Neutral citation number: [2006] IEHC 212

THE HIGH COURT

[1990/5724P]

BETWEEN

LISMORE HOMES LIMITED (IN RECEIVERSHIP)

PLAINTIFF

AND

BANK OF IRELAND FINANCE LIMITED, DELOITTE HASKINS AND FELLS, BRENDAN MERRY AND PARTNERS, P.B. GUNNE (DUBLIN) LIMITED AND BERNARD SOMERS

DEFENDANTS

THE HIGH COURT

[1990/5939P]

BETWEEN

LISMORE BUILDERS LIMITED (IN RECEIVERSHIP)

PLAINTIFF

AND

BANK OF IRELAND FINANCE LIMITED, DELOITTE HASKINS AND FELLS, BRENDAN MERRY AND PARTNERS, P.B. GUNNE (DUBLIN) LIMITED AND BERNARD SOMERS

DEFENDANTS

Judgment of Mr. Justice Quirke delivered on the 30th day of June, 2006

There are two High Court actions before the court. The plaintiffs in both actions are companies limited by shares. Both plaintiff companies are beneficially owned by the same person or persons. Both companies are in receivership.

The two actions arise out of the development of lands at Weston Park, Newcastle, Co. Dublin. The plaintiffs' claims as presently constituted are for damages from the same defendants for loss and damage allegedly sustained by the plaintiffs by reason of negligence, breach of duty, misrepresentation and breach of contract on the part of the defendants, their servants and agents jointly and severally.

The negligence, breach of duty, breach of contract and misrepresentation alleged by both plaintiffs against all of the defendants is the same. The loss and damage allegedly resulting from negligence, breach of duty, breach of contract and misrepresentation on the part of the defendants is alleged to have affected the plaintiffs differently and to have resulted in claims for different heads and levels of damages in respect of each of the plaintiff companies.

Lismore Homes Limited (hereafter referred to as "Homes") is a company limited by shares which are presently held by Ms. Antoinette Kennedy. Its objects included the purchase of property for development, redevelopment, management exchange resale or for any other purpose.

Lismore Builders Limited (hereafter referred to as "Builders") is also a company limited by shares which are presently held by Ms. Antoinette Kennedy. Builders was incorporated with the express intention and objective of developing and building houses on lands belonging to or to be acquired by Homes.

It was agreed between Homes and Builders that Builders would develop lands owned by Homes at Weston Park in Dublin and would build houses on those lands for the mutual benefit of both companies subject to certain terms and conditions.

Both actions were commenced by the issue and service of Plenary Summonses in April, 1990. Statements of Claim were delivered in both actions on 8th April, 1991. For reasons which will be outlined in greater detail later herein the actions have not proceeded to trial.

The plaintiffs and the first and second named defendants have now brought motions before the court seeking particular reliefs.

The Reliefs Sought

There are five applications before the court on foot of Notices of Motion. They are as follows:-

1. An application on behalf of Homes and Builders on foot of a Notice of Motion dated the 23rd day of December, 2004, seeking:

   (a) An Order consolidating the substantive proceedings on behalf of Homes with the substantive proceedings on behalf of Builders, and

   (b) An Order permitting Homes and Builders thereafter to deliver an amended and consolidated Statement of Claim.

2. An application on behalf of the first defendant (hereafter "the Bank"), on foot of a Notice of Motion dated the 14th day of April, 2005, for an order pursuant to the inherent jurisdiction of the court striking out or dismissing the claim made by Homes against the Bank on the grounds that the proceedings comprise an abuse of process in two respects, that is –

   (a) By reason of inordinate and inexcusable delay on the part of Homes in prosecuting the action against the Bank and,

   (b) Because they have been improperly maintained by Homes without any *bona fide* intention of proceeding to trial.

3. An application made on behalf of the Bank on foot of a Notice of Motion dated the 6th day of April, 2005, seeking an order pursuant to the inherent jurisdiction of the court striking out or dismissing the claim made by Builders against the Bank on the grounds that the proceedings comprise an abuse of process because: –

(a) of inordinate and inexcusable delay on the part of Builders in the prosecution of the action and because,

(b) they have been improperly maintained and prosecuted by Builders without any *bona fide* intention of proceeding to trial,

4. An application on behalf of the second named defendant (hereafter "Deloittes"), seeking,

(a) An order pursuant to Order 122, r. 11 of the Rules of the Superior Courts dismissing the claims made by Homes against Deloittes for want of prosecution consequent on an expiry of a period of more than three years since any proceeding had been had therein, and

(b) An order pursuant to the inherent jurisdiction of the court dismissing the claim by Homes against the Bank for want of prosecution on grounds of inordinate and the inexcusable delay.

5. An application on behalf of Deloittes on foot of a Notice of Motion dated the 25th day of February, 2005, seeking –

(a) An Order pursuant to O. 122, r.11 of the Rules of the Superior Courts dismissing the claim by Builders against Deloittes for want of prosecution consequent on the expiry of a period of over seven years since any proceedings had been had herein, and

(b) An Order pursuant to the inherent jurisdiction of the courts dismissing the claim by Builders against Deloittes for want of prosecution on grounds of inordinate and inexcusable delay.

Factual Background

A. In the Statements of Claim delivered on behalf of both Homes and Builders on the 8th of April 1991 it is claimed as follows:

1. That from the year 1987 onwards it was the intention of Homes and Builders to build a housing development on lands at Weston Park, Newcastle, Co. Dublin with the financial assistance of the Bank. Homes had purchased the land in or around 1979.

The indebtedness of Homes and Builders to the Bank was initially secured by way of a mortgage debenture dated 18th November, 1987, which provided *inter alia* that Homes and Builders would, on demand, repay the Bank all sums due or owing to the Bank on any account whatsoever.

2. That by letter dated 17th February, 1989, the Bank demanded payment of all sums then due and owing by Homes and Builders to the Bank but withdrew that letter and demand and entered into an agreement with Homes and Builders in March, 1989, which provided that the Bank would make further facilities available subject to certain terms and conditions including a condition (called Special Condition 9.01) which provided for the appointment and retention by Builders of a financial controller, a quantity surveyor and an auctioneer all of whose appointments had to meet with the prior approval of the Bank.

3. That pursuant to Special Condition 9.01 an employee of Deloittes named Mr. Matt McIlvenna was appointed financial controller of Builders in March of 1989… "*with the approval and/or at the insistence of …*" the Bank.

4. That the following were express or alternatively implied terms of an agreement between Builders and Deloitte in relation to the appointment of Matt McIlvenna.

"(a) …That Deloittes would initially be paid a total sum of IR£2,750 exclusive of V.A.T per week by the said (Builders) on its own behalf and on behalf of (Builders) for the services of the aforesaid Matt. McIlvenna;

(b) That Matt McIlvenna would carry out his functions as Financial Controller in an adequate, competent and/or effective manner;

(c) That Matt McIlvenna would act solely for the benefit and in the best interests of Builders;

(d) That Matt McIlvenna would report to, attend certain meetings with and/or act on the instructions of the Directors of (Builders);

(e) That a less expensive financial controller would be recruited and installed within a period of two months;

(f) That Matt McIlvenna would ensure that as far as practicable and/or work to attain the completion of the aforesaid Weston Park Development."

5. That Matt McIlvenna did not carry out his functions adequately and competently but acted solely for the benefit and in the interests of the Bank and failed to report to or attend meetings with the directors of Homes or Builders but instead assumed the functions of a general manager of the business and did not work to obtain the completion of the Weston property development and ceased to act on behalf of Builders or Homes in or around July, 1989.

6. That by reason of those misrepresentations, breaches of contract and negligence on the part of Mr McIlvenna, the Bank and Deloittes, both Homes and Builders suffered loss, damage and expense so severe that Receivers had to be appointed to both companies.

B. In the Statements of Claim delivered on behalf of Homes and Builders negligence and breach of duty is alleged on the part also of a third named defendant, Brendan Merry and Partners, which is a firm of quantity surveyors and on the part of a fourth named defendant, Messrs. P.B. Gunne (Dublin) Limited, which is an auctioneering and estate agency company and on the part of a fifth named defendant Bernard Somers, who is an accountant and who was appointed Receiver in respect of both Homes and Builders.

Long and exhaustive particulars of the negligence and breach of duty on the part of all five defendants have been pleaded within the Statements of Claim delivered on behalf of Homes and Builders on 8th April, 1991. The claims against all three of these defendants have now been withdrawn or abandoned by Homes and by Builders. However both Homes and Builders wish to allege wrongdoing against one or all of those three defendants in these proceedings and wish to maintain a claim that the Bank and Deloittes are vicariously liable to them for that wrongdoing.

7. By Order of the High Court (Keane J.) dated 2nd March, 1992, Homes and Builders were each directed to lodge security for the Bank's and Deloittes' costs of defending the proceedings. Builders appealed that order to the Supreme Court. Homes did not appeal that Order within the time limited by the Rules of the Superior Courts for doing so. An application on behalf of Homes to extend the time for appealing the Order was rejected by the Supreme Court on 31st March, 1995.

8. By further Orders of the High Court (Keane J.) dated respectively 30th July, 1992 and 6th November, 1992, it was directed *inter alia* –

(a) That the two substantive actions brought by Homes and Builders against the defendant should be heard at the same time and

(b) That all proceedings in the two actions should be stayed pending the determination of a number of appeals then pending before the Supreme Court on a number of matters ancillary and related to those actions.

9. In an affidavit sworn on 26th January, 1996, James Kennedy, (who is the husband of Antoinette Kennedy and whose participation in discussions with the Bank and Deloittes has been acknowledged by the parties to be central to the events which have given rise to these proceedings), averred (at paragraph 5) as follows;

"When Mr. McIlvenna arrived on the site, he produced a cheque book and stated that he wanted a cheque for fees and an agreement in respect of charges assigned in advance. … he presented to me for my signature (in the presence of my fellow director Antoinette Kennedy) what I now understand to be the second page of a letter which is exhibited as Exhibit "B" in the affidavit of John Donnelly sworn on 17th October, 1991. I say that this page is not numbered and that at the time I did not know that it formed the second page of the aforesaid letter. I did not become aware of this fact until a number of weeks subsequent to Mr. McIlvenna's arrival…….On the same date and on the next day 10th March 1989 cheques in respect of (Deloittes') fees were written…"

10. On 11th February, 1998, the appeal by Builders against the Order of the High Court (Keane J.) dated 2nd March, 1992, requiring lodgement of security for costs was upheld. Builders were entitled to prosecute the claim with effect from that date. No step was taken to advance the proceedings until Deloittes issued a Notice of Intention to Proceed against Builders in May, 1999.

In December, 1992, Homes and Builders lodged an appeal against that decision of the High Court but did not prosecute the appeal and withdrew it in November of 1999.

11. On 24th March, 2000, the High Court (McCracken J.) on foot of applications made by the Bank and by Deloittes, (by Notices of Motion dated July and October of 1999), fixed security for the Bank's and Deloittes costs in respect of the claim by Homes in the amount of IR£200,000 each.

12. On 2nd June, 2000, the Bank delivered a Defence to the substantive proceedings against the Bank by Builders.

13. On 29th January, 2001, an application on behalf of both Homes and Builders to consolidate the actions and to serve an amended Statement of Claim in a consolidated action was struck out by the High Court (Johnson J.) on the grounds that the security for costs ordered by the High Court (McCracken J.) in respect of Homes on 24th March, 2000, had not been lodged.

The amended and consolidated Statement of Claim which Homes and Builders sought to deliver ran to some 129 pages.

14. On 25th October, 2001, the appeal by Homes against the Order of the High Court (McCracken J.) dated 24th March, 2000, was dismissed and the sums to be lodged by Homes in respect of security for the costs of both the Bank and Deloittes was affirmed at Ir£200,000 each.

On 6th February, 2002, security for costs in the sum of Ir£200,000 each was lodged by Homes in respect of the Bank and of Deloittes.

15. On 22nd October, 2004, an attempt was made on behalf of Homes and Builders to deliver an amended Statement of Claim in consolidated proceedings. That document ran to some 37 pages. It included a claim for damages in the amount of €45,106,108.35. The Bank and Deloittes refused to accept delivery of the amended Statement of Claim.

16. The Notices of Motion which are the subject of these proceedings were issued and served between 23rd December, 2004, and 14th April, 2005.

Consolidation

This is the third application which has been made to the court to consolidate the substantive proceedings on behalf of Homes with those of Builders.

On the 30th July, 1992, the High Court (Keane J.), refused an application by Deloittes to consolidate the proceedings ordered that the two actions should be heard at the same time. Homes and Builders opposed the application to consolidate. The court expressed the view that consolidation would have been appropriate but was not possible because of (then), pending appeals before the Supreme Court. However it was ordered that the two actions should be heard together and at the same time.

It is now submitted on behalf of Homes and Builders that the two actions involve common questions of fact and are inter-related involving the same transactions and the same witnesses. It is argued that previously existing grounds for opposition to the consolidation have been removed and that the actions should be consolidated. It is contended that the issues between the parties can be determined more speedily and economically if the actions are consolidated.

On behalf of the Bank and Deloittes it is submitted that since the appeal lodged by Homes and Builders against the existing Order of the High Court (Keane J.) dated 30th July, 1992, was withdrawn in November, 1999, that Order regulates the proceedings. It is argued that the Order is binding and may not now be litigated.

It is contended that the High Court has, by its order made a final determination on the most appropriate and cost effective means by which the actions may be heard. It is further contended that no evidence has been adduced by Homes or by Builders explaining how consolidation would satisfy any relevant criteria more effectively than the order which now regulates the proceedings and which directs that the two actions should be heard at the same time.

It has been argued on behalf of the Bank and Builders that the doctrines of *res judicata* and issue estoppel apply to the application for consolidation. It is contended that the Order of the High Court (Keane J.) 30th July, 1992, refusing consolidation and directing that the two actions be heard together is binding upon the parties.

Applicable Principles.
I would respectfully adopt the following observations of Brook LC in *Woodhouse v. Consignia* plc: *Steliou v. Comptom* [2002] 1 W.L.R. 2558 at p. 2575.

> *"There is a public interest in discouraging a party who makes an unsuccessful interlocutory application from making a subsequent application for the same relief, based on material which was not, but could have been, deployed in support of the first application."*

However I am satisfied that this court has jurisdiction to vary its earlier orders and directions as to mode of trial and issues to be tried in proceedings to be heard before the court. This may be necessary where circumstances change or the interests of the parties and the administration of justice so require.

Order 49, R. 6 of the Rules of the Superior Courts provides as follows:-

> *"Causes or matters pending in the High Court may be consolidated by order of the Court on the application of any party and whether or not all the parties consent to the order."*

The principles applicable to applications for consolidation have been identified by the Supreme Court (McCarthy J.) in *Duffy v. News Group Newspapers Limited* [1992] 2 I.R. 369 in the following terms (at p. 376):-

> *"1. Is there a common question of law or fact of sufficient importance?*
>
> *2. Is there a substantial saving of expense or inconvenience?*
>
> *3. Is there a likelihood of confusion or miscarriage of justice?"*

He continued (at p. 379):-

> *"Whilst the wording of the relevant rule (Order 49, R.6) is, as the learned judge pointed out, very wide, that does not mean that it is to be applied widely or that a heavy burden does not lie upon those who seek to join or consolidate actions."*

The answer to the first question posed above is predominantly affirmative. The questions of law and fact to be determined are, in the main, common to both actions. That will be the case whether or not an amendment to the pleadings is permitted.

The second question concerns a substantial saving of expense or of inconvenience. The evidence adduced in these proceedings has not established that there will be a substantial saving of expense if the proceedings are now consolidated. The Order of the High Court dated 30th July, 1992, requires that the evidence in both actions must be heard at the same time. A formal order consolidating the two actions will not have any practical effect upon that process. The same witnesses will adduce the same evidence at the same time whether or not a formal order is made.

It has been submitted that an order consolidating the actions will avoid unnecessary duplication in pleading and in ancillary matters such as discovery. I am not sure that such is the case. Two sets of pleadings may result in additional expense but it will not be substantial additional expense. Separate pleadings may be of assistance in identifying the claim advanced on behalf of Homes and in distinguishing it from the claim advanced on behalf of Builders.

It is however the third question posed by McCarthy J. which is the most relevant to the issue of consolidation in this case.

These two substantive actions were commenced more than 15 years ago. They each have had protracted different and rather unsatisfactory histories. From time to time the action by Homes followed a different path to the action by Builders. Different considerations applied to the two actions at different times.

It is contended on behalf of the Bank and on behalf of Deloittes that the differing paths chosen by Homes and by Builders in the prosecution of their claims were part of a strategic or tactical approach adopted by Homes and Builders which, *inter alia*, was designed to disadvantage the Bank and Deloittes and to delay the prosecution of one or other or both of the claims from time to time for a variety of reasons.

Both Homes and Builders vigorously deny that such was the case. I am conscious that the High Court, in July of 1992, felt that it was inappropriate to consolidate the actions because of (then), pending appeals to the Supreme Court. It is, however, undeniable that Homes and Builders strongly resisted the application to consolidate. They chose to prosecute separate actions. Their choice to proceed separately was confirmed by their appeals against the order of the High Court directing that the actions be heard together. They did not withdraw those appeals until 1999, some seven years after their commencement.

On 21st December, 2000, Homes and Builders issued motions seeking to consolidate the proceedings and to deliver an amended Statement of Claim. However by that date the two actions had assumed separate existences as is evidenced by the fact that the motion was struck out because one of the parties (Homes) had failed to comply with an order of the High Court which did not apply to the other party (Builders).

Decision
Applying the principles identified by McCarthy J. in *Duffy* to the evidence adduced in these proceedings, I am not satisfied that Homes and Builders have discharged the burden of proving that these two actions should now be consolidated.

An Order of the High Court, (made after a similar application in 1992 by the Bank and Deloittes), now regulates the manner in which these actions will be heard. Appeals against the order were withdrawn by the appellants (Builders and Homes). Both actions have now proceeded separately and along differing paths for a further period of more than 13 years. The Bank and Deloittes have been required to defend two separate actions from two separate claimants for the entire of that period. They did not wish to do so at the outset. They sought to consolidate the claims.

They now wish to argue in the substantive proceedings and before this court that the delay (or part thereof), on the part of Homes and Builders in prosecuting their claims has not been entirely *bona fides*. They are entitled to make that case if they can adduce evidence in the substantive proceeding or in these proceedings which supports that contention. The determination or resolution of such issues within proceedings consolidated in the manner sought could cause additional difficulty.

I am satisfied on the evidence that the consolidation of the two actions cannot be justified. The delivery now of new and consolidated pleadings is also likely to add to an already unacceptable delay in bringing the substantive issues in these proceedings to trial. It may also cause or add confusion to actions which are at present, far from ordered.

The pleadings may be delivered in the existing actions in accordance with the Rules and the actions brought to trial if that is found to be permissible. It has not been established that consolidation will result in any benefit or substantial saving of expense.

No adequate reason has been provided on behalf of Homes or Builders which would now justify the consolidation sought.

It follows that the application made on behalf of Homes and Builders to consolidate the two actions is refused.

Amendments of the Statements Claims
Statements of Claim comprising approximately 25 pages have been delivered in each of the two actions as presently constituted. Each document makes substantially the same allegations against the five defendants named in the two sets of proceedings.

Homes and Builders have applied to this court for an order permitting them to deliver an amended and consolidated Statement of Claim against the Bank and Deloittes. Their applications have been made in conjunction with their application to consolidate the two sets of proceedings.

At the commencement of this hearing Homes and Builders brought before this court a document comprising approximately 37 pages. It did not comply with the Rules of the Superior Courts in virtually any respect. It was difficult to comprehend and was hopelessly prolix.

On the second day of the hearing Mr. Hayden SC, on behalf of Homes and Builders, properly acknowledged that the document did not comply with the Rules and had other significant shortcomings. He sought and was given leave to replace the document with another document which, it was contended, would comply with the Rules of the Superior Courts.

On the afternoon of the third day of the hearing the court was presented with two documents. The documents cannot be described as an amended Statement of Claim capable of delivery on behalf of Homes and Builders in consolidated proceedings. They comprised amended versions of the two Statements of Claim already delivered on behalf of Homes and on behalf of Builders in April, 1991.

There are changes to the text of the original Statements of Claims and there are sections deleted. There are additional pleadings (largely comprising particulars) underlined in red in the documents. The principal amendments comprise the inclusion of claims for damages for loss and damage allegedly sustained by Homes and Builders arising out of alleged deceit, conspiracy and misrepresentation on the part of the Bank and Deloitte.

A claim is made alleging that the Bank and Deloittes are vicariously liable for wrongdoings which are alleged on the part of the three defendants against whom Homes and Builders have now withdrawn or abandoned their claims.

Notwithstanding an inconsistency with the motion before the court (which seeks an order permitting Homes and Builders to deliver one amended and consolidated document) and doubt in relation to compliance with the Rules, the court agreed to receive and consider the two documents.

The documents will accordingly be considered by this court as applications made on behalf of Homes and Builders to amend each of the Statements of Claim in the actions as presently constituted in the terms of the documents now received.

Mr. Hayden SC on behalf of Homes and Builders has argued that the amendments are necessary and should be permitted in order to enable the real questions which are in controversy between the parties to be determined. He says that new information has come to the attention of the Homes and Builders as a result of evidence adduced on affidavit in support of various procedural applications made in these proceedings and in particular applications which were made on behalf the Bank and Deloittes for security for costs.

He says that Homes and Builders were not formerly aware of this new information which comprises evidence of acts of deceit, conspiracy and misrepresentation on the part of the Bank and Deloitte. He contends that the new information comes within four specific categories. I will consider that information and those four categories later herein.

Applicable Principles
Order 28 Rule 1 of the Rules of the Superior Courts provides as follows:

> *"The Court may, at any stage of the proceedings, allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*

The principles to be applied to the determination of such applications were first identified in *Cropper v. Smith* (1884) 26 Ch. D. 700 in the following terms:

> *"It is a well established principle that the object of the Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases, by deciding otherwise than in accordance with their rights….. I know of no kind of error or mistake which if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without prejudice to the other party. The Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter or favour or of grace…. it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."*

It has been pointed out on behalf of the defendants that, prima facie, Homes and Builders are now barred by the provisions of the Statute of Limitation from making the claims which they now wish to make.

In *Weldon v. Neal* [1887] 19 Q.B.D. 394 the Court of Appeal in England considered an appeal against a refusal to amend a statement of claim which, in addition to a claim of slander included a fresh claim in respect of assault, false imprisonment and other causes of action, which were at the time of the application barred by the provisions of the Statute of Limitations.

Dismissing the appeal the Court of Appeal (Lord Esher) observed that:

> *"We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, in proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."*

In *Bank of Ireland v. John Connell and Anor.* [1942] I.R. 1 the Supreme Court (Murnaghan. J.) noted at p. 11 that:

> *This Court on the hearing of the appeal has jurisdiction to allow an amendment which was not asked for in the High Court, but this power is subject to the general principle of amendment that no injustice must be caused to the opposite party; and, where the amendment has not been sought in the Court below, this Court is all the more slow to grant such a concession. Where the amendment sought is one that affects the operation of the Statutes of Limitations the rule has consistently been followed since the Judicature Act that an amendment will not be allowed if it prejudices the rights of the opposite party as existing at the date of the amendment. Even if this rule be not an absolute rule, the general principle of not interfering with the operation of the Statutes of Limitations is well established."*

In *Krops v. The Irish Forestry Board Limited* [1995] 2 I.R. 113 the High Court (Keane J.) considered an application to take proceedings in a case where the plaintiff's wife was killed in a road traffic accident in 1990. In 1994 the plaintiff sought to amend the Statement of Claim to include a claim of nuisance against the defendant.

Referring to the rule in *Weldon v. Neal* (supra) the Keane J. observed (at p. 118) that:

> *"It will be observed that, although the rule was stated in reasonably wide terms in that decision, it was abundantly clear that the plaintiff was seeking, not merely to add new causes of action to that already pleaded, but to make fresh allegations of fact which had never been pleaded, in circumstances where the Statute of Limitations had already run. Nevertheless the rule as stated in such general terms came to be seen as unduly restrictive of the general power of the court to amend pleadings where it seemed just to do so and, in particular, where it was necessary to determine the real question in issue between the parties."*

Having noted changes in certain provisions of the Rules of the Supreme Court 1965, in England, which he indicated were:*"…clearly intended to enable the courts in to grant an amendment of the pleading in circumstances such as the present,"* and having reviewed a number of English authorities he approached the question on the basis that *"….there is no Irish authority to guide me (at pp. 117 and 120)."*

Positing a set of circumstances where an error in a Statement of Claim might describe the location of a road traffic accident in the County rather than the City of Dublin at a time when the limitation period has run he declared that it would be (at pp. 120 – 121):

> *".. obvious that in such a case the defendant is not deprived of any defence under the Statute of Limitations, 1957: he never had such a defence in the first place since the plenary summons and the statement of claim were issued within the limitation period… where, as here, an amendment, if allowed, will not in any way prejudice or embarrass the defendant by new allegations of facts, no injustice is done to him by permitting the amendment. In that sense, it is true to say that the amendment does not in truth deprive him of a defence under the Statute of Limitations, 1957: since the proceedings were always capable of amendment in such manner as might be just and in order to allow the real question in controversy between the parties to be determined, it cannot be said that the defendant was at any stage in a position to rely on the Statue of Limitations, 1957."*

Referring to the facts of the case before him he noted, (at p. 115) that;

> *"…it was accepted that the proposed amendment did not involve the pleading of any new facts. The plaintiff, in effect, wished to put himself in a position to argue at the hearing that, if the facts as proved failed to establish that the defendants or either of them had been guilty of negligence and breach of duty, including breach of statutory duty, they did establish that the defendants, or either of them, had been responsible for a user of the land adjoining the public road which amounted to a nuisance in law."*

The general principle applicable to applications to amend pleadings is that before permitting an amendment the Court must be satisfied that no injustice will be caused to the opposite party.

The fact that the amendment sought will deprive the opposite party of a defence pursuant to the provisions of the Statute of

Limitations will not, of itself, necessarily be fatal to the application. However it is a factor which may be taken into account by the court in considering whether or not the amendment should be permitted.

Order 28 Rule 1 of the Rules of the Superior Courts empowers the court to permit "*… all such amendments … as may be necessary for the purpose of determining the real questions in controversy between the parties*". As a general principle the court should be slow to permit an amendment amounting to a new cause of action based upon facts which have not been pleaded where the new cause of action would otherwise be barred by the Statute of Limitations. That is necessary *inter alia* to ensure that the stated intention of the Oireachtas may not be defeated in particular cases and the provisions of a statute rendered meaningless.

The court has jurisdiction to permit an amendment which is required in order to plead a cause of action which can be readily identified from the facts already pleaded. It may do so even if the amendment includes a cause of action which would otherwise be barred by the Statute of Limitations. However, an amendment should be permitted only where no injustice will be caused to the opposite party.

Issues
In this case the new causes of action of deceit, conspiracy and misrepresentation which Homes and Builders now seek to plead are *prima facie* barred by the provisions of the Statute of Limitations.

Homes and Builders claim that, during the course of these proceedings, they discovered new information which alerted them to acts of deceit, conspiracy and misrepresentation on the part of the Bank and Deloittes. This new information is additional to the facts as pleaded in the proceedings to date. They claim that no injustice will be caused to the Bank or to Deloittes if the pleadings are now amended in the manner sought.

I cannot accept that contention. The causes of action which Homes and Builders now seek to plead cannot be identified from the facts as pleaded in the Statements of Claim delivered in these proceedings on the 8th April, 1991, and I am not satisfied on the evidence and on the balance of probabilities that any new facts have been discovered by Homes or Builders after the commencement of these proceedings which alter the position in any meaningful way.

It is claimed that the new information discovered by Homes and Builders came within four categories. Those categories were as follows:

1. The terms of appointment of Mr. Matt McIlvenna
Mr Hayden S. C. says that until the hearing of motions for security for costs in the High Court in February of 1992, Homes and Builders believed that Mr. McIlvenna of Deloittes had taken up his appointment as Financial Controller with Builders and had at all times conscientiously performed his duties in the best interests of Builders in accordance with the terms of his appointment.

He claims that evidence adduced during the hearing of the motions for security for costs in February of 1992, disclosed for the first time to Homes and Builders the existence of a letter dated 9th March, 1989, from Deloittes to the Bank which described Mr. McIlvenna's terms of appointment inter alia in the following terms:

> *"Lismore Homes Limited.*
>
> *Lismore Builders Limited.*
>
> > *As requested…we will second Mr. McIlvenna to act as Financial Controller to the above companies on behalf of your Bank.*
> >
> > *We understand that Mr. McIlvenna will carry out the normal duties of Financial Controller reporting to the Directors of the above companies.*
> >
> > *Mr. McIlvenna will also report directly to Bank of Ireland Finance Limited on a weekly basis, and will attend with the Directors of the company, a monthly meeting with the Bank to advise the Bank of the progress made in the development of this site.*
> >
> > *The agreed weekly fee for the assignment is IR£2,750 plus VAT at 25% payable weekly in advance…"*

The letter comprised two pages. The second page provided as follows:

> *"James Kennedy, Director of Lismore Homes and Lismore Builders has confirmed his acceptance of the charges involved in this arrangement by signing the letter below.*

The letter was signed on behalf of Deloittes and was signed also by Mr. James Kennedy on behalf of Homes and on behalf of Builders.

Mr. Hayden argues that the terms of the Facility Letters governing the appointment of Mr. McIlvenna as Financial Controller of Homes and Builders provided expressly that he was to be employed by Homes and Builders with an overriding obligation to act in the best interests of Homes and Builders. He points out that this agreement was subsequently confirmed by Mr. Robert Hughes of the Bank who averred on affidavit on the 9th February 1996, *inter alia* that:

> *"… the appointment of Mr. McIlvenna and the terms and conditions governing his appointment were not made or agreed by the Bank nor was it a party thereto. Furthermore it was at all times understood by Mr. Kennedy that the appointment of a Financial Controller was one to be made by the Lismore Company and not by the Bank"*

He says that when, in October, 1991, Homes and Builders received the affidavit of Mr John Donnelly and discovered that Mr. McIlvenna had been appointed on the terms of the letter from Deloitte to the Bank dated the 9th March, 1989, they realised that the Bank and Deloitte had conspired with one another and with other defendants, had committed acts of deceit and misrepresentation and had deliberately brought about the insolvency of Homes and Builders for the benefit of the Bank.

With effect from March, 1992, the proceedings against all of the defendants were stayed by Order of the High Court (Keane J.) until security for costs was lodged on the terms ordered by the Court. In consequence, it is claimed, it was not possible for Homes or for Builders to amend their pleadings to include their new claims of deceit, conspiracy and misrepresentation until they did in fact do so.

Homes and Builders now seek to amend the Statements of Claim in their respective proceedings to plead *inter alia* (at paragraphs 26(9) in each Statement of Claim) as follows:

> *"(The Bank)..wrongfully concealed its agreement with ..(Deloittes)..with regard to its appointment of Mr. McIlvenna from the plaintiffs. The plaintiffs only became aware of this agreement on or about 24th July, 1989, when they requested Mr. Donnelly to provide a copy of ..(Deloittes') letter in relation to fees. Mr. Donnelly so did, through Mr. McIlvenna, on that date and also provided a copy of (Deloittes')..letter of agreement with (the Bank)..dated the 9th March, 1989."*

It is contended that relevant evidence became available to Homes and Builders when they first read the letter dated 9th March, 1989, from Deloittes to the Bank. That letter was exhibited in the affidavit sworn by Mr. John Donnelly in October, 1991.

I am satisfied on the evidence (and in particular on the evidence contained within the affidavit of James Kennedy sworn on the 26th January, 1996) that, at latest, Homes and Builders became aware of the contents of the letter dated 9th March, 1989, when Mr. McIlvenna presented the letter to Mr. James Kennedy in the presence of Mrs. Antoinette Kennedy "*… a number of weeks subsequent to …*" the 9th March, 1989. The terms of Mr. McIlvenna's appointment were, accordingly, known to Homes and Builders no later than April or May of 1989. These proceedings were commenced in April, 1990. It was then open to Homes and Builders to advance the claims which they now wish to advance.

It is contended that the averment by Mr. Hughes in an affidavit sworn on 9th February, 1996 indicating that the conditions of appointment of Mr. McIlvenna were to be made by "*the Lismore company and not by the bank*" comprises a new fact which has somehow alerted Homes and Builders to the causes of action now sought to be pleaded.

The averment by Mr. Hughes was quite consistent with the Facility Letters between the Bank and Homes and Builders. The Facility Letters were within the possession of Homes and Builders before the commencement of these proceedings and indeed at all material times.

2. The Statement of Affairs dated 24th February 1989.
It is contended on behalf of Homes and Builders that, arising from information contained in an affidavit sworn on behalf of the Bank by Mr. Hughes on the 9th February, 1996, Homes and Builders discovered that Deloittes had reported to the Bank in February, 1989, on the financial status of Homes and Builders. It is claimed that the Bank was, accordingly, aware that a Statement of Affairs prepared by Builders dated 24th February, 1989, was inaccurate and could not be relied upon.

Ms Antoinette Kennedy, on behalf of Homes and Builders, has averred that the affidavit of Mr. Hughes, when read together with an affidavit sworn by Mr. John Donnelly of Deloitte in October, 1991, and January, 1992, disclosed that;

> *"…(The Bank).. conspired with (Deloittes) .. to bring about a situation whereby in July, 1989, they sought to undermine.. (Builders').. Statement of Affairs when they already knew as at 24th February, 1989, that it was not and could not have been prepared as accurate or correct."*
>
> And that it further;
>
> *"… established that (The Bank) .. inserted clauses 7.04 into (Homes and Builders) facility agreements knowing that not even (Deloitte) could have prepared a Statement of Affairs which gave a true and fair view."*

It is contended that Homes and Builders were not alerted to the existence and nature of the conspiracy and of the acts of deceit and misrepresentations of the Bank and Deloittes until they received the affidavit of Mr. Hughes sworn on 9th February, 1996.

It contended that when Homes and Builders read the affidavit of Mr. Hughes and compared its averments to averments within affidavits sworn by Mr. John Donnelly of Deloittes in October, 1991, and January, 1992, they were alerted to potential acts of deceit, conspiracy and misrepresentation.

However Mr. James Kennedy on behalf of Homes and Builders in successive affidavits averred to the financial stability of Homes and Builders at the material times.

Perhaps more importantly, the evidence adduced in these proceedings has conclusively established that Homes and Builders knew no later than mid-1991 (and probably before that date) that Deloittes had reported to the Bank in February, 1989, on the financial status of Homes and Builders.

It was open to Homes and Builders to seek to amend between mid-1991 and March 1992 in the manner now sought. They failed to do so. If, as now suggested, they were alerted by this information to acts of deceit, conspiracy and misrepresentation by the Bank, Deloittes and the other defendant it is surprising that no application to amend was made at that time.

3. The "*Travers Construction*" Litigation
Homes and Builders also contend that they received an affidavit sworn on behalf of the Bank on the 27th August, 1991, by Mr. Robert Hughes who averred that the directors of Homes and Builders had been in breach of warranty to the Bank in relation to disclosure. It was alleged by Mr Hughes that Homes and Builders had failed to disclose that proceedings had been issued against Homes in early 1987, by a company called Travers Construction Limited.

Homes and Builders claim that this averment comprised additional information which became available to them in August, 1991, and which alerted them to acts of conspiracy, deceit and misrepresentation by the Bank and Deloittes.

In an affidavit sworn on 20th December, 2004, in support of the application to amend proceedings, Ms. Antoinette Kennedy at paragraph 14, (b), referred to a letter received from the Bank's officials on 28th August, 1989, and averred that:

> *"….I specifically refer to paragraph (b) of this letter wherein the (the Bank) stated that because proceedings had been issued against (Homes) by Travers Constructions Limited and that such proceedings had been issued since early 1987 and that because the directors failed to disclose the nature or existence of such claim which (the Bank) understands is for a sum in excess of IR£300,000 the Lismore Group of Companies are in breach of warranty ….".*

In the same affidavit Ms. Kennedy referred to admissions allegedly made by Mr. Hughes stating that he was familiar with the contents of an article in "Phoenix" Magazine in March, 1987, which related to the then pending litigation between Travers Construction Limited

and Homes.

In a letter sent by fax and by post to Mr. Hughes at the Bank's head office and dated 14th September, 1989, Mr. James Kennedy writing on behalf of Builders stated *inter alia* that:

> *"The Travers Constructions Limited matter was fully disclosed to senior officials of the bank. The bank is seeking to overstate the relevance of the Travers Construction Limited case and to utilise it as the ground for calling in the loan advanced to the company. The company correctly warranted that there was no litigation taking place or pending before any court. There was no specification. The warranty was given against a background of the information that the bank already had in its possession and was aware of. This included both the Travers and the 'Burke' cases."*

He continued later in the letter as follows:

> *"The matter was discussed again at the company's office by Mr. Carrigy and Mr. Simons and Mr. Woods met the Directors there in October 1988. Mr. Carrigy raised it when he was discussing the support that the bank had given the company over the previous years and that it had done so notwithstanding the Phoenix article on the company. It is difficult to comprehend how Messrs Woods, Carrigy and Simons can now deny hearing of the Travers proceedings. At a meeting with Mr. Hughes on 4th August, 1989 at Lismore House, he stated that Mr. Woods admitted to knowing about the proceedings, but he said that he thought the case was settled."*

In this letter sent by Mr Kennedy to the Bank in September, 1989, referred to and disputed the Bank's allegation of breach of warranty. It is difficult, therefore, to understand how the averments of Mr Hughes in his affidavit sworn on 27th August 1991comprised new facts or information suggesting the causes of action now sought to be pleaded.

4. The level of sales
It was further claimed on behalf of Homes and Builders that clause 6.02 of the Facility Letters between the Bank and Homes and Builders provided that the funds to be provided by the bank would be governed inter alia by principles which included the following:

> *"That the bank is satisfied that the level of sales to be maintained by Homes and Builders will be sufficient ultimately to discharge the obligations of Homes and Builders to the bank."*

It is claimed that Homes and Builders did not discover until receipt of the affidavit of Mr. John Donnelly sworn on 17th October, 1991, that Mr. McIlvenna was in fact acting on behalf of the Bank and not in the best interests of Homes and Builders.

In her affidavit sworn in support of the application to amend the statements of claim application it was claimed Mrs Antoinette Kennedy averred *inter alia* that:

> *"No new contract whatsoever for the sale of even one house on the western part of the development was entered into with a perspective house purchase from the date of …Mr. McIlvenna's appointment as financial controller on behalf of (the Bank)."*

It continued:

> *"As a result thereof it was the responsibility of (Deloittes)…and their servant or agent Mr. McIlvenna that there were no sales on the ….development and as (Deloittes)..was appointed by (the Bank) it was (the Bank's) …own responsibility that the level of sales were not maintained and that principles 6.02 (a) were not complied with. I therefore say … that the claims of conspiracy and deceit in this regard in the combined Amended Statement of Claim arise from the information gathered from these affidavits sworn by… Mr. Robert Hughes and by… Mr. John Donnelly."*

Homes and Builders claim that the low (indeed non-existent) level of sales of houses at their development assumed significance when they discovered the terms of Mr. McIlvenna's appointment as financial controller on behalf of the Bank.

The low level of sales was known to Homes and Builders at all material times. The terms of Mr. McIlvenna's appointment as financial controller on behalf of the Bank were known to Homes and Builders shortly after the 9th March, 1989.

It follows that the combination of the low level of sales and the terms of Mr McIlvenna's appointment were known to Homes and Builders shortly after the 9th March, 1989. If, as has been argued, that combination alerted Homes and Builders to acts of deceit, conspiracy and misrepresentation, it was open to them to include and plead those causes of action when these proceedings were commenced in 1990.

Decision
No evidence indicating deceit or conspiracy or misrepresentation on the part of the Bank or Deloittes became available to Homes and Builders after the date shortly after the 9th March, 1989 when the terms of Mr. McIlvenna's appointment were made known to the proprietors of Homes and Builders.

I cannot accept either the contention advanced on behalf of Homes and Builders that new evidence of deceit, conspiracy and misrepresentation became available to Homes and Builders after the commencement of these proceedings and at a time when it was not possible for Homes and Builders to apply to this court to amend their pleadings in the manner now sought.

Whilst it is unnecessary for a plaintiff to include, within pleadings, the factual evidence which will be relied upon in support of the claim made, it is necessary for the plaintiff to factually identify the wrong alleged, the loss and damage allegedly sustained and the relief sought.

In order to sustain a claim for relief arising from deceit and wilful misrepresentation a plaintiff must prove, on the balance of probabilities and by way of factual evidence;

(a) a representation of fact made by words or conduct;

(b) made in the knowledge that it is false, i.e. in the absence of any genuine belief as it is true;

(c) with the intention that it will be acted upon by the plaintiff in a manner which has resulted in damage to the plaintiff.

In order to sustain a claim for relief arising from conspiracy a plaintiff must prove, on the balance of probabilities and by way of factual evidence that two or more persons agreed to do an unlawful act or do a lawful act by unlawful means with consequent loss and damage to the plaintiff.

It follows that a plaintiff making a claim for relief arising from deceit, conspiracy or misrepresentation must factually identify, within his or her pleadings, the acts of deceit, conspiracy or misrepresentation alleged. It must further be pleaded that the plaintiff acted upon or was detrimentally affected by the wrongs alleged and sustained loss and damage as a result.

In this case Homes and Builders seek to amend their Statements of Claims for the purpose of pleading deceit, conspiracy and misrepresentation on the part of the Bank and Deloittes.

The Statements of Claims delivered by Homes and Builders in April 1991 did not factually identify an agreement between the Bank and Deloittes, (or between any of the parties to these proceedings), to do an unlawful act or to do a lawful act by unlawful means. They did not factually identify false representations made by the Bank or Deloittes, (or by any of the other defendants) made in the knowledge that such misrepresentations were wilfully false and with the intention that Homes and Builders would act upon them to their detriment. No other pleading delivered in the proceedings has done so.

The "*…real questions in controversy between the parties*" as outlined and described in the Statements of Claim were concerned with alleged breaches by the Bank of an agreement between the Bank and Homes and Builders and with alleged negligence and breach of duty on the part of the defendants.

It has not been contended on behalf of Homes and Builders that, at material times, they were not familiar with the statutory time limits applicable to them in respect of deceit, conspiracy and misrepresentation. It must be assumed that they knew and were professionally advised as to when their claims against the Bank and Deloittes would become barred by the provisions of the Statute of Limitations.

They chose not to include claims of deceit, conspiracy and misrepresentation within the proceedings which were commenced in 1990. They chose not to seek to amend those proceedings to include such claims between 1990 and March of 1991 (when the proceedings were stayed pending lodgement of security for costs). They chose not to apply to the High Court to lift the stay for the limited purposes of pleading a new cause of action.

They chose to appeal the order imposing the stay and to withdraw it after six years. They chose not to seek priority for the hearing of that appeal on grounds of the risk of the statutory bar.

They chose not to institute separate proceedings by issuing writs against the Bank or against Deloittes or against any of the other defendants after March of 1991 and before the expiration of the time limited by the Statute of Limitations for the commencement of those claims.

They chose not to write open letters to the Bank or to Deloitte or to any of the other defendants or to notify them at any time that they wished to advance claims of deceit, conspiracy and misrepresentation and were precluded from formally doing so by the order of the High Court staying the proceedings.

They permitted the Bank and Deloittes and other defendants to continue to conduct their defences in respect solely of the claims pleaded against them in 1991. They failed to notify them that they wished and intended to advance new and gravely serious claims of unlawful misconduct against them. That failure continued for a period in excess of ten years.

As has been indicated earlier, this Court will be slow to permit an amendment which, in fact, comprises a new cause of action based upon facts which have not been pleaded and which would otherwise be barred by the Statute of Limitations. The amendments sought by Homes and Builders in these proceedings actually comprise pleas of new causes of action which would otherwise be barred by the Statute of Limitations. The proposed new causes of action cannot be identified from the facts already pleaded. The amendments sought, therefore, include pleas of facts which have not, as yet, been pleaded.

No attempt was made on behalf of Homes and Builders, within the time limited by the Statute, to notify the Bank or Deloittes of their intention to make the claims which they now seek to make.

Claims alleging primary liability in breach of contract, negligence and other civil wrongs against three other defendants have now been abandoned or discontinued by Homes and Builders who, nonetheless, now wish to claim that the Bank and Deloittes are and remain vicariously liable for civil wrongs, allegedly perpetrated more than sixteen years ago by parties over whom the Bank and Deloittes now exercise no control.

In *Croke v. Waterford Crystal Glass Limited* [2005] 1 I.L.R.M. 321, the Supreme Court (Geoghegan J.) considered the provisions of O. 28, r. 1 of the Rules of the Superior Courts against the background of an application to amend to plead deceit, fraud, fraudulent concealment and breach of duty. He distinguished cases where fraud and deceit were implicit within the terms of the original Statement of Claim from cases where;

> *"… the appellant has not put forward any factual basis whatsoever to support a fraud or any kind of deliberate misconduct claim…" pointing out that in that case whilst "..In the replies to particulars there is a vague allegation that deliberate misrepresentations was made by the first named respondent as agent for the second-named respondent. But there are no particulars even remotely supporting that proposition."*

In this case the pleadings delivered on behalf of Homes and Builders have not factually identified acts or omissions by the Bank or Deloittes which could be categorised or identified as acts or omissions comprising deceit, conspiracy or misrepresentation.

An amendment to the pleadings now to permit Homes and Builders to allege deceit, misrepresentation and conspiracy on the part of the Bank and Deloittes would comprise a fresh new claim advanced by those plaintiffs which would otherwise be barred by the provisions of the Statute of Limitations. No satisfactory explanation has been offered by Homes and Builders for their failure to advance those claims within the time limited by the Statute of Limitations.

More importantly, I am satisfied on the evidence that injustice would be caused to the Bank and to Deloittes if the amendments sought were permitted. My reasons for that have been outlined earlier.

In the circumstances then I am satisfied that the applications made on behalf of Homes and Builders to amend their Statement of Claim must be refused.

Motions to Dismiss

1. Motion by the Bank against Homes.
It is contended on behalf of the Bank that the proceedings which have been commenced by Homes against the Bank should be dismissed. Mr. Finlay, S.C., contends that the proceedings comprise an abuse of process: (a) by reason of inordinate and inexcusable delay on the part of Homes in the prosecution of the action against the Bank and (b), because they have been improperly maintained and prosecuted by Homes without any *bona fide* intention to proceed to trial.

(a) Inordinate and inexcusable delay- Principles applicable.
The principles applicable to applications made pursuant to the inherent jurisdiction of a court to strike out or dismiss claims on the grounds that proceedings comprise an abuse of process by reason of inordinate and excusable delay in the prosecution of proceedings have been reviewed by the courts in the recent past. They were summarised by the Supreme Court (Hamilton C.J.) in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in the following terms:

> *"The principles of law relevant to the consideration of the issues raised in this appeal may be summarised 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 principles were considered again by the Supreme Court (Hardiman J.) in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 *inter alia* in the following terms:

> *"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. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one."*

Decision
In these proceedings a period of almost twelve months passed between the date of the issue of Plenary Summons on 20th April, 1990 and the delivery of the Statement of Claim on 8th April, 1991.

On 2nd March, 1992, an order was made by the Court requiring *inter alia* that Homes should lodge security for the Bank's costs.

In July and November of 1992, orders were made which had the effect of staying further steps in the proceedings pending the final determination of issues relating to the issue of security for costs.

On the 31st March, 1995, an application made on behalf of Homes to extend time within which to appeal the order for security for costs was refused by the Supreme Court.

On 29th July, 1999, a Notice of Motion applying for an order fixing the amount of security to be lodged by Homes was issued on behalf of the Bank.

On 24th March, 2000, the High Court (McCracken J.) *inter alia* fixed the security to be lodged by Homes in the amount of IR£200,000.

On 25th October, 2001, an order was made by the Supreme Court affirming the order of the High Court (McCracken J.) which had fixed the amount of security to be lodged by Homes.

On 6th February, 2002, the appropriate sum was lodged by Homes as security for the costs of the Bank.

On 30th July, 2002, the Defence of the Bank was delivered.

Further orders were made by the court in February and June of 2003 and in January and February of 2004, relating to discovery and particulars.

Prima facie a sixteen year delay between the commencement of High Court proceedings and the trial of those proceedings is inordinate. It would be absurd to suggest otherwise.

I am satisfied that where there has been inordinate delay on the part of a plaintiff in prosecuting a claim against a defendant, there is an onus upon that plaintiff to offer an explanation by way of evidence or argument or both demonstrating that the delay has been excusable in the circumstances. I am satisfied that such an onus rests upon Homes in these proceedings. I am not satisfied that Homes has discharged that onus.

The prosecution by Homes of its claim against the Bank has been characterised by prolonged periods of inactivity and by repeated failures by Homes to take steps to prosecute its claim.

Almost twelve months elapsed between the issue of the Plenary Summons and the delivery of the Statement of Claim in April of 1991.

Whilst the six year period between 2nd March, 1992 and the 11th February, 1998, was largely, dominated by procedural matters, (principally by a determination of issues relating to the issue of security for costs), no evidence has been adduced in suggesting that Holmes was concerned by this very substantial delay or took any steps to reduce the extent of that delay.

The same can of course be said of the Bank and Deloittes, (and the other defendants). However, as indicated earlier, the obligation to prosecute a claim of this kind rests principally upon the plaintiff.

It has been contended on behalf of Homes that the stays imposed by the High Court (Keane J.) in July and November of 1992, prevented Holmes from prosecuting its claim against the Bank pending the final resolution of appeals then pending before the Supreme Court. However those appeals had been finally resolved with effect from 11th February, 1998. Although nothing prevented Homes from prosecuting his claim against the Bank with effect from 11th February, 1998, it took no steps to do so. Seventeen months later the Bank issued and served a motion to fix security for costs in order to advance the proceedings.

As I have indicated earlier, almost twelve months had elapsed between the issue, on behalf of Homes of a Plenary Summons and the delivery of a Statement of Claim.

A further seven years passed before a meaningful step was taken, (on the initiative of the Bank), to have security for costs fixed so that the proceedings could proceed to trial. Because of that seven year delay (and the earlier delay), the obligation upon Homes to take appropriate steps to prosecute the case with expedition assumed greater importance and became more urgent.

The Order of the High Court fixing the amount to be lodged by Homes was appealed by Homes to the Supreme Court. That appeal was dismissed by the Supreme Court on 25th October, 2001.

Since more than eleven years had elapsed since the commencement of the proceedings the onus upon Holmes to prosecute its case against the Bank with expedition had assumed even greater urgency.

Nonetheless a further period of three years was allowed to elapse between 25th October, 2001, (when the appeal by Homes against the order of the High Court seeking security for costs was rejected by the Supreme Court), and 22nd October, 2004, when Homes attempted to deliver an amended Statement of Claim in the proceedings and indicated an intention to seek to consolidate the proceedings with those commenced on behalf of Builders.

The applications now made to this court on behalf of Homes seeking to consolidate the two sets of proceedings and to deliver an amended Statement of Claim were commenced by the issue of service of a Notice of Motion on 20th December, 2004.

The document produced on behalf of Homes to this court in support of its application to consolidate the proceedings and to deliver amended pleadings was wholly unsatisfactory, inappropriate, virtually incomprehensible and hopelessly prolix.

The two documents offered to the court by way of substitution for that document were also unsatisfactory.

Consequently this court is forced to the conclusion that, although some sixteen years have passed since the commencement of these proceedings, Homes still has difficulty adequately identifying and pleading the claim which it wishes to make against the Bank. In consequence, the bleak prospects for the Bank in having the proceedings brought to trial expeditiously are evident.

As I have indicated earlier, there has, at all material times, been an onus upon Homes to take appropriate steps to prosecute its claim against the Bank with reasonable expedition. Reasons why that is so have been identified by this court and recently by the High Court (Clarke J.) in *Rogers v. Michelin Tyre Plc. and Anor* [2005] I.E.H.C. 294.

The Bank is presumed to have suffered prejudice in its capacity to defend itself against the claim made by Homes by reason of the passage of that time. That has been established by the courts repeatedly in recent years and in particular by the Supreme Court in (Hardiman J.) in *Gilroy v. Flynn* [2004] I.E.S.C. 98 and the High Court (Clarke J.) in *Rogers v. Michelin Tyre Plc.* [2005] I.E.H.C. 294.

The issue for determination by this Court is whether or not the inordinate delay on the part of the Homes in prosecuting its claim against the Bank has been excusable in the circumstances.

A litigant advancing a serious claim against another person or persons has an obligation to prosecute that claim with reasonable expedition. No corresponding onus rests upon a defendant to have a claim for relief against him or her expedited to trial.

Whilst I am conscious that procedural steps taken by the Bank and Deloittes (and other considerations), have contributed to the delay in the prosecution of these proceedings I can find no evidence of any steps ever taken by Homes to expedite the proceedings in any respect. In fact, during the period in excess of sixteen years which have elapsed since the date when these proceedings were first commenced, I can find no evidence of any measure taken by Homes at any stage directed towards bringing the proceedings to trial. Rather the contrary has been the case.

Notwithstanding the procedural steps taken by the Bank and by the other defendants in these proceedings which contributed to the delay in bringing these proceedings before the court I am satisfied that there has been inordinate delay on the part of Homes in prosecuting these proceedings against the Bank.

Inordinate delay by a plaintiff in the prosecution of proceedings does not, *per se*, require that the proceedings should be dismissed on the application of the affected defendant. The delay may have been reasonably justified in the circumstances and the interests of justice may require that the proceedings should proceed to trial.

It is claimed on behalf of the Bank that the inordinate delay on the part of Homes in prosecuting these proceedings was inexcusable in the circumstances.

On behalf of Homes it is contended that the principal cause of the sixteen year delay was the fact that the Bank and the other defendants took procedural steps within the proceedings which caused the delay. Mr. Hayden S.C. argues that the delay was, therefore, excusable in the circumstances.

I am not satisfied that the very substantial delay in bringing these proceedings to trial can be attributed to the procedural steps taken by the Bank and the other defendants.

The principal cause of the inordinate delay in prosecuting these proceedings to trial has been inactivity and dilatory conduct on the part of Homes. On the evidence neither the Bank nor any of the other defendants acquiesced in the delay on the part of Homes in prosecuting its claim.

The procedural steps taken on behalf of the Bank and the other defendants necessarily delayed the proceedings to a significant degree. However the inaction and dilatory conduct on the part of Homes was unconscionable in the circumstances and was in gross breach of its obligation to prosecute its claim against the Bank with reasonable diligence and expedition.

The consequences of the inaction and dilatoriness by Homes has been that the Bank will, at some future date, be required to adduce oral and documentary evidence in respect of events which are alleged to have occurred in 1988 and 1989.

It will further be required to adduce evidence in defence of its alleged vicarious liability for action, (or inaction), on the part of three defendants which is alleged to have occurred sometime in 1988 or 1989.

In *Culbert v. Westwell and Company* [1992] 2 P.I.Q.R. 54 the Court of Appeal in England (Parker L.J.) observed that:

> *"An action may also be struck out for contumelious conduct, or abuse of the process of the court or because a fair trial of the action is no longer possible.*
>
> *Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the rules of the court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on a defendant raising the question of prejudice. In my judgment the way in which the action has been conducted does amount to an abuse of the process of the court and it would be a further abuse of process if the action were allowed to proceed."*

In this case a document running to some 129 pages was prepared on behalf of Homes and Builders in December, 2000, and relied upon in support of an application by those parties to consolidate the actions and deliver amended pleadings. The application was struck out by the High Court (Johnson J.) on 29th January, 2001, by reason of the failure of Homes to comply with an order to lodge security for costs.

The nature and content of that document raises questions as to the bona fides of the document and of the application. It was not brought before the court or relied upon by Homes or Builders on any subsequent occasion.

Having regard to the history of these proceedings it was also difficult to understand how the application made to this court on behalf of Homes to consolidate the defence pleadings could have been grounded upon a document as unsatisfactory as that which was presented to the Court at the commencement of this hearing.

I think it is also pertinent to note that the Bank and Deloittes have expressly and openly questioned the bona fides of Homes and of Builders in the prosecution of these proceedings. It was baldly alleged by Mr. Finlay S.C. on behalf of the Bank and by Mr. Murray S.C. on behalf of Deloittes that it is not the intention of Homes or Builders or their shareholders to prosecute these proceedings to a conclusion.

Reliance was placed by both Counsel upon averments in evidence that Mr. James Kennedy is now outside this jurisdiction and has publicly stated that he will not return to this jurisdiction in the immediate future. He is the husband of the principal shareholder of both Homes and Builders and was centrally involved in the events which have given rise to the proceedings.

It is claimed that it will be impossible for the claims advanced by Homes and by Builders to succeed, (or to proceed), in the absence of his testimony.

Mr. Hayden S.C. on behalf of Homes and Builders has refused to make any observation upon that claim or upon the intentions of Mr. James Kennedy. He has pointed out that Mr Kennedy is not a party to these proceedings and is not, presently, a shareholder in either Homes or in Builders.

He has further, correctly, pointed out that Homes and Builders are entitled to adduce such evidence as they may deem appropriate in support of their respective claims against the Bank and Deloittes. They are not obliged to identify the nature or extent of any testimony which they intend to adduce in the proceedings.

It was, however, surprising that he made no observation upon allegations so grave and so stark. On the evidence it is undeniable that Mr. Kennedy was a central figure, on behalf of Homes and Builders in all of the events which have given rise to these proceedings. Evidence that he intends to remain outside the jurisdiction of this court for the foreseeable future has been adduced and remains unchallenged. His wife is the principal shareholder in both Homes and Builders and has been the principal deponent on their behalf in the applications before the court. That fact will not be determinative in these applications but it cannot be ignored. It must form part of the overall factual matrix for consideration by the court in its determination.

I am satisfied that there have been a number of separate and inexcusable delays on the part of Homes in prosecuting its claim against the Bank. I am satisfied further that Homes has, at all material times, been fully aware of the consequences of those delays. That fact is a cause of concern to this court.

On the evidence in this case, no adequate explanation has been offered on behalf of Homes or Builders which in any way justifies the inaction and dilatoriness on their part which has been the predominant cause of their respective failures to prosecute their claims against the Bank. I am accordingly quite satisfied that the delay on the part of Homes has been both inordinate and inexcusable in the circumstances.

As I have already indicated I am satisfied upon the evidence that the Bank has not acquiesced in the delay by Homes in prosecuting its claim and that the portion of the delay which was caused by procedural steps taken by and on behalf of the Bank and the other defendants does not ameliorate the breach by Homes of its obligation to prosecute its claim against the Bank with reasonable expedition.

This court, having regard to the implied constitutional principles of basic fairness of procedures, has an inherent jurisdiction to dismiss a claim when the interests of justice so require.

On the evidence in this case I am satisfied that the inordinate and inexcusable delay by Homes, (and the consequent prejudice to the Bank), has given rise to a substantial risk that a fair trial of these proceedings is not now possible and it would be unfair to the Bank to allow the proceedings to continue.

The position might have been different if, after the 11th February, 1998 or, certainly after October, 2001, Homes had been prepared to plead its case against the Bank coherently and urgently and in a serious and determined manner.

However the contrary was the case and, as late as the commencement of this hearing, Homes was not in a position to provide coherent pleadings to this court identifying properly the claim which it wished to advance against the Bank.

The conduct of Homes in the prosecution of its claim against the Bank has been contumelious by reason of inordinate and inexcusable delays made in disregard of the Rules of Court and with full awareness of the consequences of that disregard.

I am satisfied, further, that by reason of the failure of Homes to prosecute its claim against the Bank with reasonable diligence and expedition it is most improbable that a fair trial of this action will be possible in the foreseeable future. For that reason I am satisfied that the claim by Homes against the Bank should be dismissed.

2. Motion by the bank against builders.
It is also contended on behalf of the Bank that the proceedings which have been commenced by Builders against the Bank should be dismissed by reason of the inordinate and inexcusable delay on the part of the Builders in the prosecution of its action against the Bank and because the proceedings have been improperly maintained and prosecuted by Homes without any *bona fide* intention to proceed to trial.

The considerations which I have identified earlier in relation to the claim by Homes against the Bank also apply with equal force to the claim by Builders against the Bank.

I am, accordingly, satisfied that he conduct of Builders in the prosecution of its claim against the Bank has been contumelious by reason of inordinate and inexcusable delays made in disregard of the Rules of Court and with full awareness of the consequences of that disregard.

A period of almost 12 months also passed between the date of the issue of the Plenary Summons on 20th April, 1990, and delivery on behalf of Builders of the Statement of Claim on the 8th April, 1991.

The orders of the High Court (Keane J.) dated in respect of the 30th July, 1992 and 6th November, 1992, directed that the substantive actions by Homes and Builders against the Bank should be heard at the same time and stayed all proceedings in those actions pending the determination of appeals then pending before the Supreme Court.

With effect from 11th February, 1998, (when Builders won its appeal), it was open to Homes and Builders to prosecute their claims against the Bank.

However neither took any step until, (on the initiative of the Bank, and Deloittes), an application was made in respect of Homes to fix security for costs. It is claimed on behalf of Builders that the Orders of July and November 1992 directing trials at the same time prevented Builders from advancing its claims further at that time. However it made no attempt to do so by way of application to the court or otherwise.

No step was taken on behalf of Builders during the three year between 25th October, 2001 (when the issue of security for costs was finalised) and the 22nd October, 2004, when an attempt was made on behalf of both Homes and Builders to deliver an amended Statement of Claim in consolidated proceedings. That in turn gave rise to the application which is before this court.

It will be apparent from the reasons which I have outlined earlier that the periods of inactivity by Builders, including the period of three years just referred to, was inordinate in the circumstance and I am satisfied that no adequate explanation has been offered on behalf of the Builders to justify that delay. The delay was therefore inexcusable.

As I have indicated earlier I am satisfied that the procedural step taken on behalf of the Bank and the other defendants did not amount to acquiescence on the part of the Bank or the other defendants in the inexcusable delay on the part of Builders.

I am also satisfied that the Bank, by its conduct, did not induce the plaintiff to incur further expense in pursuing the action. The steps which the Bank took were, reasonable in the circumstances.

As I have indicated, the considerations which I have identified earlier in relation to the contumelious conduct of Homes apply also in respect of the conduct of Builders.

I am, therefore, satisfied that the inordinate and excusable delay on the part of Builders in prosecuting its claim has given rise to a substantial risk that a fair trial of the issues in this case will not be possible in the foreseeable future.

It follows that the claim by the Builders against the Bank will be dismissed.

Motions by Deloittes against homes and builders
The considerations which apply to the motions by the Bank against Homes and Builders apply with equal force to the motions brought by Deloittes seeking to dismiss the claims against it by Homes and Builders.

The sequence of events is similar and the inaction and dilatoriness on the part of Homes and Builders is similar if not identical to that demonstrated in respect of the respective claims by Homes and Builders against the Bank.

On the evidence therefore I am satisfied that periods of inactivity by both Homes and Builders in prosecuting their respective claims against Deloittes were inordinate in the circumstances and that no adequate explanation has been offered on behalf of either Homes or Builders to justify those delays. The delays were therefore inexcusable.

I am satisfied on the evidence that the procedural steps taken on behalf of Deloittes and the other defendants did not amount to acquiescence on the part of Deloittes or the other defendants in respect of the inexcusable delay on the part Homes and Builders.

I am also satisfied that Deloittes, by its conduct, did not induce either Homes or Builders to incur further expense in pursuing their respective actions. The steps taken by Deloittes were reasonable in the circumstances.

The considerations which I have identified earlier in relation to the contumelious conduct of Homes and Builders in respect of the Bank apply also in respect of Deloittes.

I am therefore satisfied that the inordinate and inexcusable delay on the part of both Homes and Builders in prosecuting their respective claims have given rise to the substantial risk that a fair trial of the issues in their respective claims will not be possible in the foreseeable future.

It follows that the claims by both Homes and Builders against Deloittes will be dismissed.

Deloittes have also applied pursuant to the provisions of Order 122, Rule 11 of the Rules of the Superior Courts for an order dismissing the claims of Homes and Builders for want of prosecution.

Since I have dismissed the claims by Homes and Builders against Deloittes on the grounds of inordinate and inexcusable delay issues it is unnecessary for this court to proceed further and deal with the applications on behalf of Deloittes made pursuant to the provisions of Order 122, Rule11.