**THE HIGH COURT**

**1997 7917 P**

**BETWEEN**

**DERMOT DESMOND**

**PLAINTIFF**

**AND**

**TIMES NEWSPAPERS LIMITED**

**DEFENDANT**

**AND**

**THE HIGH COURT**

**1998 5039 P**

**BETWEEN**

**DERMOT DESMOND**

**PLAINTIFF**

**AND**

**TIMES NEWSPAPERS LIMITED, RORY GODSON AND JOHN McMANUS**

**DEFENDANTS**

**AND**

**THE HIGH COURT**

**1998 5041 P**

**BETWEEN**

**DERMOT DESMOND**

**PLAINTIFF**

**AND**

**TIMES NEWSPAPERS LIMITED, RORY GODSON, JOHN MANUS AND JOHN BURNS**

**DEFENDANTS**

**AND**

**THE HIGH COURT**

**1998 5044 P**

**BETWEEN**

**DERMOT DESMOND**

**PLAINTIFF**

**AND**

**TIMES NEWSPAPERS LIMITED, RORY GODSON, JOHN McMANUS AND JOHN BURNS**

**DEFENDANTS**

**AND**

**THE HIGH COURT**

**1999 8966 P**

**BETWEEN**

**DERMOT DESMOND**

**PLAINTIFF**

**AND**

**TIMES NEWSPAPERS LIMITED, RORY GODSON AND JOHN McMANUS**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Dunne delivered on the 12th day of June 2009**

The defendant in the above entitled proceedings has issued a series of motions in the respective proceedings seeking the following relief against the plaintiff in each of the proceedings:

> "An order pursuant to the inherent jurisdiction of this Honourable Court or, in the alternative, pursuant to O. 122, r. 11 of the Rules of the Superior Courts, 1986, dismissing the plaintiff's claim against the defendants herein (or, in the alternative, striking out that claim) by reason of the inordinate and inexcusable delay in the prosecution thereof by the plaintiff."

The grounds on which the application was made is similar in each case and the response of the plaintiff is similar in each case. For that reason it was convenient to deal with the motions in each case together.

**Background**
In order to give some indication as to the nature of the individual proceedings I propose to set out by way of background an outline of the matters at issue in each of the proceedings. For this purpose, I gratefully adopt the factual background as set out in the submissions of the defendants herein.

(a) Dermot Desmond v. Times Newspapers Limited; Record No. 1997/7917P.

These proceedings ("the 7917 proceedings") were instituted by plenary summons dated the 9th July, 1997, and arise out of two articles published in the Sunday Times on the 22nd June, 1997, under the headline "Desmond advised Dunne not to give evidence to Tribunal" and "Dunne advised not to testify".

The articles refer to conversations between the plaintiff and Noel Smyth, solicitor, in which it was stated that the plaintiff had sought to persuade or advise Ben Dunne not to give evidence to the Tribunal of Inquiry (Dunnes payments) and that Mr. Dunne believed that such persuasion or advice was motivated by a desire on the part of the plaintiff to protect Charles Haughey, the now deceased former Taoiseach, from adverse findings of that Tribunal. The plaintiff alleges, *inter alia*, that the articles were published falsely and maliciously.

The defendant denies that the articles are defamatory, pleads justification in certain specific respects, denies that the plaintiff has suffered damage and further relies, *inter alia*, on the provisions of the European Convention on Human Rights. Following the close of pleadings, there were discussions between the parties in relation to discovery, but nothing further was heard from the plaintiff's solicitors after a letter of the 10th October, 2000.

(b) Dermot Desmond v. Times Newspapers Limited, Rory Godson and John McManus, Record No. 1998/5039P.

These proceedings ("the 5039 proceedings") were instituted by plenary summons dated the 29th April, 1998, and arise out of an article published in the Sunday Times Newspaper on the 8th February, 1998, under the headline "Desmond rescued Haughey's son's firm". The article referred to a payment of IR£100,000 made by the plaintiff, through an investment company controlled by him, International Investment Underwriting Limited, to Celtic Helicopters Limited, (the company controlled by Ciaran Haughey, son of Charles Haughey) in 1995 to cover flying hours for executives. As of the time of the writing of the article in 1998, IR£56,150 of time had been used.

The defendants deny that the article was defamatory, deny certain innuendos pleaded by the plaintiff, pleaded justification in certain specific respects, deny damage and further rely, *inter alia*, on the provisions of the European Convention on Human Rights. Again, following the close of pleadings, there were discussions between the parties in relation to discovery, but nothing was heard from the plaintiff's solicitors after a letter of the 10th October, 2000.

(c) Dermot Desmond v. Times Newspapers Limited, Rory Godson, John McManus and John Burns; Record No. 1998/5041P.

These proceedings ("the 5041 proceedings") were also instituted by plenary summons dated the 29th April, 1998, and arise out two articles published in the Sunday Times Newspapers on the 11th January, 1998, under the headlines "Telecom cash paid Haughey's boat bill" and "Just good friends"'

The first article related to the sum of approximately IR£75,000, which was paid from the accounts of Freezone Investments Limited, a company controlled by the plaintiff, which was a substantial beneficiary of the sale of the former Johnston Mooney & O'Brien's site to Telecom Éireann, to the Haughey family. The second article related more generally to the plaintiff's business career.

The defendants deny that the articles were defamatory, deny that innuendos pleaded by the plaintiff, plead justification

in certain specific respects, deny damage and further rely, *inter alia*, on the provisions of the European Convention on Human Rights. Again, following the close of pleadings, there were discussions between the parties in relation to discovery, but nothing was heard from the plaintiff's solicitors after a letter of the 10th October, 2000.

(d) Dermot Desmond v. Times Newspapers Limited, Rory Godson, John McManus and John Burns; Record No. 1998/5044P.

These proceedings ("the 5044 proceedings") again were instituted by plenary summons on the 29th April, 1998. They arise out an article published in the Sunday Times Newspapers on the 15th February, 1998, under the heading "DPP under fire from missed cases".

The article referred to a number of Tribunal and Inspectors' Reports which had been sent to the Director of Public Prosecutions over a number of years which had not resulted in any prosecutions being taken. The article referred to the fact that John Glackin, the Inspector appointed by the Minister for Industry and Commerce to investigate issues arising from the purchase of the site in Ballsbridge by Telecom Éireann had found that the plaintiff had given untruthful evidence in relation to his involvement in the transaction, which had cost the state millions of pounds. The article further noted that no prosecution had ever been taken.

The defendants deny that the article or the meanings contended for by the plaintiff were defamatory, pleaded justification in certain specific respects, deny that the plaintiff had suffered damage and further rely, *inter alia*, on the provisions of the European Convention on Human Rights. Again, following the close of pleadings, there were discussions between the parties in relation to discovery, but nothing was heard from the plaintiff's solicitors after a letter of the 10th October, 2000.

(e) Dermot Desmond v. Times Newspapers Limited, Rory Godson and John McManus: Record No. 1999/8966P.

These proceedings ("the 8966 proceedings") were instituted by plenary summons dated the 8th September, 1999, and arise out an article published in the Sunday Times Newspapers on the 8th August, 1999, under the heading "Haughey's son was on Ryanair payroll".

The article referred to a payment of IR£10,000 made to Celtic Helicopters Limited, a company controlled by Ciaran Haughey, which was made by NCB, a stockbroking firm then owned by the plaintiff, through Ryanair.

The defendants deny that the article or the meanings alleged by the plaintiff were defamatory, pleaded justification, deny that the plaintiff has suffered damage and further rely, *inter alia*, on the provisions of the European Convention on Human Rights. Again, following the close of pleadings, there were discussions between the parties in relation to discovery, but nothing was heard from the plaintiff's solicitors after a letter of the 10th October, 2000

As can be seen from the summary of the background set out above, reference was made to a letter of the 10th October, 2000, from the plaintiff's solicitors and for completeness I should just refer to that letter. It stated that the plaintiff would swear his own affidavit of discovery and confirmed that the plaintiff's solicitors would not require specific categories of discovery to be agreed. It concluded: "We await hearing from you".

**The applications**
As can be seen from the above outline of the background to theses proceedings, the first set of proceedings commenced in 1997 and the last of the series of actions commenced in 1999. All of the proceedings have been dormant since 2000. Apart from these proceedings, the plaintiff issued one further set of proceedings against these defendants entitled The High Court, Record No. 1998/5045P, between Dermot Desmond, plaintiff and Times Newspapers Limited, Rory Godson and John Burns, defendants ("the 5045 proceedings"). Those proceedings were revived by the plaintiff in 2005/2006 and an application was brought by the defendants in those proceedings to dismiss on grounds of delay. I will refer later to the judgment of MacMenamin J. in those proceedings in which he made an order dismissing the proceedings but placed a stay on the order subject to conditions. That judgment and order is under appeal by the defendants to the Supreme Court.

The basic complaint on the part of the defendants in these proceedings is that the proceedings have lain dormant since the 10th October, 2000. The events at issue in the proceedings range over a period in the 7917 proceedings to the late 1980s: in the 5039 proceedings to 1995; in the 5044 proceedings to 1990 and so on. Ms. Claire Callanan in the affidavits grounding the various applications complained as to the inordinate delay of the plaintiff in prosecuting these actions from the time of the last letter received on the subject of discovery in October, 2000. She referred to the prejudice caused to the defendants by reason of the passage of time. She also noted that the co-defendants in some of the proceedings, Mr. Godson and Mr. McManus are no longer employed by the newspaper. (I note in this context that the solicitors for the first defendant are also on record for the other defendants. Presumably this should ease any concern about the fact that the co-defendants no longer work for the newspaper).

A significant complaint made by Ms. Callanan in these proceedings as to delay relates to the fact that notwithstanding the decision of the plaintiff to reactivate the 5045 proceedings in 2005/2006, the plaintiff took no steps to reactivate this series of proceedings. The 5045 proceedings were also libel proceedings and it would be fair to say that the factual background in that case is similar to the factual background in this series of cases. In the 5045 proceedings the plaintiff sought to explain the delay in prosecuting those proceedings by reference to advice received from counsel that no further steps should be taken by him pending the outcome of the Moriarty Tribunal as there was a belief that the Tribunal would make findings relevant to those proceedings.

A complaint was also made by Ms. Callanan as to the possible objective of the plaintiff issuing proceedings in order to inhibit the defendants in their reporting on the plaintiff and his affairs.

Mr. McAuliffe, solicitor, on behalf of the plaintiff noted that there had been correspondence between the parties, between March 1998, and the 10th October, 2000, in relation to the issue of discovery. He stated that the Tribunal of Inquiry known as the Moriarty Tribunal was sitting from in or around October 1997. The terms of reference at that Tribunal gave rise to a belief that the Tribunal would most likely make determinations relevant to the allegations being made and issues arising in these proceedings. The plaintiff was advised by his then Senior Counsel, Garrett Cooney, S. C., not to proceed further with the actions but to await the findings of the Moriarty Tribunal. He went on to accept that there had been delay and went on to say that the defendants knew or ought to have known by in or around December 2005, that the plaintiff was intent on proceeding with other libel matters involving the newspaper, the plaintiff having concluded that the

Moriarty Tribunal was taking too long to conclude its deliberations. He went on to say that the balance of justice favoured the plaintiff and asserts that the plaintiff acted bona fide in not pursuing his action for the specific time and that the defendants have not suffered appreciable prejudice. He referred to the fact that the defences plead justification and that such a pleading heightens the obligations and responsibilities of the defendants and points out that the defendants must have retained possession of the evidence gathered at that time including notes and statements of witnesses which go to support that plea.

Ms. Callanan swore another affidavit on behalf of the defendants and in that affidavit complained of the fact that no affidavit had been sworn by the plaintiff himself in relation to the matters herein and in particular relating to the plaintiff's own decision not to pursue the proceedings on the basis of the advice furnished to him. In that affidavit, Ms. Callanan sets out at length a number of concerns as to the nature of the advices apparently given to the plaintiff and the fact that the decision not to proceed further with the actions pending the findings of the Moriarty Tribunal was never communicated to the defendants. She does not accept that the reason given by the plaintiff for not proceeding could be a valid justification for what is a failure to prosecute the actions for a period of approximately eight years. She also referred to a distinction between these actions and the 5045 proceedings and gave a description of the course of those proceedings. I will deal with the question of whether there is or is not a distinction between the 5045 proceedings and these proceedings in the context of the arguments made herein.

Finally a short affidavit was sworn by the plaintiff herein. In that affidavit, he confirmed the nature of the advice given to him by Senior Counsel and that he accepted the advice given to him. He also stated that his instructions at all times from the issue of proceedings were to bring the cases on for trial as soon as possible. He took issue with the suggestion that the proceedings were issued for the purpose of inhibiting the defendants in their reporting of the plaintiff and his affairs. He accepted that there had been delay in the proceedings and undertook to prosecute the actions expeditiously if permitted to do so.

Before considering in detail the submissions made to the court and the relevant legal principles, I want to comment briefly on one aspect of the evidence on affidavit before me. Ms. Callanan in her affidavits, as I have already mentioned, referred to the manner in which the plaintiff sought to justify the delay in prosecuting these proceedings by reference to the advice of Senior Counsel. She was of the view that such advice even if given orally would have been documented and she queried the extent of any such advice and whether the advice was subject to review or tempered by any caveat having regard to the possibility of the proceedings being dismissed on delay grounds. For that reason she stated that any documents which recorded the oral advices given should be exhibited by the plaintiff himself in a supplemental affidavit. I have already referred to the affidavit sworn by the plaintiff herein and it is clear from what I have noted above of his affidavit that the plaintiff did not give any further information in relation to the advice given, save that it had been given at consultation and that the advice was accepted. I appreciate that legal professional privilege would normally apply to such advice but the plaintiff has relied on that advice to explain and justify the delay in prosecuting these proceedings. Nonetheless nothing is exhibited in relation to that consultation although one would have expected that in the ordinary course of events a memorandum of attendance at a consultation between Senior Counsel, Solicitor and client would have been made. The plaintiff has certainly not clarified whether the advice was subject to review or tempered by any caveat having regard to the possibility of the proceedings being dismissed on delay grounds. It is somewhat surprising that the plaintiff has chosen not to provide further information in regard to this issue particularly having regard to the concerns raised by Ms. Callanan. The conduct of the proceedings is also somewhat surprising having regard to the averment of the plaintiff that his instructions at all times from the issue of the proceedings was to bring the cases on for trial as soon as possible. His instructions appear to be at odds with the advice given by Senior Counsel which he says he accepted. What is most surprising however, is that having decided to revive the 5045 proceedings, it appears that no steps were taken to revive the other proceedings and those matters remained in abeyance. No explanation or excuse has been offered in the affidavits of either Donal McAuliffe, solicitor on behalf of the plaintiff or the plaintiff himself for taking no further steps in these five sets of proceedings. Mr. McAuliffe in his affidavit, averred:-

> "Whilst we accept that there has been delay, at no time did the defendants *(sic)* serve a notice of discontinuance. Furthermore, the defendants knew or ought to have known, by in or around 2005, that the plaintiff was intent on proceeding with other libel matters involving the same newspaper, the plaintiff having concluded that the Moriarty Tribunal was taking too long to conclude its deliberations."

Given the averment that the defendants knew or ought to have known by December 2005, approximately, that the plaintiff was intent in proceeding with these libel actions against the Sunday Times newspaper, one wonders why no steps of any kind were taken by or on behalf of the plaintiff to continue these proceedings. It seems difficult to reconcile the lack of action on the part of the plaintiff with the stated intentions of the plaintiff in relation to the pursuit of these proceedings. Whilst it may be that there is some degree of excuse for the delay up to December 2005 by reason of the advice of Senior Counsel in relation to the Moriarty Tribunal, no excuse of any kind whatsoever has been proffered in relation to the period thereafter for the additional delay between that date and the date of issue of the motions herein.

**Legal principles**
The legal principles applicable to an application such as this have been set out in a number of well known decisions. The first of those is the Supreme Court decision in the case of *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. In that case the principles were summarised by Hamilton C.J. in an often quoted passage at pp. 475 – 6 where he stated as follows:-

> "(a) The courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) It must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) Even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (d) In considering this latter obligation the court is entitled to take into consideration and have regard to:

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant - because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

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

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

The *Primor* principles have been applied in a number of decisions, notably *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 and *Stevens v. Paul Flynn Limited*. The decision in *Gilroy v. Flynn* is noteworthy for the comments of Hardiman J. at p. 293-4 where he said:-

> "Secondly, the Courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. Thirdly, following such cases as *McMullen v. Ireland* [ECHR 422 97/98. 29 July, 2004] and the European Convention on Human Rights Act, 2003 the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.
>
> These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope."

That decision was relied on by the defendants to support the argument that it is clear that it is not necessary for a defendant to say that as a result of the delay there is a difficulty because of, for example, a missing witness or document or other evidence which may have been available to but which is no longer available as a result of the delay in prosecution of the particular case.

The approach of the court in *Gilroy v. Flynn* was noted by the High Court in the case of *Stevens v. Paul Flynn Limited* [2005] I.E.H.C. 148, a decision which was subsequently upheld on appeal by the Supreme Court. Clarke J. in that case stated at p. 152 thereof:-

> ". . . it seems to me that for the reason set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached 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 may 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."

Referring to those decisions, counsel on behalf of the defendant emphasised the statement of principles set out by Clarke J. in *Stevens v. Flynn*. In the course of his judgment in that case, having referred to the decision of the Supreme Court in the Gilroy case, Clarke J. identified the applicable principles as follows:-

> "Having considered the matter I am satisfied that the two central tests remain the same. The court should therefore:
>
> 1. Ascertain whether the delay in question is inordinate and inexcusable;
>
> 2. If it is so established the court must decide where the balance of justice lies."

Clarke J. then went on to make the comment which is quoted in the passage above.

In that case, Clarke J. considered the nature of the prejudice therein. He stated:-

> "I am therefore satisfied that the defendant has suffered prejudice by virtue of the delay, but that same cannot be placed at too high a level. Finally in that regard I have considered the prejudice on the basis of the delay from the time of the incidents giving rise to the proceedings rather than solely in respect of the period from the commencement of the proceeding to date. While I agree that the court is confined, in determining a delay has been inordinate, to the period subsequent to the commencement of the proceedings I am of the view that in assessing

> the balance of justice the court has a wider of discretion and can take into account prejudice which may be cumulatively attributable to a delay both prior to and subsequent to the commencement of proceedings."

Clarke J. went on in that case to describe the prejudice as being of a moderate degree but nonetheless, found that the balance of justice favoured the dismissal of the proceedings.

One of the interesting points to note in that case is the fact that Clarke J. had regard not just to the delay since the commencement of the proceedings but also to the delay since the incidents complained of in those proceedings in assessing where the balance of justice lay in the context of that case. It was emphasised having regard to the facts of the cases before this court that it would be necessary to look back at events that took place in the 1980s and 1990s. The delay in these cases is far in excess of the delay in the case of *Stevens v. Paul Flynn Limited*. The delay in those proceedings was of the order of 20 months.

I think it would also be helpful to refer to a decision which specifically deals with defamation proceedings and the importance in such proceedings to move with expedition. In *Ewins v Independent Newspapers (Ireland) Limited* [2003] 1 I.R. 583, Keane C.J. at p. 590 commented:-

> "A plaintiff in defamation proceedings, as opposed to many other forms of proceedings, is under a particular onus to institute his proceedings instantly and without delay and, of course, not simply because he will otherwise be met with the response that it cannot have been of such significance to his reputation if he delayed so long to bring the proceedings but also in his own interests in order, at once, to restore the damage that he sees to have been done to his reputation by the offending publication."

Although that comment was made in the context of the institution of defamation proceedings, it was emphasised on behalf of the defendants that it applied equally to the prosecution of defamation proceedings. Keane C.J. also commented at p. 58:-

> "He . . . issued the plenary summons, but simply took no further steps, other than the very preliminary steps I have referred to as amending the title and so on. He simply took no further steps. It is not in my view open to him at this stage, some five years later, to say that he did that for tactical reason of his own which, it is clear, he never actually formally communicated to the defendants saying that this was why he was not pursuing the claim. He simply took that decision of his own motion and if it should transpire that as a result of his own decision as to how he would proceed, if he elected to take that course to which it cannot be said that the defendants contributed in any way, then he has also to accept the consequences of the delay he allowed to ensue is so inordinate as to entitle the defendants, unless justice indicates otherwise, to have the proceedings struck out.
>
> That is a risk he takes in pursuing that particular course of inaction in this case."

Although the plaintiff in this case proceeded to a different stage than the plaintiff in the *Ewins* case, it is nonetheless interesting to note the similarity between the facts of that case and the facts of these cases. Although the plaintiff in these cases continued with the proceedings for longer before they became inactive, he decided not to pursue these proceedings for very considerable period of time having regard to the legal advice he had apparently obtained. Like Mr. Ewins, he took no steps to communicate the decision not to pursue the proceedings on the advice of senior counsel pending the hearings at the Moriarty Tribunal.

In the course of submissions, counsel on behalf of the defendants also referred to the decision in the case of *Comcast International Holdings Inc. v. Minister for Public Enterprise* (Unreported, High Court, 13th June, 2007). That case is of interest because the plaintiffs therein offered as an excuse for their delay in prosecuting the proceedings the fact that they were monitoring the Moriarty Tribunal which was considering the award of a GSM mobile telephone licence, the subject matter of the issues in the proceedings. This was not found to be a valid excuse by Gilligan J. who stated at p. 23 of the judgment:-

> "My overall conclusion is that I do not consider that the excuses offered by the plaintiffs and, in particular, that they were monitoring the hearings of the Moriarty Tribunal into the award of the second GSM mobile telephone licence and, hence, did not deliver a statement of claim, an explanation that constitutes a valid excuse and, accordingly, I come to the conclusion that the delay involved in the prosecution of all three claims herein is not only inordinate but also inexcusable. The delay, in my view, goes beyond the minimum which may be considered inordinate."

Gilligan J. also made a number of comments in relation to presumed prejudice. He found in that case, that the prejudice that would have been suffered by reason of the passage of time and the dimming of memory of relevant witnesses was moderate.

I now want to consider two cases which have a particular bearing on the case before me. The first of those cases is the case of *Desmond v. Doyle and Desmond v Times Newspapers Limited and Others*, a judgment of MacMenamin J. dated the 14th March, 2008. This is the ex-tempore judgment in the 5045 proceedings referred to previously. One judgement was delivered in two separate sets of proceedings, one being the 5045 proceedings referred to previously and the other set of proceedings being proceedings brought by the plaintiff against a Tom Doyle, (The High Court, Record No. 1998/4771P). The second decision I want to look at is the decision of the Supreme Court in the case of *Desmond v. M.G.N.* Limited [2008] I.E.S.C 56. The plaintiff in those cases is one and the same as the plaintiff in the cases before me. The proceedings in each of the cases are libel proceedings and the factual background is similar to the factual background in the present cases.

The application before the court in the 4771/5045 proceedings was to strike out the proceedings for want of prosecution. The proceedings arose out of an article published on the 1st March, 1998, in the Sunday Times newspaper, under the headline "Desmond was not the man behind IFSC idea, Tribunal told". In the proceedings against Times Newspapers Ltd., the plaintiff submitted that the words complained of might be understood to mean that he had wrongly taken credit for

the idea of the Financial Services Centre, that in fact he had obtained the idea for the Centre through a leak in the Department for Finance, that other persons were excluded by himself in collusion with others from acquiring a block in the centre and that as a consequence he is to be considered a corrupt or dishonest person. In the proceedings against Tom Doyle, it is alleged that words to the same effect were contained in a letter sent to the Moriarty Tribunal of Inquiry; were also sent or given to John Burns, a journalist working with the Sunday Times and as a consequence were published in the edition of the Sunday Times Newspaper referred to above. Those proceedings were issued in 1998. A chronology of the Doyle proceedings was set out in the course of the judgment of MacMenamin J. and it was indicated that the chronology in respect of the Times Newspapers was similar. Following the delivery of a notice of change of solicitor on behalf of the defendants on the 6th August, 1999, no further steps were taken in the proceedings. Indeed the last step taken on behalf of the plaintiff appears to have been the delivery of a reply in April 1999, to the defence of the defendants. As was noted by MacMenamin J., the critical point was the elapse of time after the steps taken in 1999. In December, 2005, a notice of intention to proceed, was served by the plaintiff. Subsequently in July 2007, a motion for discovery was issued by the plaintiff and thereafter in October 2007, the motion to dismiss for want of prosecution was issued by the defendants.

It was contended in that case that there had been inordinate and inexcusable delay on the part of the plaintiff in the prosecution of the proceedings and that there was prejudice deriving from a natural dimming of memory. A further concern was raised by the defendants in relation to the task of obtaining documentation from the Department of Enterprise, Trade and Employment. There was a concern that such documentation might no longer in the possession of the Department. In the course of his judgment, MacMenamin J. noted that:-

> "Quite clearly, a number of the issues identified earlier relating to the circumstances of publication of the letter, and the 'mitigation' issues identified, have a significantly wider range than simply matters of law. They will rely on evidence. Issues of recollection and perforce dimmed recollected by reason of the elapse of years may well come into play here.
>
> However, there is no plea of justification or fair comment in either of the proceedings which might broaden further the scope of the proceedings and raise other issues of recollection. It is not shown that any relevant witness is deceased or has no recollection of the events. Thus, substantial prejudice in its classical sense is not established."

In considering the facts before him, MacMenamin J. concluded that the delay was inordinate and inexcusable. He then proceeded to consider the issue of the balance of justice. In the course of his judgment at para. 30 he commented:-

> "There is no suggestion that the defendant newspaper in correspondence indicated that it would be appropriate that the plaintiff defer proceeding in his action against that newspaper to await the outcome of proceedings elsewhere to the same general issue against a television company. A decision taken by a plaintiff for tactical reasons absent the consent or participation of a defendant is not available in an application of this type as an answer to whether the delay was excusable. I am satisfied the delay is inexcusable although the circumstances fall to be considered in the balance of justice test."

Having considered the balance of justice, he commented at para. 44:-

> "On balance, therefore, I have not been satisfied that the claim should be dismissed without condition. The effect of delay in the many forms which may arise is not sufficiently established. What stands, is essentially, substantial elapse of time without any more than marginal or potential prejudice."

Apparently the defendants take issue with the finding that the defendants had not suffered anything other than marginal or potential prejudice. As mentioned previously that decision is under appeal to the Supreme Court.

I now want to look at the decision in *Desmond v. M.G.N.* Limited. The proceedings in that case were for damages for libel arising out of the publication of an article in the Irish Mirror on the 8th January, 1998. The article concerned the finances of Charles Haughey and alleged that the plaintiff helped fund the "champagne lifestyle" of Mr. Haughey. A further article was written on the 9th January, 1998 of which complaint was also made in the proceedings. The proceedings were commenced on the 12th May, 1998. A defence was delivered on the 1st February, 1999, in which it was pleaded, *inter alia*, no libel, justification and fair comment. No reply was delivered. Nothing further occurred in the proceedings until a notice of intention to proceed was served on behalf of the plaintiff in February, 2005. Thus, the proceedings had been dormant for six years. The explanation given for the delay in that case was a decision taken by the plaintiff to "park" the proceedings to await the outcome of the Moriarty Tribunal's investigations. The decision was based on legal advice. Ultimately, given the length of the hearings and investigations by the Moriarty Tribunal, the plaintiff took the view that he should reactivate the proceedings. In that case as in these cases, the defendant had not been notified of the plaintiff's decision to let the proceedings lie dormant.

The three judges of the Supreme Court agreed that the delay in that case had been both inordinate and inexcusable. Macken J. and Geoghegan J. concluded that the balance of justice favoured the action being allowed to proceed. Kearns J. in his judgement dissented from that view. Hanna J. in the High Court had found that the delay was inordinate but he found the delay to be excusable having regard to the legal advice that had been given to the plaintiff. One of the comments in the course of the judgment of Macken J. on this issue seems to me to be of some importance in the overall context of the decision. She noted at p. 5:-

> "It is, moreover, axiomatic that in the case of a claim to vindicate the reputation of a person, the rule is that proceedings such as those for defamation must be progressed with extra diligence. That may mean, in a particular case, moving proceedings with even more speed than is required under the Rules of the Superior Courts. Such a requirement is well established also in certain types of judicial review proceedings, for example. On the issue of defamation proceedings in particular, the appellant relies, *inter alia*, on the following extract from the English case of *Wakefield v Channel 4 Television Corporation and Others* [2005] E.W.H.C. 2410:
>
> 'As it was put by Glidewell LJ in *Grovit v Doctor*, 28th October 1993 (unreported), CA:

> 'The purpose of a libel action is to enable the plaintiff to clear his name of the libel, to vindicate his character. In an action for defamation in which the plaintiff wishes to achieve this end, he will also wish the action to be heard as soon as possible."
>
> I would wholeheartedly endorse such an approach. If a plaintiff in defamation proceedings has decided, even, as here without any suggestion of *mala fides*, although the appellant suggests it was a wholly tactical decision, and even on the recommendation or advice of his legal advisors, not to progress his proceedings at least within the normal time limits prescribed, the delay thereby caused may not be excusable. It is certainly a telling factor against excusing delay, if a party retains to himself, as the respondent did here, the right unilaterally to take no further steps in the proceedings for an indeterminate period into the future without, as a very minimum, notifying the other party of his intention to do so."

Macken J. as is clear from the passage set out above and as is also clear from her judgment as a whole was in no doubt that there is a specific obligation on a plaintiff in libel proceedings to progress the claim with real diligence. It is not surprising then that in the light of those trenchant comments the court found the delay in those proceedings to be inordinate and inexcusable.

The Supreme Court then proceeded to consider the balance of justice in *Desmond v. M.G.N.* As I have pointed out the majority of the court in that case came to the conclusion that the balance of justice favoured the continuance of the proceedings. Macken J. in her judgment examined the relevant legal principles and was satisfied that the longstanding jurisprudence set out in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, as developed in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, and which has been endorsed in a number of more recent cases remains substantially unaltered. She referred in particular to the *Primor* decision and the principles set out therein. She then examined the facts of that case in the light to those principles. Of particular importance on the facts of that case, was the fact that a plea of justification had been made in the *Desmond v. M.G.N.* case. At

p. 14 of her judgment she stated:-

> "A plea of justification it is particularly important, having regard to the nature of the obligations imposed in that regard, for the law makes it very clear, as Kelly, J. stated in *Cooper Flynn v Radio Telefis Eireann* citing Lord Denning M.R. in Associated Leisure v Associated Newspapers [1970] Q.B. 450 at 456:
>
> > 'Like a charge of fraud, (counsel) must not put a plea of justification on the record unless he has clear and sufficient evidence to support it.'
>
> I am satisfied that counsel would not put a plea of justification other than in accordance with their obligations in that regard, since the case law also makes it clear that a plea of justification, *simpliciter*, is a mere repetition of a libel, and ordinarily, material facts supporting a plea of justification should be included in the defence as delivered (*McDonagh v Independent Newspapers,* (Unreported, High Court, 10th May 2005)).
>
> Even allowing for a modified form of justification which counsel for the appellant now appears to contend for, it is axiomatic that there is an obligation on a party pleading justification to remain at all times in possession of all the evidence, including notes, which go to support the plea, as well as all the meanings contended for, at the time of the delivery of the defence. A failure to do so in my view may well constitute, depending on the circumstances, negligence, even gross negligence, on the part of the party invoking such a plea who fails to ensure that the evidence is in fact maintained, at least to the expiry of a limitation period.
>
> As for the respondent, a plea of justification now lies against his claim for damages for libel. The libel, according to the statement of claim, is serious in that it is said to consist, *inter alia*, of offences under the Prevention of Corruption Act 1906. In the ordinary course of events, if the proceedings are struck out his claim for defamation fails. However, the plea of justification included in the defence, although it will never be litigated, remains unchallenged. That is, on any view, a serious injustice to a person seeking to vindicate his good name and reputation, even after a delay. If he is prevented from doing so where a defence of justification is pleaded, and the pleader successfully relies on an absence arising from his own fault, of the very own notes it claims would support the plea, the taint of clear wrongdoing of a very serious nature, would remain.
>
> Balancing the interests of each of the parties, having regard to the above principles, it seems to me that that balance lies in favour of the respondent being permitted to vindicate his name."

As mentioned before, Geoghegan J. agreed with the judgment of Macken J. and he made one comment in relation to the plea of justification at p. 2 of his judgment which I think is of note:-

> "The first relates to the plea of justification. I entirely agree with Macken J. that as she puts it:
>
> > 'in assessing where the balance of justice lies as between the parties, . . . the scope and ambit of the defence . . is a factor which, in an appropriate case, may be taken into account.'
>
> The plea of justification in a defamation action has always been considered to be a most serious plea and certainly not one to be made likely. (sic) In this case, the appellant pleaded that the words in their natural and ordinary meaning were true in substance and in fact. Macken J., in her judgment, refers to the fact that during the course of exchanges before the court, senior counsel for the appellant suggested that in some way it was not a full justification plea and that at any rate it might be amended to a modified plea of some kind. In my view, no significance can be attached to that submission. If the action was to be struck out now the plea of justification would remain on the record and it could never be disproved."

Finally, for completeness, I want to refer to one short passage from the dissenting judgment of Kearns J. Kearns J. as mentioned above, agreed that the delay in this case was inordinate and inexcusable, but he went on to find that the balance of justice favoured the defendant/appellant. In dealing with the plea of justification and its role in an application for the striking out of proceedings on the grounds of delay, he stated:-

> "However, while I recognise that it is most unsatisfactory that the plea of justification is left hanging in the air (even if it is in a watered down version) I am also of the view that the inclusion of this plea equally imposed a

particular obligation on the plaintiff to prosecute his claim vigorously and expeditiously if it was his intention to avail of these particular proceedings to vindicate his reputation."

**The Balance of Justice**
I propose now to look at the factors to be considered by me in assessing the balance of justice between the parties in the light of the principles set out in the decisions referred to above. I should say at the outset that counsel on behalf of the plaintiff in these five proceedings conceded that for the purpose of these cases the delay in prosecuting these claims has been inordinate and inexcusable.

There are a number of distinguishing features between the facts of these cases as compared with the facts of the 5045 proceedings and the *M.G.N.* proceedings. The most obvious difference is that there has never been any attempt on the part of the plaintiff in these cases to reactivate the proceedings. No explanation at all has been given by the plaintiff as to why this is so. It is difficult to understand why a decision was taken to reactivate the 5045 proceedings and the *M.G.N.* proceedings in December 2005, and February 2005, respectively, yet no step was taken in these proceedings. Notwithstanding the earlier decision of the plaintiff on legal advice to "park" proceedings pending the outcome of the Moriarty Tribunal no excuse of any kind is proffered for the additional period of delay in these cases following the decision to proceed in other cases. Indeed, it is difficult to understand the failure to reactivate these proceedings in the light of the plaintiff's averment in all of these cases to the effect that his "instructions at all times (my emphasis) from the issue of proceedings was to bring the cases on for trial as soon as possible". It follows that the delay in these proceedings is far greater than that which was before the court for consideration in the 5045 proceedings or the *M.G.N.* proceedings. In the course of submissions made herein on behalf of the plaintiff it was contended that there was no difference of substance between the facts of these cases and those of *Desmond v. M.G.N.* It was also contended that there were more matters of prejudice set out in that case, eg, the loss of a journalist's notes and the death of Mr. Haughey. The defendants herein have not raised any specific prejudice of note, save for the possibility that, for example in the 5041 proceedings, documents which might have been available at an earlier stage are highly unlikely to be available at this stage. Of course, the defendants rely on the general prejudice that flows from delay and the lapse of time. The events at issue in these proceedings go back many years. In some cases, as I noted that the outset, the factual matters go back to the late 1980s and the early 1990s. In this context I think it is important to remember the well known comment of Henchy J. in the case of *O'Domhnaill v. Merrick* [1984] I.R. 151 at p. 158, where he commented as follows:-

> "While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons, a trial in 1985 of a claim for damages for personal injuries sustained in a road accident in 1961 would be apt to give an unjust or wrong result, in terms of the issue of liability or the issue of damages, or both. Consequently, in my opinion, the defendant, who has not to any material or substantial way contributed to the delay, should be freed from the palpable unfairness of such a trial."

The only other ground of prejudice raised by the defendants was the fact that certain of their employees were no longer working for the newspaper concerned. I commented on this at an earlier part of the judgment and noted that the solicitors for the first named defendant are on record for all of the defendants. I do not see how any question of prejudice could arise in that way, given that fact.

Much reliance was placed on the decision of the Supreme Court in the *Desmond v. M.G.N.* case by the plaintiff herein. There is no doubt that the Supreme Court identified the nature of the defence of justification as a factor to be considered in assessing where the balance of justice lies as between the parties. It is clear from that judgment that the plea of justification in the case was a general plea of justification. In the cases before me, it was submitted on behalf of the defendants that the pleas of justification in these cases were very specific pleas. I think it is clear on the judgment of Macken J. in *Desmond v. M.G.N.* that a plea of justification modified or not, to use the language adopted in that case or specific or not to use the language employed before me in these cases, is, regardless of the terminology used, a plea of justification and therefore, an important factor to consider in assessing where the balance of justice lies. However, it is clear that in that case, particular emphasis was placed on the fact that the defendant therein, was claiming to be prejudiced by the loss of their own notes upon which they relied to support the plea of justification. I think it is important to reiterate a passage from the judgment of Macken J. where she stated as follows at p. 15:-

> "As for the respondent, a plea of justification now lies against his claim for damages for libel. The libel, according to the statement of claim, is serious in that it is said to consist, *inter alia*, of offences under the Prevention of Corruption Act 1906. In the ordinary course of events, if the proceedings are struck out his claim for defamation falls. However, the plea of justification included in the defence, although it will never be litigated, remains unchallenged. That is, on any view, a serious injustice to a person seeking to vindicate his good name and reputation, even after a delay. If he is prevented from doing so where a defence of justification is pleaded, and the pleader successfully relies on an absence arising from his own fault, of the very notes it claims would support the plea, the taint of clear wrongdoing of a very serious nature, would remain."

I think it is important to consider the context in which that decision was reached. I do not think that it could be said that the libel as pleaded in these cases could be regarded as anything other than serious as was the case of the libel in *Desmond v. M.G.N.* A glance at the various statements of claim suggests that the words complained of in the various articles have a variety of meanings including that the plaintiff committed criminal offences, that he is corrupt, that he is dishonest.

The defendants for their part have put in defences pleading justification and I think it is fair to say that the pleas of justification are limited to some extent. In other words, the defendants do not plead that the words complained of are true in substance and in fact in respect of all of the meanings contended for by the plaintiff. Nonetheless, there are pleas of justification and those pleas of justification remain on the record.

The fact that there is a plea of justification in defamation proceedings is an important factor to be considered in assessing where the balance of justice lies in an application to dismiss a claim for want of prosecution as found by the Supreme Court in *Desmond v. M.G.N.* It was not suggested during the course of the hearing before me that a plea of justification in defamation proceedings excludes the *Primor* principles from applying to an application to dismiss for want of

prosecution. I think it is fair to say that the *Desmond v. M.G.N.* decision is not an authority for the proposition that a case cannot be dismissed if there is a plea of justification is made in defamation proceedings unless there is a specific prejudice as a result of the delay in prosecution of the proceedings.

I am satisfied therefore, that the principle to be derived from the decision in *Desmond v. M.G.N.* is that in considering where the balance of justice lies, the scope and ambit of the defence filed by a defendant is a factor which in an appropriate case may be taken into account. In defamation proceedings therefore, the fact that a defence includes a plea of justification is a factor which may be taken into account. It is, of course, not the only factor.

I therefore want to consider what factors are relevant on the facts of these cases. One of the facts of significance in the case of *Desmond v. M.G.N.* was that a journalist who had been in the newspaper's employ no longer had the shorthand notes in relation to the articles complained of. It seems to me to have been a significant factor in the decision of the Supreme Court that the newspaper was relying on the absence of notes which arose from its own fault as a matter of prejudice caused by the delay in prosecution. No such issue arises in these cases. Apart from that issue, the main difference in these cases is that there was no step taken to reactivate these proceedings following the decision to reactivate other proceedings. As previously mentioned, no explanation has been given to reactivate the proceedings herein.

There is no doubt that a plea of justification is an important factor to be borne in mind in considering and assessing where the balance of justice lies. The fact that a plea of justification has been made in defamation proceedings is not, however, a licence to a plaintiff to allow proceedings to languish indefinitely without any activity. Reference has been made to a number of decisions in which the importance of proceeding with expedition in defamation proceedings has been emphasised. The essence of defamation proceedings is the vindication of an individual's good name. A person's reputation is at the heart of such proceedings. That is why it is necessary for a plaintiff to act quickly in the prosecution of defamation proceedings for the longer a defamatory statement remains unchallenged, the greater the potential damage to a person's reputation. The taint of wrong doing implicit in a plea of justification and the fact that that will be allowed to remain on the record is a significant matter in considering where the balance of justice lies.

Nonetheless, it cannot be the case that a plaintiff's case cannot be dismissed for want of prosecution, only by reason of the fact that there is a plea of justification. One has to ask the question at what point could the defendants be entitled to apply to have these proceedings dismissed for want of prosecution. In my view the defendants in these cases became entitled to apply to have the proceedings dismissed when the plaintiff failed to reactivate these proceedings in 2005 or within a reasonable period thereafter, having reached the decision that it was no longer appropriate to await the outcome of the Moriarty Tribunal. At that point, even on the plaintiff's case, there was no reason not to proceed. The plaintiff attempted to do so in the 5045 proceedings and the *M.G.N.* proceedings. It was only thereafter that the defendant sought to have those proceedings dismissed for want of prosecution. In these cases, the plaintiff could have reactivated the proceedings, but chose not to do so and has not provided any reason, good, bad or indifferent for that decision. I do not think that the fact that justification has been pleaded in these cases on its own is a sufficient reason to swing the balance of justice in favour of the plaintiff. One has to consider other factors that arise in these cases. In the course of a passage from the judgement of Clarke J. in *Stephens v Paul Flynn Ltd*. to which I have already referred, reference was made to the fact that in considering the balance of justice the court was not confined to considering delay from the commencement of proceedings but had a wider discretion "and can take into account prejudice which may be cumulatively attributable to a delay both prior to and subsequent to the commencement of proceedings." I agree with that proposition. The delay in the prosecution of the cases herein involves a delay from October 2000 until the issue of the various notices of motion herein. The various proceedings were issued promptly following the publication of the articles complained of therein. I think it is important to bear in mind that some of the events at issue in the proceedings go back to the 1980s and 1990s. As such, I think it is inevitable that the delay in prosecuting these proceedings is such as to have caused a degree of prejudice to the defendants. I would place that prejudice at a moderate level.

Finally, I want to refer briefly to the nature of the plea of justification in these cases. These cases do not give rise to the issue that arose in the *Desmond v. M.G.N.* case to the effect that the plea of justification in that case was not a full plea of justification and that the plea might be amended to a "modified" plea of some kind. It is important to note that the extent of the pleas of justification in these proceedings varies from case to case. Each plea of justification has been carefully set out to deal with specific elements of the plaintiff's pleas as to the defamatory meanings contended for in the Statements of Claim herein. In the course of her judgement in Desmond v *M.G.N.*, Macken J. commented that "the scope and ambit of a defence…is a factor which, in an appropriate case, may be taken into account." I would add that in an appropriate case, the scope and ambit of a plea of justification may be a factor to be taken into account in assessing the balance of justice. However, I do not consider this aspect of the case to be a significant factor in the circumstances of these cases. I am of the view that it is the fact of the plea of justification *per se* in these cases that is the factor to be assessed in the consideration of the balance of justice.

There has been inordinate and inexcusable delay in the prosecution of these proceedings. Although the plaintiff took steps to re-activate other proceedings, no such steps were taken in these proceedings notwithstanding the plaintiff's stated instructions. There is no explanation for this failure. This failure is a matter to which I attach significant weight. There is nothing to show that the plaintiff intended to re-activate these proceedings other than his averment to which I have previously referred and which averment is at odds with his conduct of the proceedings. Notwithstanding the fact that there are pleas of justification in these proceedings, I am of the view that at this stage the balance of justice favours the defendants. The defendants herein are entitled to have finality in relation to this matter. In the circumstances I am satisfied that these proceedings should be dismissed.