THE HIGH COURT

[2001 No.14557P]

BETWEEN

MORAY ERICSON, PAMELA ERICSON, SHANE HANLON, ODETTE O'FLAHERTY, JAMES DOYLE, KATHLEEN MORRISON, GARRATH WHELAN, PATRICIA HANDRICK

PLAINTIFFS

AND

MOLONEY ENTERPRISES LIMITED

DEFENDANT

AND

BRENDAN GRIMES

THIRD PARTY

JUDGMENT of Mr. Justice Gilligan delivered on the 20th day of January, 2016

1. In this application the third party seeks to dismiss the defendant's claim against him on the basis that (a) the claims advanced against the third party are unsustainable, bound to fail, and are frivolous and/or vexatious and further (b) that the defendant's claim should be dismissed on the basis of inordinate and inexcusable delay.

Background.

2. The defendant is the developer of certain residential houses in Skerries, County Dublin, which were developed in two phases, each phase consisting of five houses. The plaintiffs were the purchasers of four of the five houses in phase 1 and in October, 2001, they brought proceedings against the defendant alleging trespass. In particular, the plaintiffs alleged that the defendant did not retain any easements, rights and privileges in disposing of the relevant sites. Accordingly, the plaintiffs alleged that that part of the relevant road used by the defendant to access the five houses at phase 2, at a point beyond phase 1, was within their ownership and on that basis, the defendant was guilty of trespass in traversing the road.

3. The defendant delivered a defence which pleaded that a mapping error occurred which did not reflect the true intention of the parties and in that regard counterclaimed for rectification.

4. In October, 2002, the defendant sought and was granted leave to deliver a third party notice on Mr. Brendan Grimes. The defendant contended that the third party was retained to prepare maps, including the boundaries of the individual houses, for the purposes of the relevant development. In the third party statement of claim, as delivered on the 19th day of February, 2013, it is stated that the claim related to an entitlement to be indemnified against the plaintiff's claim or a contribution in respect of the plaintiff's claim. A defence and counterclaim was delivered on the 19th day of November, 2004, on behalf of the third party in which he denied the allegations made and, in addition, alleged that if any damage had been suffered by the defendant then it was due to the acts or omissions of Matthews Solicitors, the defendant's then solicitors who effected the conveyance of the houses at phase 1 of the development.

5. In or around 2003, the defendant instituted separate proceedings as against Matthews Solicitors (the "solicitor proceedings".)

6. In December, 2004, discovery was made by the third party to the defendant. On 21st February, 2006, a notice of intention to proceed was delivered to the third party but no steps were taken pursuant thereto. A further notice of intention to proceed was again delivered some eight years later, on 7th May, 2014. The instant application issued in November, 2014, and has been adjourned from time to time, finally coming before this Court on 7th October, 2015. In June, 2015, despite the existence of the present application, the defendant purported to deliver updated particulars of loss, a notice to produce, and a notice of trial in the third party action. Accordingly, the time between the date of the delivery of discovery by the third party, to the date the within application was brought, amounts to almost 10 years.

7. Order 122, Rule 11 of the Rules of the Superior Courts provide as follows:

> "In any cause of matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the respondent may apply to the court to dismiss the same for want of prosecution, and on hearing of such application, the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just. A motion or summons on which no order has been made shall not, but notice of trial though countermanded shall, be deemed a proceeding within this rule."

8. There was a delay of eight years between the notice of intention to proceed against the third party in 2006 and the further notice of intention to proceed in May, 2014. Counsel for the defendant, Mr. McCarthy, however, submits that this delay can be explained by what occurred in the intervening period, namely the fact that a settlement of the action between the plaintiff and the defendant for €80,000.00 inclusive of costs took place in February, 2009, which enabled the conveyances in relation to the 5 houses which had been landlocked to be finalised and this process was only completed in 2013. Therefore, counsel submits that the delay was not inordinate, in the sense of being undue, unwarranted, or unreasonable.

9. Counsel for the third party, Ms. Smith, on the other hand, does not accept that the delay is limited to a period of eight years. While a notice of intention to proceed was delivered in 2006, no step was taken on foot thereof in the third party proceedings. In those circumstances, counsel submits that the relevant delay here is closer to ten years from the date the third party delivered

discovery in December, 2004, to the May, 2014, notice of intention to proceed.

10. Counsel for the defendant submits that the delay (which, on their case, is only eight years) is excusable for two reasons. Firstly, it is contended that the defendant was entitled to wait for the determination of the solicitor proceedings which were issued in 2003 and not renewed until 2006. In 2006, Mr. Justice Peart renewed the plenary summons and an application was brought by the solicitors to have that renewal set aside. That application was refused by this Court (Dunne J.) on the 4th July, 2008. The High Court order was made and perfected in February, 2011. Matthews Solicitors sought to appeal against this order, which appeal came on for hearing before the Supreme Court on 22nd April, 2015, and the matter was compromised on that date, in the sum of €180,000.00 inclusive of costs.

11. In the context of the solicitor proceedings and, in particular, the period between 2003 and 2014, the defendant submits that it could not have progressed the third party claim until the appeal was determined, particularly since the third party herein in its defence and counterclaim contended that any breach of duty or negligence was on the part of Matthews Solicitors. On this point, counsel for the third party notes that the solicitor proceedings were brought by way of separate proceedings and not, as one would expect, joined as a third party to the within proceedings. Secondly, counsel contends that the position that the appeal on the solicitor proceedings had to be dealt with prior to the third party claim being advanced is entirely at odds with the explanation put forward by the defendant's solicitors in a letter dated 31st July, 2014, in which it was stated that the within proceedings and the solicitor proceedings "will have to be linked and heard together to save time and costs."

12. It is further submitted by counsel for the third party that at no point did the defendant or its solicitors put the third party on notice that they were awaiting the outcome of the solicitor proceedings. Instead, the issue was only raised after the third party indicated, in 2014, an intention to bring an application to strike out for want of prosecution.

13. The second reason put forward by the defendant relates to the compromise of the proceedings with the plaintiffs. The defendant compromised the action with the plaintiffs in February, 2009. It is contended by counsel on behalf of the defendant that it was only at that point that the defendant was in a position to access the second phase of the development and complete the sale of the houses there. This occurred in or about 2013, when the houses in the second phase of the development were conveyed. In this regard, counsel for the third party queries why it took four years for the sales to be completed (between 2009 and 2013) and why it took until 2014 to deliver a notice of intention to proceed as against the third party. Counsel submits that no basis is advanced for the proposition that it was reasonable for the defendant to wait for more than 5 years from the date on which the plaintiff's claim was compromised to the service of the 2014 notice of intention to proceed and without making any attempt to communicate with the third party as to the position taken.

14. It is submitted by counsel for the defendant that the third party, in neglecting to issue any notice of motion to strike out the claim on the ground of want of prosecution until after the defendant's notice of intention to proceed in May, 2014, acquiesced in the delay. It is submitted that the defendant's case against the third party could not be concluded until the conveyances of the houses which were landlocked had been completed and the actual losses of the defendant crystallised.

15. It is further contended that the only prejudice identified by the third party, at paragraph 23 of his grounding affidavit, is that he kept his archived files in a "damp and mice infested facility, much of which has had to be disregarded or shredded over the past number of years." It is thereby submitted that any prejudice which the third party might have suffered has been caused by his own acts or omissions.

16. Counsel for the third party submits that failing to issue any notice of motion to strike out a claim for want of prosecution until after a party has served a notice of intention to proceed is not a valid factor to be taken into consideration, as is clear from the Court of Appeal judgment (Irvine J.) in *Gorman v Minister for Justice, Equality and Law Reform* [2015] IECA 41. Ms. Justice Irvine stated as follows:

> "The Court is [also] satisfied that the fact that the defendants only moved to dismiss the claim when the plaintiff sought their consent to the reinstatement of the notice of trial does not in itself afford any ground for valid complaint. It is precisely when a step such as that is taken that a defendant is most likely [to] review the consequences of the reinstatement of such notice and if satisfied as to the unfairness and the possibility of an injustice will bring forward [a] motion to dismiss the claim."

17. In response to the defendant's submission that any prejudice suffered by the third party is a result of his own acts and omissions, counsel for the third party submits that the fact that his files have been damaged and to a large extent destroyed is largely a reflection of the time that has elapsed since any step was taken in these proceedings, and that it cannot be reasonable to suggest that a party is obliged to archive their files indefinitely.

18. Counsel for the third party submitted that their client has suffered prejudice by reason of diminution in memories in relation to the subject matter of these proceedings, as well as reputational prejudice as a result of the third party, being a professional person, having these proceedings hanging over him. In response, counsel for the defendant submits that the third party does not contend that he is at a loss of sufficient documentation to be able to refresh his memory, and this is not a case involving the death of a material witness.

19. In *Stephens v Paul Flynn Limited* [2005] IEHC 148, this Court (Clarke J.) confirmed that the two central tests remain the same, namely:

> "(a) Ascertain whether the delay in question is inordinate and inexcusable; and
>
> (b) If it is so established, the Court must decide where the balance of justice lies."

20. Clarke J. in that case concluded that a 20-month delay in filing a statement of claim was inordinate. He further concluded that the delay was inexcusable, particularly having regard to the requirement on the appellant to move with extra expedition in light of the delay in the commencement of those proceedings. This reasoning was upheld by the Supreme Court on appeal.

21. In considering where the balance of justice lay, Clarke J. concluded that there had been a significant delay. Not only had the plaintiff failed to render that delay excusable, but he had failed to do so by a significant margin. He also concluded that if the defendant were to be compelled to meet the case he would suffer prejudice. In confirming the reasoning of Clarke J, Kearns J. (as he then was) in the Supreme Court ([2008] 4 I.R. 40 at paragraph 28) stated as follows:

> "In the ordinary course of events, no Court would rigidly apply a 21-day period for delivering a statement of claim or see non-delivery within that time as a failure which would justify dismissal of proceedings, even in the simplest of cases. Equally, even the most complex of cases must be prosecuted with due expedition and an appropriate sense of urgency. However, the period of 20 months is totally outside any period of time that might be considered appropriate or reasonable and is clearly, and was so found by Clarke J. to be, inordinate. The challenge to that finding is unsustainable."

22. Clarke J.'s assessment of the appropriate legal test in *Stephens v Flynn* was confirmed by the Supreme Court in *Desmond v MGN Limited* [2009] 1 IR 737. In that case, the Supreme Court dismissed an appeal from the judgment of Hanna J., which found that although the plaintiff's delay was inordinate, it was excusable having regard to the circumstances that the matters to which the proceedings related formed a substantial part of the subject matter of the Moriarty tribunal. Geoghegan J. (at page 742) expressed the view that "the basic principles…remain substantially unaltered." He was not of the view that the case law of the European Court of Human Rights relating to delay "justifies reconsideration of those principles or in any way modifies those principles" or that "it would be either necessary or desirable" that these principles should be revisited.

23. In *ECI European Chemical Industries v McBauchemie Muller GmbH* [2006] 2 ILRM 19, the Court set aside a third party notice on the basis that it had not been served expeditiously. The respondent subsequently brought proceedings against the appellant for a contribution from the appellant by way of independent action. In the context of the Court's discretion where no third party notice had ever been served, Geoghegan J. considered the issue of prejudice and stated as follows:

> "Since the clear purpose of the legislation is to ensure that as far as possible third-party issues would be heard in the original plaintiff's action, I find it difficult to accept that the court would only be entitled to reject the independent action if prejudice to the defendant in that action is proved. This does not necessarily mean that the issue of prejudice does not come into play at all. I will return to it in due course. First and foremost, however, it would seem to me that the court would have to consider was there a good reason why the statutory requirement of serving a third-party notice as soon as is reasonably possible was not complied with. This consideration must include not merely the failure to serve a third-party notice but the failure to serve one as soon as reasonably possible, the court, therefore, would have to consider what was the latest date on which a third-party notice ought to have been served. If there was no good reason why a third-party notice could not have been served in accordance with the Act, then, I would take the view that in most cases, irrespective of any question of prejudice, the new proceedings should be rejected. There may be exceptional cases in which as a matter of justice the action should not be rejected on that account alone. Otherwise, a clear obligation to adopt a third-party procedure could become hopelessly weakened to the point of being meaningless…"

24. Geoghegan J. was of the view, albeit *obiter,* that if prejudice was to be considered by the Court, only procedural prejudice would be relevant.

25. The above dictum of Geoghegan J. was relied upon by the High Court in *Andrews Construction Limited v Lowry Piling Limited* [2010] IEHC 276, the facts of which are that the plaintiff developer had built and sold a housing development. The defendant had been contracted by the plaintiff to carry out piling works on the housing development. Following the purchase of the houses, significant structural problems became apparent. Proceedings were issued by the homeowners against the plaintiff in 2003. In June, 2003, the plaintiff's engineer provided an initial inspection report wherein it was concluded that the problems were attributable to the works of the defendant. The plaintiff settled the homeowner proceedings in December, 2004, and subsequently in September, 2006, issued plenary proceedings against the defendant seeking an indemnity or contribution in respect of same. The defendant applied to strike out the proceedings on the grounds of inordinate delay.

26. The defendant's application was based primarily upon the ground that the plaintiff, having been sued in other proceedings by the homeowners, did not join the defendant as a third party in those proceedings but rather settled those proceedings without any participation by the defendant or indeed any reference to them.

27. It was argued on behalf of the defendant that section 27(1)(b) of the Civil Liability Act 1961 imposed an obligation on a party seeking an indemnity or contribution to proceed as soon as was reasonably possible and that no good reason had been offered by the plaintiff as to why this had not been done. The plaintiff argued that the cause of the damage did not come to light fully until long after the homeowner proceedings had been settled and that this was why a third party notice had not been served in the case.

28. Having considered the law in this area and in particular the decision of Geoghegan J. in *ECI European Chemicals v McBauchemie Muller GmbH*, Hedigan J. found that the plaintiff had been aware from the time of the engineer's report in 2003 that the defendant was likely to be causally responsible for the problem. It was noted by the Court that the homeowner proceedings had been settled in 2004 without any participation by or reference to the defendants. In light of the foregoing the Court held as follows:

> "I am satisfied that in these circumstances the justice of this case lies in favour of a finding for the defendant. The plaintiff in my view acted unreasonably in not seeking to join the defendant to the original proceedings once it had received the report from DBFL of 9/6/03. Due to this the defendant was deprived of an opportunity to participate in the defence and settlement of the case. In the light of this finding it is not necessary to deal with the issue of prejudice to the defendants. Nonetheless I think it is appropriate to note that the defendants herein are prejudiced by the delay *ipso facto* in involving them in this dispute by reason of the ten years that has elapsed to date. I think it would have been far preferable for both plaintiff and defendant herein had a third party notice been served as soon as the first proceedings were served on the plaintiff herein. On the evidence then available to the plaintiff it could reasonably have done so. Nothing in the evidence before the court suggests it would have been any less likely that the case could have been settled when it was had the defendant been involved at that time. No good or sufficient reason has been advanced by the plaintiff as to why a third party notice was not served. In the result, on the basis of the judgment of the Supreme Court in the *ECI* case, I find that the court ought not to exercise its discretion in allowing the plaintiff proceed in separate proceedings."

29. Accordingly, the Court (Hedigan J.) struck out the proceedings.

30. This Court (Hedigan J.), in *Meehan v Walsh Western Holdings Ltd* [2009] IEHC 505 reiterated (at paragraph 22) that the decision to dismiss a case on grounds of delay will not be taken lightly. In that case, the delay was found to be both inordinate and inexcusable. A notice of intention to proceed was delivered 7 years after the delivery of points of defence, and a letter seeking voluntary discovery was sent some 8 months later. Specific prejudice was also identified in that a large body of documentation of some antiquity was sought by the plaintiff by way of discovery, which could have been sought at an earlier stage.

31. In the recent case of *Tanner v O'Donovan* [2015] IECA 24, the Court of Appeal (Hogan J.) noted that while the Courts had

traditionally been reluctant to strike out professional negligence claims on the basis of undue delay, since it necessarily impinged on a litigant's right of access to the courts, the balance of justice must also be considered in light of the constitutional protections provided to a respondent to litigation. Those protections include the constitutional requirement that the Courts be capable of conducting a fair trial, in the context of oral evidence given after a significant delay, and also in the context of a professional person's entitlement to his good name.

32. In *Casserly v O'Connell* [2013] IEHC 391, this Court (Hogan J.) considered that the fact that allegations of professional negligence were hanging over a solicitor for the best part of eight years was a significant factor to be considered. Similarly, in the aforementioned *Tanner v O'Donovan*, Hogan J. in the Court of Appeal recognised the unfairness associated with undue delay in the context of professionals and emphasised the protection of the right to a good name expressly guaranteed by Article 40.3.2 of the Constitution which necessarily implies that claims of this kind which have implications for the good name of a professional party should be heard and determined within a reasonable time.

33. In *Cahalane v Revenue Commissioners* [2010] IEHC 95, this Court (Laffoy J.) (at page 23) set out four factors which are relevant to the assessment of where the balance of justice lies:

(a) Whether the defendants will be prejudiced to the extent that they will not be afforded a fair trial if the proceedings are allowed to continue;

(b) The character of the plaintiffs;

(c) The conduct of the defendants; and

(d) The scope and ambit of the defendants' defence and counterclaim.

34. In *Cahalane*, 20 years had elapsed since the events giving rise to the claim. Laffoy J. was not satisfied that the delay would prejudice the defendants to the extent that they would be deprived of a fair trial.

35. A similar balancing exercise was recently carried out and resolved in favour of the plaintiff by the Court of Appeal in *Granahan v Mercury Engineering* [2015] IECA 58. There was a finding of inordinate and inexcusable delay on the part of the plaintiff. Irvine J. looked at the conduct of the defendant and the extent to which it might be considered to be guilty of delay, to have acquiesced in the plaintiff's delay, or implicitly encouraged the plaintiff to incur further expense in pursuing the claim. Irvine J. also assessed the prejudice alleged by the defendant and whether it was real or illusory. The appeal from the order of the High Court dismissing the proceedings was allowed on the balance of justice test, albeit with a note of caution that the plaintiff should proceed with all due expedition.

Conclusion.

36. I do not consider that there are sufficient grounds made out on behalf of the third party to enable the Court to give serious consideration to the claim being dismissed on the grounds of being unsustainable. The real issue is that of delay and the background circumstances to the defendant's claim as against the third party.

37. This Court is of the view that the delay on the part of the defendants to take any meaningful steps between November, 2004, and May, 2014, with regard to the within proceedings constitutes inordinate delay. This Court is satisfied that the correct time period to take into account is that of ten years, and not eight as submitted by the defendant. While a notice of intention to proceed was delivered by the defendants in 2006, no further steps were taken on foot thereof, and as such, it appears to the Court that the date the third party delivered discovery in 2004 is the material date to be taken into account.

38. Furthermore, I find the reasons put forward by the defendant to excuse this inordinate delay to be inadequate. The defendant has suggested that its failure to progress these proceedings was, in part, due to its intention to link the solicitor proceedings with the instant proceedings so that they could have been heard together. The Court has been informed that the solicitor proceedings have since been settled with the defendant, without any reference to the third party.

39. Other reasons put forward by the defendant for the delay, including having to wait until the houses in the second phase of the development were conveyed after the settlement of the proceedings with the plaintiff, do not find favour with the Court. The third party was also not involved in any settlement between the defendant and the plaintiffs, and there are also gaps of years in which no excuse has been proffered by the defendant (for example what occurred between 2003 and 2006, and what occurred between 2008 and 2011.) The delay involved is inexcusable.

40. In relation to the balance of justice in this case, it is true that courts have traditionally been reluctant to strike out claims of this kind on the ground of undue delay, since this necessarily impinges on the litigant's right of access to the courts. However, this Court is particularly mindful that the third party is a professional person who has had this case hanging over his head for almost 10 years. Bearing in mind the recent decision of the Court of Appeal in *Tanner v O'Donovan,* as discussed, and the remarks of Hogan J. therein, it is clear that the unfairness associated with undue delay in this context has long been recognised. As O'Hanlon J. observed in this context in *Celtic Ceramics Ltd. v. Industrial Development Authority* [1993] I.L.R.M. 248, 258-259:

> "It seems very unfair and unjust that persons whose professional standing and competence are under attack should be left with litigation hanging over their heads for years by reason of the inordinate and inexcusable delay on the part of a plaintiff and I would respectfully echo the view expressed by Henchy J. in *Sheehan v. Amond* [1982] I.R. 235 that it should be possible to invoke 'implied constitutional principles of basic fairness of procedure' to bring about the termination of such proceedings."

41. Furthermore, Moloney Enterprises Ltd brought a separate action against Matthews Solicitors under High Court Record No. 2003/12918 P and these proceedings were settled in the sum of €180,000.00 to include costs without the participation of or reference to Brendan Grimes, the third party herein, on 22nd April, 2015. The plaintiffs' proceedings were settled by the defendant in or around February, 2009, for a sum of €80,000.00, inclusive of costs. This settlement was also without the participation of or reference to the third party.

42. In relation to the submissions of counsel for both sides regarding the concurrent wrongdoing of all parties and the application of the Civil Liability Act, 1961, I am of the view that the settlement as entered into between the defendant and Matthews Solicitors, without any participation of or reference to the third party in the compromise, places the third party at a significant disadvantage. While I accept the submissions of counsel for the defendant that the compromise of the solicitor proceedings does not necessarily

release the third party from liability, it is clear that the third party was deprived of the opportunity to participate in the defence and settlement of the case, and, having regard to the decision of this Court (Hedigan J) in *Andrews Construction Limited v Lowry Piling Limited* [2010] IEHC 276, it would have been preferable had the defendant sought to join Matthews Solicitors to the within proceedings once it was apparent that they may have been at fault. In this regard, any reasonable interpretation of the solicitors' duties would give rise to the conclusion that they may have been at fault and thus the relevant knowledge was present from the very beginning of any difficulties that arose herein from the cause of action.

43. The third party has effectively had no role in relation to the involvement of Matthews Solicitors, having already been advised on the defendant's behalf on the 31st of July, 2014, before the settlement, that both sets of proceedings "will have to be linked and heard together to save time and costs."

44. Both Matthews Solicitors and the third party herein are alleged wrongdoers but for different claims in damages arising from the same cause yet the third party herein was excluded from participating in the settlement negotiation and at this point in time, despite the defendant's assurance, any claim he has against Matthews Solicitors arising out of his inter-action with them is now lost to him, and he is prejudiced.

45. As matters presently stand, the only claim brought by the defendant against the third party until very recently is for an indemnity in respect of the plaintiff's claim against the defendant which in fact was compromised in February, 2009, seven years ago, for a sum of €80,000.00, inclusive of costs. Now the defendant seeks, having settled with Matthews Solicitors in the sum of €180,000.00, inclusive of costs, to alter the basis of the claim, in effect, to a direct claim against the third party for the damage it has allegedly suffered as opposed to, as indicated, seeking an indemnity in respect of the plaintiff's claim.

46. This, in my view, creates a seriously unfair position for the third party, brought about entirely by the defendant's actions.

47. Further, in my view, the position of the third party as an alleged wrongdoer is hopelessly compromised by the actions of the defendants, which have never been satisfactorily explained to this Court, in choosing to issue separate proceedings as against the solicitors in 2003. In this regard, the defendant acted unreasonably and contrary to its clear obligation to use the third party procedure for the purpose of joining the solicitors to these proceedings once it was apparent that the solicitors could be at fault, thereby failing to create a level playing field.

48. A further complicating feature is that, on the defendant's own admission, there was a real prospect that the Supreme Court could have allowed the appeal from the order of the High Court as perfected on the 17th of February, 2011, and thus the negotiations as entered into with the solicitors put the defendant at a distinct disadvantage, through its own fault. If the appeal was allowed, the defendant's proceedings against Matthews Solicitors were at an end. All this time the claim in damages by the defendants as against the third party was for a simple indemnity in respect of the €80,000.00 all in settlement of the plaintiff's claim, whereas the defendant's claim (as plaintiff) against Matthews Solicitors was for a sum in excess of eight hundred thousand euro.

49. The defendants have not proceeded as soon as was reasonably possible against a background where it always had to be aware of the potential liability of its own solicitors who, in this instance, were the solicitors on record for the defendants when the application was made to join the third party herein to the proceedings. In the view of this Court, the defendants should have sued both the solicitors and the third party and proceeded against them as soon as was reasonably possible. By not doing so and settling with the solicitors only relatively recently, the third party was deprived of the opportunity to participate in the defence and settlement of the defendant's case. The third party was effectively excluded from the defendant's dealings with the solicitors.

50. Furthermore, at all material times when both matters were compromised, the defendants were only seeking from the third party an indemnity in respect of the plaintiffs' claim as against the defendant.

51. The Court must be capable of conducting a fair trial in the context of oral evidence given after a significant delay and also, particularly in this instance, the third party's professional entitlement to his good name and reputation. In this instance, the fact that the proceedings have been hanging over the third party for some ten years is a significant factor to be considered. There is also the fact of the loss of the third party's records, but I do not consider this aspect to be determining. This Court is entitled to take into account the manner in which the defendants have conducted these proceedings.

52. In my view, the third party has been placed at a significant disadvantage by the delay and the manner in which the defendants have conducted the two sets of relevant proceedings to date. I take the view, on the balance of justice, that the situation that now arises has to favour the third party on the issue of delay alone. There would not be, in my view, in the particular circumstances that pertain, a fair trial within a reasonable period of time. When conjoined with the up to date position brought about by the two sets of proceedings and the manner in which the defendant has conducted them, the position pertaining is one of unfairness to the third party and further reinforces my view that, on the balance of justice, the defendant's proceedings herein against the third party must stand dismissed.