THE HIGH COURT

[2012 No. 12659 P.]

BETWEEN

FINN LYDEN

PLAINTIFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED

(IN SPECIAL LIQUIDATION)

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 26th day of June, 2018

1. This is an application to dismiss the plaintiff's claim for delay on behalf of the plaintiff in the prosecution of the proceedings.

Summary of the facts
2. In or about December, 2006 the plaintiff agreed to invest in a fund promoted by Anglo Irish Bank Corporation Limited (the predecessor in title of the defendant) ("the contract") together with an associated loan agreement. The plaintiff repaid the loan in early 2008 and the defendant continued to hold the investment on behalf of the plaintiff.

3. On 13th December, 2012 the plaintiff issued a plenary summons seeking a declaration that the contract was null and void as between the plaintiff and the defendant or in the alternative seeking rescission of the contract and an order providing for repayment to the plaintiff by way of restitution of all payments made by the plaintiff in connection with the contract since the 14th December, 2006. He also sought damages for breach of contract, for breach of fiduciary duty, for negligent misrepresentation and negligent misstatement.

4. In February, 2013, by reason of the passing of the Irish Bank Resolution Corporation Act, 2013 all actions against Irish Bank Resolution Corporation Limited (as Anglo Irish Bank Corporation Limited was then known) were automatically stayed. On 27th November, 2013 the plaintiff obtained an order pursuant to s. 6(2) (a) of the Act of 2013 lifting the statutory stay on the proceedings and granting the plaintiff liberty to amend the title of the summons to read Irish Bank Resolution Corporation (in special liquidation).

5. The plaintiff then served the plenary summons on 11th December, 2013 but he did not deliver a statement of claim either with the summons or thereafter. An appearance was entered on behalf of the defendant on 17th December, 2013 and solicitors for the defendant requested the delivery of a statement of claim on 11th March, 2014.

6. Thereafter the proceedings lay fallow for three and half years until 29th June, 2017 when the plaintiff served a notice of intention to proceed. After a month had elapsed, the plaintiff still did not deliver a statement of claim.

7. On 6th October, 2017 the defendant issued this motion seeking to have the plaintiff's claim dismissed by reason of the inordinate and inexcusable delay of the plaintiff in prosecuting his claim. It would appear that this motion effectively crossed with the plaintiff's statement of claim as he finally delivered his statement of claim on 11th October, 2017.

The defendant's submissions
8. The defendant submitted that the delay in this case has been inordinate and inexcusable. It emphasised the fact that the summons was issued when the limitation period had nearly expired and that the plaintiff then delayed for nearly a year before serving the plenary summons, even allowing for the need to make an application to court to lift the stay on the proceedings following the defendant going in to special liquidation.

9. The defendant submitted that the plaintiff was fully aware of all of the elements of his claim from February 2009 at the latest. In a detailed letter written on 11 May 2012 to the chairman of Anglo Irish Bank Corporation Limited the plaintiff was in a position to set out the claims which in fact now form the essence of the statement of claim. He was in a position to set out all these matters in the affidavit sworn on 27th November, 2013 grounding his application to lift the stay on the proceedings pursuant to s. 6 of the Act of 2013. Notwithstanding all of the above, no statement of claim was delivered until the 11th October, 2017.

10. Miss Eve Mulconry of Arthur Cox Solicitors for the defendant swore the affidavit grounding the application in this case. She avers:

> *"21. I say and believe that the defendant, which is in an advanced stage of special liquidation, is prejudiced by the plaintiff's failure to prosecute these proceedings in a timely fashion, as the defendant is at the advanced stage of its winding down and is operating with limited resources, capacity and a lack of corporate memory. For this reason, and in circumstances where key witnesses maybe unavailable, the defendant would be significantly prejudiced should the within proceedings advance to trial.*
>
> *22. I say that it would be unjust and unfair that the defendant should now be called upon to meet a challenge to contracts and investments entered into in 2006 and/or 2009 in light of the circumstances outlined above and the conduct of the plaintiff.*
>
> *23. The prejudice faced by the defendant in defending these proceedings is further compounded given that the general endorsement of claim seeks damages arising from "negligent statements" and/or "negligent representations", none of*

which have been particularised, alleged to have been made by the then servants and/or agents of Anglo Irish Bank Corporation Plc in the period 2006 to 2009."

11. The affidavit was sworn on 6th October, 2017 before the delivery of the statement of claim which gives particulars of the alleged negligent statements and representations and of the individuals who allegedly made the statements and representations on behalf of Anglo Irish Bank Corporation Plc.

The plaintiff's submissions
12. In his replying affidavit of the 13th November, 2017 the plaintiff takes issue with a number of Ms. Mulconry's averments and in effect says that the defendant has not identified any prejudice by reason of the passage of time in defending this case. At para. 23 of his affidavit he explains his actions and thinking as follows:

> *"The facility letter involving JC Flowers which is germane to the within proceedings also included another facility in relation to the European Geared Property Fund ("EGPF"). I instituted separate proceedings with respect to the latter fund. There was some overlap between the two issues. For example, both involved dealings with Mr. Neal Lindsay, an employee of Anglo Irish Bank who acted as Financial Advisor in their Private Banking Wealth Management Division. I maintain that Mr. Lyndsay misrepresented material facts about the EGPF in a compliment slip he sent to me accompanying the fund brochure. I was aware of another case before the High Court involving Mr. Sean O'Driscoll, concerning the EGPF, which ultimately did not run to a full hearing but which, at the time, I expected would run. I considered that the most efficient use of everybody's time, including the Court's, was to wait to see the outcome of that case. I was of the view that, if Mr. O'Driscoll had been successful in his litigation, my own case in respect of the EGPF would have been very much stronger, and given that loan facilities had been offered to me in relation to both the JC Flowers fund and the EGPF, my assessment was that a settlement of both proceedings would have been much more likely. However, it transpired that Mr. O'Driscoll's case settled so that the issues were not fully aired in open court."*

13. He does not explain when Mr. O'Driscoll's case settled and he also notes that he was *"monitoring litigation involving the defendant including the judgments in the John Spencer case"*. He then explained that new counsel were engaged in the matter in around 27th July, 2016. An opinion was furnished on the 10th October, 2016 and then there was a consultation on the 26th October, 2016. As the proceedings alleged professional negligence it was necessary to obtain the report of an expert for the purposes of the statement of claim and an expert was engaged on the 15th November, 2016. Subsequently, consultations were held with the expert and with counsel on the 18th January, 2017. He then says at para. 29:

> *"I provided further instructions and further additional documentation in relation to certain matters pleaded in the draft statement of claim in May and October, 2017".*

He does not identify why there was this delay from January to October, 2017.

14. He says that if the relief is granted it will amount to *"a significant interference"* with his right of access to the courts and *"an extinguishment of that right with respect to the matters herein"* and his *"underlying property rights"*. He says that this was *"not an equivalent prejudice to any prejudice occasioned to the defendant by allowing the trial to proceed"*.

The law
15. The leading decision is that of the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] I.R. 459. The first task of a court dealing with an application of this nature is to ascertain whether the delay by the person seeking to proceed has been inordinate and, if inordinate, whether it has been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable lies upon the party seeking a dismiss of the proceedings.

16. Even where the delay has been shown to be both inordinate and inexcusable the court must then further proceed to exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of, or against, the proceeding of the case.

17. At p. 475-6 Chief Justice Hamilton summarised the principles of law relevant to the consideration of a motion to dismiss.

> *"(a) The courts have in inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
>
> *(b) It must, in the first instance, be established by the party seeking a dismissal of the proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;*
>
> *(c) Even where the delay has been both inordinate and inexcusable the court must exercise the judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;*
>
> *(d) In considering this latter obligation, the court is entitled to take into consideration and have regard to:*
>
> > *(i) The implied constitutional principles of fair procedures*
> >
> > *(ii) Whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action*
> >
> > *(iii) Any delay on the part of the defendant – because litigation is a two party operation, the conduct of both parties should be looked at,*
> >
> > *(iv) Whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,*
> >
> > *(v) The fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,*

(vi) Whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) The fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

18. The matters listed at (d) (i) – (vii) are matters which the court is entitled to take into consideration when weighing the balance of justice in the case. While they obviously provide useful guidance of relevant matters for the court to have regard, they should not distract from the fact that the exercise of the court is to weigh the balance of justice and not to determine whether one or more of the factors listed by the chief justice exists in any particular case. At p. 490 of the report Hamilton C.J. said that:

"The court was obliged to consider whether the total delay has been such that a fair trial between the parties cannot now be had and whether the defendants had been prejudiced by the continued delay."

19. In considering the issue of the excusability of the delay in *Stephens v. Paul Flynn Ltd* [2005] IEHC 148 Clarke J. approved the dicta of Lord Diplock in *Birkett v. James* [1978] A.C. 297:

"A late start makes it more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

Clarke J. continued:

"However it seems to me for the reasons set out by the Supreme Court in Gilroy the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which need to be significantly reassessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore."

20. In *Quinn v. Faulkner trading as Faulkner's Garage & Anor* [2011] IEHC 103 Hogan J. stated that:

"While as Charleton J. pointed out in Kelly v. Doyle [2010] IEHC 396 it would be wrong for the court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more proactive in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common."

21. In the light of those decisions I turn to consider whether the delay in this case could be considered inordinate and, if so, whether it is inexcusable.

Was the delay inordinate?
22. The defendant advanced its case based on the delay from the date of the issue of the plenary summons to the date of the delivery of the statement of claim (after this motion had issued), though it did rely on the fact that the events which form the subject matter of these proceedings largely occurred in 2006, with some events occurring in 2008 and 2009. In my judgment, the delay is to be assessed by the court irrespective of any prejudice asserted by the moving party and so the observations of the plaintiff to the effect that the defendant has failed to identify any real prejudice are not relevant to this assessment by the court.

23. The plaintiff could have served the plenary summons upon the defendant at any time between the 13th December, 2012 and the date of the commencement of the special liquidation of the defendant in February 2013. Thereafter, he was in a position to serve the plenary summons after the order of the 27th November, 2013 which he did two weeks later on the 11th December, 2013, two days before he would have been required to renew the plenary summons. The solicitors for the defendant entered an appearance in December, 2013 and on 11th March 2014 they called upon the plaintiff to deliver a statement of claim. He did not and took no further steps until 29th June, 2017 when he served a notice of intention to proceed. He did not proceed on 29th July, 2017 and in fact engaged new counsel on 27th July, 2017. The defendant then issued this motion on 6th October, 2017. The plaintiff delivered his statement of claim on 11th October, 2017. Even giving him the benefit of the doubt and counting the delay from the order of the 27th November, 2013 (and not the date of the issue of the plenary summons) until the delivery of the statement of claim on the 11th October, 2017, it is clear that the delay must be characterised as inordinate. Under the provisions of O. 122 r. 11 the defendant would have been entitled to issue this motion two years after the last step in the proceedings before the notice of intention to proceed was sent. The only step taken by the plaintiff in the proceedings after serving the plenary summons was to issue a notice of intention to proceed in June 2017 and then, he was not in a position to deliver the statement of claim thereafter.

Was the delay inexcusable?
24. In *Philip Shields and Hillgrange Services Ltd v. Interlink Ireland Ltd* [2014] IEHC 74 Ryan J. said that in assessing whether the delay was inexcusable:

"The question is whether any reasonable, credible explanation has been proffered for the delay overall or the particular periods."

25. In his submissions to the court, the plaintiff said that the proceedings were technical and complex, involving as they do issues of misselling of funds and the tax status of limited liability partnerships. However, Mr. Lyden makes no reference in his affidavit to these factors giving rise to delay in preparing the statement of claim. On the contrary, he indicates that he had opinion of counsel from October 2016. It was necessary to obtain an expert report because professional negligence was to be alleged. On his own evidence, he instructed the expert on the 15th November, 2016 and consultations were held with him and subsequently with senior and junior counsel on the 18th January, 2017 so it would not appear that the complexity of the issues affords an explanation for the delay which actually occurred in this case. It seems to me therefore that based on the evidence before the court I cannot rely on the alleged complex and technical nature of the case as a basis for holding that the delay was excusable.

26. Furthermore, there is no reason why the steps he outlines in his affidavits which he took from October, 2016 through to January, 2017 could not have occurred in 2013. 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. 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.

27. That is not what occurred here. The plaintiff for his own reasons and in order to obtain a perceived litigation advantage decided unilaterally to await the outcome of litigation involving two other plaintiffs. Not only did he not obtain the consent of the defendant to this approach, he did not even notify the defendant that he was so acting. This is absolutely critical. In the case of *Comcast International Holding Inc. & Ors v. Minister for Public Enterprise & Ors.* [2012] IESC 50 Denham C.J. said that, in general, it is not open to a party to decide unilaterally not to proceed with proceedings in a case for the particular time and reasons. At para. 39 of her judgment she said that usually a deliberate decision by a party to delay proceedings is not excusable. In his concurring judgment Clarke J. at para. 5.8 says:

> *"It seems to me that a party who wishes to adopt what might, in all ordinary circumstances, be considered to be an unorthodoxed approach to litigation (such as putting the proceedings on hold pending some event), is required to, at a minimum, place on record with all other parties to the litigation, that that course of action is being adopted. It does not seem to me that it is legitimate for a party to adopt an unorthodoxed approach to litigation on a unilateral basis. Indeed, it was the failure of the plaintiff in Desmond v. MGN to inform the defendant that it was intended to await developments at the Moriarty Tribunal that led this court to view the explanation given as not being sufficient to excuse the delay in question."*

At para. 5.33 he continued:

> *"The matter which caused me most concern is the fact that neither Persona nor Comcast took any formal steps to inform the Minister that it was their intention to, in effect, "park" the proceedings pending developments at the Moriarty Tribunal. By not adopting that formal position, it seems to me that the Minister was, at least to some extent, prejudiced by being deprived of the opportunity of taking advice on, and taking whatever steps might be advised in relation to, the situation which would then have become clear."*

28. In *Comcast* all of the judges placed very significant emphasis on the unique circumstances arising in that case. In contrast, there are no such unique circumstances indicated in this case. The plaintiff simply chose to await the outcome of a case involving similar allegations of alleged misselling of an investment in a fund that was different to the fund at issue in these proceedings.

29. I am satisfied that the defendant has shown that the delay in this case is inexcusable in all the circumstances.

The balance of justice

30. Once the court is satisfied that the delay has been shown to be inordinate and inexcusable the court must then proceed to consider whether the balance of justice lies in favour of the proceedings continuing to trial or being dismissed.

31. In assessing the balance of justice the 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 *Stephens v. Paul Flynn Ltd*). The statement of claim delivered on the 11th October, 2017 indicates that this case is very far from being a "documents" case. Significant oral testimony will be required to deal with the matters pleaded at para. 8, 14, 19, 23, 46 and 54 of the statement of claim. These paragraphs in the statement of claim referred to conversations and representations alleged to have been made in 2006 by representatives of the defendant. This judgment is being written in June 2018 and the proceedings are now a very long way off from trial. It is highly unlikely that they could be heard before 2020.

32. In *Stephens v. Paul Flynn Ltd* at p. 13 Clarke J. said:

> *"He has not, however, been able to point to any specific witness who is no longer available. It must also be taken into account that there are, apparently, statements of the relevant witnesses to the events of the 5th December, 1995 taken by the Gardaí on the occasion in question. That being said an issue as to the credibility of witnesses (which will almost certainly arise) will be all the more difficult of resolution where those witnesses are being asked to recollect matters that occurred so long ago. While the prejudice may not be quite as great as the Defendant contends for I am satisfied that it will nonetheless be of some significance."*

33. In *Comcast* at para. 6.5 of the judgment Clarke J. referred to this passage from *Stephens* and said that:

> *"experience tells that a court, when faced with having to choose between the accounts of two or more witnesses and in the absence of contemporary objective or forensic evidence which may give a clear indication as to which account should be preferred, will often have to base an assessment of the evidence on the court's impression of both the truthfulness and accuracy of the recollection of the witnesses concerned. In at least some cases the choice may be difficult. In that context little things can matter. Against that background, while the fact that parties may, a long time ago, have made a witness statement, which may provide some, but not too great, assistance for the court in forming its impression of the truthfulness of witnesses; ultimately the court's assessment may turn on their ability to describe aspects of the events not recorded in their witness statements."*

34. The plaintiff argued that the defendant had not made out any particular claim that it was prejudiced by the delay in this case. In the light of these observations of Clarke J., and of the case now pleaded by the plaintiff, I do not agree with these submissions. The defendant has not exaggerated the prejudice it will suffer if this case comes to trial but it has made out a case that it will suffer some prejudice in defending this case. It is important to note that in both Stephens and Comcast prior written statements from potential witnesses existed. That is not the case here.

35. 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. In *Carroll v. Seamus Kerrigan Ltd* [2017] IECA 66 Irvine J. said at para. 26:

> *"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 15 years ago and in circumstances where neither his employer, nor the person who allegedly perpetrated the assault remain a party to the proceedings.

36. At para. 13 of the judgment the court held:

> *"It is, however, material to remember that when a court comes to consider whether the balance of justice favours allowing the action proceed in the light of its finding of inordinate and inexcusable delay, the author of that delay is not to be absolved of their fault, unless they can point to some countervailing circumstances which the court considers sufficient to negate the effect of such behaviour: see, e.g., the comments to this effect of Fennelly J. in Anglo Irish Beef Processors Limited v. Montgomery [2002] 3 I.R 510 ."*

37. Irvine J. went to hold in para. 24:

> *"There is, in any event, a long line of authority to support the dismissal of actions in the presence of moderate prejudice where the court has found the plaintiff guilty of inordinate and inexcusable delay. In Stephens v. Paul Flynn Ltd [2008] 4 I.R. 31 Kearns J. concluded that a defendant need only establish moderate prejudice arising from delay as justification for dismissing the proceedings on the third leg of the Primor test."*

38. When Irvine J. referred to a plaintiff pointing to countervailing circumstances which a court might consider sufficient to negate the effects of his or her delay she would have had in mind the unpredictable hazards of life which can afflict the course of litigation, to use the phrase of Fennelly J., whereby individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction or where documents may have been mislaid, lost or destroyed. There are no such countervailing circumstances asserted or relied upon by the plaintiff in this case. The plaintiff knew or had available to him all of the ingredients to commence and pursue his litigation from 2009 or at the very latest February, 2012. In circumstances where the key events occurred towards the end of 2006 it was incumbent upon him to act with dispatch at that stage.

39. In my judgement, 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 will not be accepted by the trial judge as reliable where the result may have been otherwise if they had given their evidence closer to the events, with potentially very great prejudice to the defendant.

40. There are cases where unavoidably the court is required to accept evidence of events which may have occurred decades prior to the hearing of the action: applications brought pursuant to s. 117 of the Succession Act, 1965, equitable claims to land, adverse possession claims and claims to easements acquired by prescription are just some examples. However, frequently, the delay in those proceedings is unavoidable and is certainly not attributable to any delay on the part of the litigants in bringing the case to trial. Different considerations apply when it was at all times possible to bring forward a claim in a timely and efficient manner.

41. Frequently in applications of this kind the court has to consider whether the defendant has contributed in some culpable fashion to the delay in the proceedings so that in fact the balance of justice does not lie in favour of dismissing the proceedings on the grounds of inordinate and inexcusable delay. In determining what is an acceptable period of time for a defendant to wait before bringing a motion and what is an unacceptable period of time, it is useful to consider the provisions of O. 122 r. 11. This provides:

> *"In any cause or 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 defendant may apply to the Court to dismiss the same for want of prosecution, and on the 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."*

42. Thus, the rules envisaged that a defendant will not be guilty of culpable delay if it waits for a period of two years before bringing a motion to dismiss the plaintiff's action under O. 122 r. 11. The plenary summons was served on the defendant on December 2013 and therefore it would have been possible but highly unusual for the defendant to bring a motion under O. 122 r. 11 by late December 2015. In fact, the notice of intention to proceed was served 18 months later, on the 29th June, 2017 but no further steps were taken by the plaintiff after the expiration of one month from the date of the service of the notice. In those circumstances I do not believe that the defendant can be said to have delayed unduly in bringing this motion. Certainly, in my judgment it was not such as would entitle the plaintiff to rely upon it to resist an order dismissing his claim which the court would be otherwise minded to make.

Conclusion

43. The delay in this case was inordinate in that the plenary summons issued on the 13th December, 2012 and a statement of claim was not delivered until the 11th October, 2017 after the motion the subject matter of this judgment had issued. The delay was inexcusable in that the only reason offered for the delay was the plaintiff's unilateral decision – which was not communicated to the defendant and with which it did not agree – to await the outcome of other litigation in order to strengthen his position in this litigation. I do not accept that there was any appreciable delay legitimately attributable to the nature of the case the plaintiff now advances.

44. In my judgement the balance of justice favours dismissing rather than continuing the proceedings. Oral evidence will be required of events which occurred in 2006 and the credibility of witnesses will have to be assessed at least more than twelve years after the key events the subject of the litigation. The plaintiff is solely responsible for this delay. The defendant in my opinion has been prejudiced: 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 relief sought. Accordingly, I dismiss the action herein.