaintiff, Mr. Traynor states that it is now clear that the case will turn, in part, on whether the defendant owed the plaintiff a duty to advise him on the swap product and associated risks. This claim will necessarily require the involvement of relevant personnel in IBRC, their understanding of the products and their interaction with the plaintiff. Those persons have since left the employment of IBRC. Mr. Traynor is unaware of their availability and states that in any event, "*the recollection of events dating back to 2007 has to be seriously questioned."*

25. Regarding *Henderson v. Henderson*, Mr. Traynor contends that the issue of the risks associated with the swap product was articulated on behalf of the defendants in proceedings in which Mr. Dineen was a co-defendant. He believes that the plaintiff is

essentially conceding that the claims now brought could have been ventilated by way of counterclaim in the earlier proceedings. Insofar as the plaintiff may have had a cause of action arising out of those facts, such facts were known to him and/or with reasonable diligence were ascertainable by him long before these proceedings were instituted and *"certainly during the course of the judgment proceedings*".

26. Mr. Traynor makes reference to an affidavit sworn by one of the co-defendants, Mr. John Egan, in which he expressed concerns about the swap transactions including the inadequacy of hedging and cover. Mr. Traynor states that it was quite clear from the affidavit of Mr. Egan in those proceedings that the defendants were aware of the complaint about insufficient hedging and of the risks associated with the swaps. He also states his belief that the expert report obtained in 2014 is most likely based on information which was obtained by previous solicitors through a data access request in November, 2012. Mr. Dineen, he states, has provided no explanation as to why these very same steps had not been taken at an earlier time.

27. When this application first came on for hearing before this court, an issue arose as to why the letter of 15th January, 2016 had not been brought to the attention of the court by the applicant. On that occasion the court was informed by the solicitors for the defendant that they had no record of receiving this letter, although it has not been maintained, they were not saying that the letter had not been sent, merely that they had no record of its receipt.

28. The application was adjourned to permit the parties to place all relevant correspondence before the court. On behalf of the plaintiff, Ms. Robinson swore an affidavit on 29th March, 2019, exhibiting the entirety of the communications between the parties and in particular the letter of the 15th January, 2016 to which no reply was received.

29. Mr. Traynor in an affidavit sworn on the 5th April, 2019 avers that when searches were conducted in his firm, the letter of the 15th January, 2016 was discovered; it had not been scanned to the electronic file as it ought to have been. Mr. Traynor candidly accepts that the letter of the 15th January 2016 was received by his firm, although he does make the point that Mr. Dineen did not exhibit this letter in his previous affidavit either. He suggests that the plaintiff did not place any reliance on this letter when he swore his replying affidavit but was now suggesting that he was awaiting a reply to this letter before advancing the proceedings. The contents of the letter provides evidence to the contrary i.e. the plaintiff would continue to rely on service already effected unless the defendant insisted that an application be made. The defendant never insisted on such an application and there was therefore no impediment to the plaintiff prosecuting the proceedings and no justification for not taking any further steps in the proceedings over the course of the next three and a half years.

Submissions

30. The defendant submits that there has been inordinate and inexcusable delay on the part of the plaintiff and that the balance of justice favours the dismissal of the proceedings. Considerable debate has taken place in relation to the nature and quality of the prejudice which ought to be established and as to whether inferential prejudice arises in the circumstances. The court has been referred to the decision of the Court of Appeal in *Cassidy v. The Provincilate* [2015] IECA 74, the decision in *Comcast v. Minister for Public Enterprise & Ors* [2012] IESC 50 and *Collins v. Minister of Justice, Equality and Law Reform* [2015] IECA 27. In addition, the court has been referred to the decision of Costello J. in *Finn Leyden v. Irish Bank Resolution Corporation Ltd*. (unreported, High Court, Costello J., 26th June, 2018) Court of Appeal in *Millerick v. Minister for Justice* [2016] IECA 206 and of Hogan J. in *Donnellan v. Westport Textiles Ltd & Ors* [2011] IEHC 11.

31. In Cassidy, the court considered differences between the *Primor* test and the *O'Domhnaill* test, the latter concerned with delay occurring between the time of the alleged wrongs and the institution of proceedings. In those circumstances, there is a greater onus on a moving party to establish culpable delay on the part of a plaintiff. At para. 34 of her judgment, Irvine J. observed as follows:-

> *"It is clear from the relevant case law that a defendant may be able to rely upon the O'Domhnaill jurisprudence where it might otherwise fail the Primor test due to its inability to establish culpable delay on the part of the plaintiff. For example, in a case of alleged sex abuse where for all of the period of delay a plaintiff may maintain that they lived under the dominion of their abuser, the defendant would be unlikely to succeed in a Primor application, particularly if the plaintiff had evidential support for the allegation regarding dominion. However, that defendant could nonetheless maintain that, regardless of the absence of any culpable delay on the plaintiff's behalf, they should not be required to defend the claim because the period of delay since the events complained was such that it was at real risk of an unfair trial or an unjust result".*

32. Later she observed:-

> *"Having reflected upon many of the authorities in relation to the "delay" jurisprudence, I am satisfied that the third leg of the Primor test, which obliges the defendant to prove that the balance of justice favours the dismissal of the claim, does not carry the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the O'Domhnaill test…*
>
> *36. While the O'Domhnaill test, i.e. is there a real risk of an unfair trial or an unjust result, is one of the factors which may be relied upon by a defendant in seeking to prove the third leg of the Primor test, the defendant relying on that test does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay. That this is so seems clear from the decision of Kearns J. in Stephens v. Flynn [2008] 4 I.R. 31 where he accepted that the defendant need only establish moderate prejudice arising from delay as justification for dismissing the proceedings on the third leg of the Primor test".*

33. At para. 38 of her judgment she stated:-

> *"Considering its jurisdiction having regard to the test in O'Domhnaill, a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result".*

34. Reliance is also placed by the defendant on the decision of Costello J. in *Finn Lyden*, There the cause of action was alleged to have arisen in December, 2006. The transaction in question concerned an investment in a fund promoted by Anglo Irish Bank Corporation Ltd. The plenary summons issued on the 13th December, 2012 and a statement of claim was not delivered until the 11th October, 2017 after a motion had issued. Costello J. concluded that the delay was inordinate. It was also inexcusable in that the only

reason offered for the delay was the plaintiff's unilateral decision which was not communicated to the defendant to await the outcome of other litigation in order to strengthen its position in the instant litigation. The balance of justice favoured the dismissal of the proceedings. Costello J. held that oral evidence would be required of events which occurred in 2006 and the credibility of witnesses would have to be assessed more than 12 years after the key events which were the subject of the litigation. The plaintiff was solely responsible for the delay and in the opinion of Costello J., the defendant had been prejudiced. She continued:-

> *"Had the trial taken place six or seven years earlier, as would have been perfectly possible had the plaintiff acted with reasonable expedition it is more likely that a trial judge would have been able to make a fair and accurate assessment of the testimony of the defendant's witnesses as to fact. The defendant did not unduly delay in issuing this motion, certainly not to the extent that would disentitle it to the reliefs sought".*

Costello J. also placed reliance on the fact that under O. 122 r. 11 regarding the defendants entitlement to issue the motion two years after the last step in the proceedings.

35. The delay was not excusable. Experts had been retained and there was no reason why steps which were taken from October through to January, 2017 could not have occurred in 2013. Costello J. stated:-

> *"No explanation has been forthcoming as to why this did not occur at this time save for the fact that he took a deliberate decision to await the outcome of litigation involving different funds promoted by Anglo Irish Bank Corporation Ltd".*

She continued at para. 26:-

> *"Relatively frequently, the courts face situations where there are multiple sets of proceedings raising similar or identical issues and the parties agree that one or more test cases will be progressed to trial, and, by the consent of the parties, the remaining cases will abide by the outcome of the test cases. This is an entirely sensible manner in which to conduct litigation and has the benefit of saving the resources of the parties and of the courts and ensuring that matters are not litigated which do not require to be determined by the courts. Central to such an approach is an agreement between all the parties to that procedure".*

36. Costello J. concluded that that is not what had occurred in this case and the plaintiff had for his own reasons and in order to obtain a perceived litigation advantage unilaterally decided to await the outcome of litigation involving other plaintiffs. Not alone did he not obtain the consent of the defendant to such an approach but he did not notify the defendant that he proposed to so act. Costello J. believed this to be critical and relied on *dicta* of Denham C.J. in *Comcast*, that a deliberate decision by a party to delay proceedings is usually not excusable. Costello J. concluded:-

> *"In assessing the balance of justice a court has a wider discretion than when simply considering whether the delay in the case is inordinate and the court can take into account the prejudice which may be cumulatively attributable to a delay both prior to and subsequent to the commencement of the proceedings (see Stevens v. Paul Flynn Ltd.)."*

She noted that the statement of claim which was delivered on the 11th October, 2017 in that case indicated that it was far from being a documents case. Significant oral testimony would be required. A defendant is not required to point to specific prejudice, such as the non – availability of a witness or the loss of documents in order to have the court conclude that the balance of justice would favour the dismissal of the proceedings and in this regard relied upon dicta of Irvine J. in *Carroll v. Seamus Kerrigan Ltd*. [2017] IECA 66. Costello J. stated:-

> *"In my judgment, even if all relevant witnesses are in fact available to the defendant if and when this action comes to trial, nonetheless, by reason of the passage of time, they will be required to give evidence in relation to events which occurred in 2006 and a court will be required to assess their truthfulness and the accuracy of their evidence after this very significant lapse of time. This fact to my mind means that the defendant has suffered a significant prejudice. There may be witnesses whose testimony may not be accepted by the trial judge as reliable where the result may have been otherwise if they had been given their evidence closer to the events, with potentially very great prejudice to the defendant".*

37. Mr. Leonard B.L. on behalf of the plaintiff submits that the delay in this case is not inordinate and that in any event it is excusable. He relies on *dicta* of the Court of Appeal in *Connolly Red Mills v. Torc Grain and Feed Ltd*. [2015] IECA 280, that one should look at the conduct of the party moving the application as well as quantifying the prejudice the delay has caused.

38. It is to be noted, however, that in that case a statement of claim had in fact been delivered and steps were taken in the proceedings by the defendant including the raising of a notice of particulars and the delivery of a defence. Thus, those periods were considered to amount to acquiescence on the part of the defendant and were considered as a factor weighing against the dismissal of the claim. Mr. Leonard B.L. submits there was in truth a gap of 22 months between the defendant's solicitors letter of the 18th December, 2015 expressing concerns about the validity of the plenary summons and further communication on the 25th September, 2017. He submits that this gap of 22 months would clearly amount to acquiescence as understood by Irvine J. Further, there must be a causal connection between the asserted prejudice and the delay in the proceedings. Counsel submits that the incidents of prejudice advanced by the defendant are entirely speculative and vague, and the defendant had not explained how the passage of time between the letter of the 25th September, 2017 and the issuing of the motion on the 30th April, 2018 had caused such prejudice. Reliance was also placed by him on the decision of Peart J. in *Governor and Company of the Bank of Ireland v. Kelly* [2017] IECA 288 at para. 52 where he states:-

> *"It must be said at the outset that the purpose of the jurisdiction which the Court has to strike out proceedings on the grounds of delay exists in order to prevent injustice in the form of an unfair trial arising from culpable and unexcused delay by the plaintiff, and as a deterrent to culpable delay by a plaintiff leading to injustice to the defendant. The matters referred to at (i) and (ii) make this clear. The jurisdiction does not exist so that some form of punishment can be inflicted upon a dilatory plaintiff as a mark of the Court's displeasure. In an ideal world no time limit prescribed by the rules of court for the taking of a step in proceedings by either a defendant or a plaintiff would be exceeded. Sadly, the ideal world is not the real world, and neither the most enthusiastic and energetic plaintiff nor the most resolute and determined defendant will for many reasons be able to adhere strictly to the prescribed periods. The flexibility with which the Courts will extend time upon being satisfied that there are good reasons for having filed to take a step within the permitted time ensures that a rigid application of such time limits as are prescribed do not themselves lead to injustice".*

39. Counsel also places particular emphasis on the failure of the defendant, as moving party to this application, to disclose to the court all relevant communications and correspondence including and in particular the letters of the 15th December, 2015 and 16th January, 2016.

40. Mr. Leonard B.L. submits that the rule in *Henderson v. Henderson* does not apply. He described a certain irony in the fact that the defendant had pleaded *res judicata* and the rule in *Henderson v. Henderson* without having seen the plaintiff's statement of claim. In any event the plaintiff had outlined a claim in the replying affidavit and accordingly it is submitted that the plea of res judicata or the application of the rule in *Henderson v. Henderson* are misconceived.

41. In the event that the court extends the time for the delivery of the statement of claim, it would be done so immediately. In fact, implicit in counsel's submissions is that the statement of claim has not been delivered partly because of the within motion, one of the grounds being based on the rule in *Henderson v. Henderson*. The impression which the court formed was that the statement of claim was not delivered lest it might provide some fuel for the application to strike out the proceedings on the grounds that it infringed the rule in *Henderson v. Henderson*.

Decision
42. While delay is alleged in the institution of these proceedings, it seems to me that the test applicable is that which was enunciated in *Primor*. It is clear, nevertheless, that where there has been pre-proceeding delay, any subsequent delays should be viewed through the prism of those delays, resulting in a greater onus being placed upon the plaintiff to expedite proceedings.

43. The *Primor* test involves a three stage analysis. The position was succinctly summarised by Irvine J. of the Court of Appeal in *Millerick v. Minister for Justice* as follows:-

> *"17. The principles which apply on an application brought to dismiss proceedings for inordinate and inexcusable delay are fully explored in the written submissions that have been delivered by the parties. The most oft cited decision is that of the Supreme Court in Primor plc v. Stokes Kennedy Crowley [1996] 2 I.R. 459 where guidance is given concerning the proper approach to be adopted by the court when met with such an application.*
>
> *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.*
>
> *19. In considering where the balance of justice lies 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 part of the defendant and the potential prejudice resulting from the delay."*

Is the delay inordinate?
44. A statement of claim has not yet been delivered. The application is thus being considered on the basis of the evidence and information contained in the affidavits and exhibits which describe the basis of the claim being maintained. It is therefore difficult to be precise as to when it is alleged that the cause of action accrued. On the plaintiff's account the cause of action may have accrued in either 2009 or 2010. On the information contained in the affidavit of Mr. Traynor, the cause of action may have accrued at an earlier date, perhaps in 2007. On the latter analysis, the case may be statute barred; if the cause of action accrued in 2009 or 2010 and if the applicable limitation period is six years and one could not state this confidently until the cause of action is fully pleaded in a statement of claim. This is reflected in the concerns expressed in the affidavit seeking the leave of the court to institute the proceedings. On any analysis a considerable period of years was permitted to elapse between the date upon which the cause of action is said to have accrued and the date of the institution of the proceedings. Thus, this is a case which may be described as having a late commencement. In my view this period must be taken into account to some degree in the assessment of whether, in the events which have transpired, the delay has been inordinate. The second period of delay consists of an almost 12 month lapse of time between the issuing of the summons and its service. Following the service of the summons, a period of over two years elapsed before this motion was brought. Apart from the initial application to court for liberty to institute proceedings and the issuing and service of the proceedings, no other step has been taken by the plaintiffs to progress the case.

45. The plaintiff suggests that the period of time to be considered is less than 22 months, being the period between the date of the issuing of the summons in December, 2015 and the date of the letter from the defendant's solicitors consenting to the late filing of the statement of claim in September, 2017. While there was some delay following receipt of that letter, it is submitted that such delay is not of great magnitude. It is therefore contended that the delay is not inordinate.

46. Although every case must depend on its own facts, I am satisfied that delay in this case is inordinate. A period of inactivity of almost two years, in the light of the late institution of the proceedings and against the background of a delay in the service of the proceedings of a period of almost 12 months, is inordinate. I consider this position to be so even disregarding the fact that since the issuing of the motion, the statement of claim has not yet been delivered.

Is the delay excusable?
47. It is therefore necessary to consider whether the delay is excusable. Before considering the period after the institution of the proceedings, it is to be observed that a significant reason advanced to the delay in the institution of the proceedings concerns the obtaining of a report in 2014. In my view, this cannot be successfully advanced to excuse the delay after the proceedings were issued. Mr. Dineen was in dispute with his former solicitor and this resulted in a delay in the service of proceedings. I accept the defendant's submission that there was little to prevent Mr. Dineen from serving the proceedings himself during that period. Even if this period of delay might be excused for that reason, different considerations arise in relation to the period of delay which ensued after the service of the proceedings. The plaintiff states that he was involved in litigation on a number of fronts and that his attention was focussed on such litigation, including proceedings brought against the receiver and his involvement in bankruptcy proceedings. A third reason which emerged during the course of the parties' submissions was stated to be the failure of the defendant to respond to the plaintiffs solicitors letter of January, 2016, querying whether an application was required to court in relation to the service of the proceedings. None of these reasons was ever expressed to the defendant prior to this application. Following the letter consenting to the late filing of the statement of claim, no explanation was given to the defendant to explain the delay. I must conclude, in the circumstances, that the delay, even allowing for portion of that period of delay to be excused by reason of the failure by the

defendant to respond to the plaintiff's solicitors letter of January, 2016. *Dicta* of Costello J. in *Finn Lyden*, it seems to me, is apposite in this regard. Although here there is no evidence that the plaintiff did not make an uncommunicated, deliberate decision not to pursue the proceedings in order to derive a litigious advantage, the failure to correspond or communicate with the defendant to explain the reasons for delay, seems to me to fall within the general parameters of what was discussed by Costello J. in *Finn Lyden* and by the Supreme Court in *Comcast*. But even if I am incorrect in this and that those cases are not analogous to the fact that a litigant may have ongoing litigation with other parties does not, it seems to me, in and of itself, excuse delay in the prosecution of proceedings at hand, unless it can be shown that those proceedings in some way impacted upon his or her ability to prosecute the within proceedings. The only reason advanced in this case as an excuse to explain such delay is that the plaintiff's attention was directed to the most pressing issue at any given time. Very little detail is given about the other proceedings, when they were instituted, court dates, or why they impacted on the plaintiff's ability to prepare and deliver a statement of claim. The plaintiff had his expert report since November, 2014. Counsel makes reference to what was thought to be the defendant's leisurely approach to the litigation and that the defendant itself delayed in dealing with the proceedings. I do not believe that, even if correct, this amounts to a lawful excuse to such delay. The excuses which have been proffered are general in nature. The fact that the defendant may have decided not to agitate proceedings does not, it seems to me, necessarily excuse the plaintiff's own failure to so prosecute them.

48. In the circumstances, I am satisfied that the delay on the part of the plaintiff is both inordinate and inexcusable.

The balance of justice

49. This therefore brings me to the third element of the test being a consideration of where the balance of justice lies. In *Collins* is to be recalled that Irvine J. stated that the first matter to be addressed by a court when considering where the balance of justice lies is the extent to which the defendant would likely be prejudiced if the proceedings were allowed to continue. At para. 107 Irvine J. observed as follows:-

> *"Of significant relevance to that issue must be the nature of the claim being advanced by the plaintiff in the proceedings."*

In *Collins*, the court was satisfied that the defendants had established that they would be significantly prejudiced in their ability to defend the claims if the action had been allowed to proceed, particularly in the light of the death of a potential medical witness.

50. Here, it is submitted that the court is entitled to take into account what might be described as general prejudice, namely the potential unavailability of witnesses and the dimming of their memories due to the passage of time. In *Reynolds and Sons Limited v. ACC Bank Plc & Ors* [2016] IEHC 510, White J. stated at para. 21:-

> *"In exercising its discretion, the court has to consider a number of factors –*
>
> *(i) General prejudice;*
>
> *(ii) Specific prejudice.*
>
> *22. The court also considers it relevant to take into consideration the nature of the proceedings and also some of the other factors in respect of the plaintiff's knowledge.*
>
> *23. The court is entitled to infer some general prejudice to the defendants in these proceedings due to the delay. ."*

51. This is also reflected in *Carroll v. Kerrigan & Ors* [2017] IECA 66, where at para. 26, Irvine J. stated:-

> *"While the respondent has not asserted any particular prejudice, it would be wrong in my view, for this Court not to infer some prejudice as a result of the appellant's delay in prosecuting his claim against the respondent. First, the court will have to make findings of fact concerning the circumstances in which the appellant was allegedly injured over fifteen years ago and in circumstance where neither his employer, nor the person who allegedly perpetrated the assault remain a party to the proceedings. Second, having regard to the pleadings where Mr. Carroll maintains he instructed the respondent to institute proceedings within a very short period of time after the assault on the 25th of January, 2001 – facts denied by the respondent – the court will have to make findings of fact as to what, if any, instructions were given by the appellant to his solicitors over fifteen years ago."*

52. Of further relevance is the analysis of the facts in Primor by Hamilton C.J., where at p. 497 he observed:-

> *"As stated by me, when dealing with the SKC case, if prejudice to a defendant's capacity to defend a case brought against them is caused by inordinate and inexcusable delay on the part of a plaintiff and as a result thereof a fair trial cannot now be held, a defendant should not be further prejudiced by the further delay which would inevitably be caused by a long and difficult hearing of the action.*
>
> *The nature, extent and effect of such prejudice should be considered at the time of the application to dismiss the proceedings for want of prosecution"*

Hamilton C.J. concluded that the defendants had been prejudiced in their capacity to defend the proceedings by reason of the death of several important witnesses. The prejudice was such as to make it impossible that a fair trial could be had.

53. Thus, it appears as a matter of general principle that the court is entitled to presume prejudice, particularly in relation to witness memories, where there is a considerable lapse of time between the events said to give rise to the cause of action and the date of the application. In this regard, the court is entitled to look at the matter prospectively and to include a consideration of time periods which may inevitably arise between the date of the application to dismiss and potential hearing date. Clearly, where actual prejudice is shown, the position of the moving party on such application is stronger.

54. The authorities also establish that prejudice must also be assessed in the context of the issues in the case and the nature of the dispute and this may be dependent on whether proof or defence of the claim is based, or largely based, on the consideration of documentary evidence. This was referred to by Clarke J. in *Comcast*.

55. It seems clear, therefore, when one is addressing the question of prejudice, and particularly presumed or inferred prejudice, that there is an obligation on the court to consider the nature of the case and whether, it might be regarded as a "*documents*" type case.

If it is such a case then the principles outlined in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 All ER 98, are likely to be of relevance, particularly in the context of whether the oral evidence of witnesses will be required, relevant or essential. In *Investors Compensation Scheme*, Lord Hoffmann stated as follows at p. 114:-

> *"(1) Interpretation is the ascertainment of the meaning which the H document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749. D*
>
> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention c which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.""*

56. Here, because the statement of claim has not yet been delivered, it is difficult to ascertain the extent to which the construction of a contract or agreement will be necessary or whether oral evidence will be central to what is required to be determined.

57. Other factors to be borne in mind include that in *Primor*, where the court stated, in*ter alia*, that while there is an inherent jurisdiction to dismiss a claim in the interests of justice, this is a jurisdiction which should not be frequently or lightly assumed. Although since that decision there has been a tightening up of the courts attitude to delay, it is to be recalled that in *Collins*, Irvine J. reiterated at para. 34 where she stated:-

> *"It is also important to note, in the context of the Draconian nature of the type of relief claimed, that the use of this jurisdiction is not intended to be a punishment for a plaintiff's delay but rather to ensure that justice is done, as was advised by O'Flaherty J. in Primor where he stated at p.516 that:-*
>
> *'Courts do not exist for the sake of discipline but rather to deal with the essential justice of the case before them.'"*

She also observed that the rationale behind the courts jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay was that as stated by Diplock L. J. in *Allen v. Sir Alfred McAlpine & Sons Limited* [1968] 2 Q.B. 229 at p. 254, where he stated:-

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

58. The behaviour of an applicant is also relevant, but less so than that of the respondent. In this case, I find it difficult to accept that there has been any delay, at least culpable delay of any significance on the part of the defendant. It is true that while the defendant waited until September, 2017 to issue a letter consenting to late delivery of the statement of claim, it is the defendant who has taken any step in the proceedings.

59. I do not believe that this precludes the court, when considering where the balance of justice lies, from considering as one factor, the circumstances in which this application came before the court.

60. In my view, certain significance ought to be attached the letter of 25th September, 2017. No mention was made of any potential prejudice at that time. Had the plaintiff delivered its statement of claim then, or within a reasonable period thereafter, it may be that this motion may not have been brought, or brought on a different basis. However, despite this letter the plaintiff has not delivered his statement of claim. It is submitted that there are reasons why this has not occurred including that had the plaintiff delivered the statement of claim, the defendant would nevertheless have proceeded with the application. A second reason which appears to be proffered, is to the effect that the plaintiff did not wish to provide fuel for that part of the application which was based on the rule in *Henderson v. Henderson.* I do not believe that the court should condone the continued failure to deliver the statement of claim for those reasons.

61. Nevertheless, the role of the court on this application is not to punish a party. Each case is fact specific and therefore the balance of justice must be considered against the particular factors which arise. No reason has been advanced as to any material change in circumstances or the emergence of significant matters of prejudice between the date of the letter consenting to the late delivery of the statement of claim and the bringing of this application. Further, at this stage there is no significant evidence that witnesses who may be central to the defendant's defence will not be available, although the defendant has raised the prospect that such may be the case. Weighing all these factors, I am not satisfied that the balance of justice is or has been shown at this stage to be such as to justify the court to exercise its jurisdiction to dismiss the claim for want of prosecution.

62. In so far as the application to strike out the proceedings because of a failure to deliver the statement of claim is concerned, for

the reasons outlined above, the plaintiff has been in considerable default. Therefore, and also for the reasons outlined, I propose to accede to this aspect of the application and strike out the plaintiff's case, but in the interests of justice I will place a stay on the order of the court for 21 days. If a statement of claim is delivered within that time the stay will remain in place.

63. The failure of the plaintiff to deliver a statement of claim, in my view, has also caused considerable difficulty in the assessment of the proper application of the principle in *Henderson v. Henderson.* Until the statement of claim is available it is difficult to rule on this aspect of the defendant's application. Any such application is likely require an analysis of the proceedings brought by the defendant's predecessor against the plaintiff and an identification of the issues which were therein raised or which ought to have been raised. As the failure of the plaintiff to deliver the statement of claim has significantly contributed to this state of affairs, I propose to adjourn generally this part of the application with liberty to re-enter at a later and more appropriate stage of the proceedings.