

**THE HIGH COURT****[2005 No. 2881 P]****BETWEEN****MICHAEL BURKE****PLAINTIFF****AND****MINISTER FOR HEALTH AND CHILDREN, IRISH BLOOD TRANSFUSION SERVICES,****IRELAND AND THE ATTORNEY GENERAL****DEFENDANTS****JUDGMENT of Mr. Justice Sean Ryan delivered the 20<sup>th</sup> day of July 2012.**

There are two motions before the court. The first is brought on behalf of the State defendants, namely, the Minister for Health and Children and the third and fourth defendants, for an order dismissing the plaintiffs claim for want of prosecution. The second defendant, the Irish Blood Transfusion Service, supports this application. The plaintiff has a rival motion, brought in response to the application to dismiss and seeking an extension of time in which to serve his statement of claim in the action.

The facts are that in February 1992 and again in September 1993 the plaintiff donated blood to the Blood Transfusion Service Board, the predecessor of the second defendant. He claims that his blood tested positive for Hepatitis C on each occasion but the Board failed in its duty to notify him of that result until on or about the 4<sup>th</sup> October, 1993. This failure represented a variety of legal wrongs and that he suffered personal injuries, loss and damage as a result.

The background to the issuing of proceedings was the publication in March, 2005 of an expert report procured by the BTSB. In August, the Board issued a public apology in respect of the failures that were disclosed in the report. On the 12<sup>th</sup> August, 2005 the Board sent a personal apology to the plaintiff. He instituted his proceedings by way of plenary summons on the 23<sup>rd</sup> August, 2005 claiming damages for negligence, breach of duty, trespass to the person and breach of constitutional rights.

The Irish Blood Transfusion Service put in an Appearance on the 21<sup>st</sup> September, 2005. The State defendants filed and served an Appearance dated 26<sup>th</sup> October, 2005. Then there was a delay of more than six years before the next relevant development on the 14<sup>th</sup> November, 2011, when the plaintiff served Notice of intention to Proceed. On the 12<sup>th</sup> December, 2011, the State defendants- the first, third and fourth defendants issued their notice of motion to dismiss the claim for want of prosecution. On the 22<sup>nd</sup> February, 2012, the plaintiff issued his notice of motion seeking extension of time for the delivery of the statement of claim. The plaintiff had attempted to serve the statement of claim on the 22<sup>nd</sup> December, 2011 but the defendants did not consent to such service at which time the motion to dismiss had been issued.

**The plaintiff's explanation for the delay.**

The plaintiff affidavit is dated the 20<sup>th</sup> February, 2012. At para. 5 he said that at the time when he issued his proceedings he was suffering from cirrhosis secondary to chronic Hepatitis C infection and ongoing mental health difficulties and he exhibited a number of medical reports to which I shall refer later. He then said:-

"Once proceedings had been issued, I did not then pursue the matter with my legal advisers; I did not understand the legal process and simply assumed that I would be informed of a date for trial."

He said that he managed to continue working, but was suffering ongoing serious health difficulties, which included an episode of ascites and hepatic encephalopathy in or about November 2006, during which he was extremely unwell. At some point subsequent to that he had to give up working and his condition deteriorated further. He said that he and his doctors were extremely concerned about his health and that was his principal preoccupation at the time. Mr. Burke refers to letters of October, 2007 which do indeed record that his quality of life had significantly disimproved and that he was suffering from severe fatigue. Mr. Burke underwent a liver transplant at St. Vincent's Hospital in January 2009, and he had a prolonged recovery thereafter.

Mr. Burke makes the case that he was extremely unwell in the period between the issuing of these proceedings in 2005 and his recovery following the liver transplant surgery that he underwent in January 2009 and that is the reason for his delay in progressing his case. At paragraph 9 of his affidavit he says:-

"During the period, as aforesaid, and given the various health difficulties I was suffering, as just set out, I was not really in a position to focus on the proceedings that had been issued. It was only after regaining some normality in life, after recovery from my liver transplant (which is ongoing), that I got around to pursuing matters, and to attempting to advance these proceedings."

He argues at para. 11, that there is no prejudice to the defendants if these proceedings are to continue. He undertakes to advance the action expeditiously.

"Whereas I accept that there has been significant delay in my prosecuting these proceedings, I am advised and I believe that such delays are excusable, in the circumstances of my physical and mental health, as averred to, and serious and fatal (but for a transplant) underlying liver disease I was suffering."

### **The Plaintiff's Medical Reports as Exhibited.**

In late March 2005, Mr. Burke was suffering serious depression and psoriasis according to the report of the first April, 2005, from Dr. Elizabeth Kenny. In April, he showed signs of significant liver disease in addition to symptoms of depression. Dr. Kenny reported on an adverse reaction that Mr. Burke had to treatment when she reviewed him in October, 2005. In September 2006, Dr. Kenny reported that his cirrhosis was active. In late November 2006, she was worried about mild clinical depression. In January 2007, Dr. O'Dea, Chartered Clinical Psychologist, reported that Mr. Burke was working full time, but was hoping to be offered redundancy because he was very limited in what he could do at work. Over the previous two years - 2005 to 2007 - he had had bouts of severe low mood and hopelessness. He had been seeing a psychiatrist and had been on anti depressants. He had mild depression which did not respond well to intervention.

In March 2007, Mr. Burke was complaining of physical symptoms in the form of swelling of his leg and abdomen, increase in weight as well as low mood. A report of the 23<sup>rd</sup> April, 2007, records that Mr. Burke had recently decompensated in November 2006, with ascites and encephalopathy. He continued under very intense medical supervision during 2007. Low mood was a continuing problem. He was also weak physically. In October 2007, Dr. Crosby, Consultant Gastroenterologist, said that she was somewhat concerned about him. "I think he really does not have any quality of life at the moment. Apparently he spends his whole day at home and if he does any small activity whatsoever he can be extremely tired afterwards, one year ago he was working full time as you might recall before he decompensated in November 2006." He had some rectal bleeding and was admitted to hospital for an endoscopy. Prof.

McCormack, Consultant Haepetologist, reported on the 23<sup>rd</sup> October, 2007, that his quality of life had significantly disimproved. He also had severe fatigue. Prof. McCormack was considering liver transplant at that stage.

Mr. Burke continued to unwell in 2008. He had tiredness, itching and depressive moods.

He had a liver transplant in St. Vincent's Hospital in January 2009. Following that procedure he developed recurrent viral disease in his new graft and he suffered from depression. He was required to attend the liver transplant clinic in the hospital on a regular basis and to adhere strictly to "a lifelong regimen of immunosuppressive medication".

It is clear from this recitation that the plaintiff was justified in saying that he had been seriously ill in the period from the issuing of the plenary summons in 2005 up the time of his liver transplant in January 2009, and thereafter. That is the basis of his resistance to the motion to dismiss and of his application to extend the time for service of the statement of claim.

The plaintiff, Mr. Burke, says nothing about the role of his solicitor during the period in question. This is of some relevance particularly in view of the comment on this question by Finlay P., as he then was, in *Rainsford v. Limerick Corporation* to which I refer below.

### **The Affidavits in Support of the Motion to Dismiss.**

The affidavit on behalf of the State defendants is sworn by Ms. Cathy O'Donnell, solicitor. She says that the plaintiff acknowledges in his affidavit that there has been significant delay and she argues that this amounts to inordinate delay. The question therefore is whether the plaintiff had excusable grounds for the delay. She refers to his plea that he did not understand the legal process and simply assumed that he would be informed of the date for trial, as outlined above. Since nothing further happened over a period of more than six years, Ms. O'Donnell argues that "that must inevitably, mean that there is an inexcusable delay on his part in the prosecution of those proceedings. She goes on to say at para. 6:-

"While these defendants readily acknowledge, and sympathise with the plaintiff's medical condition, it is difficult to see how the medical evidence, relied upon by the plaintiff, indicates that he was incapable of instructing his solicitor for a six year period."

Ms. O'Donnell points out that the matters in respect of which the action arises occurred in the period 1991/1993 and yet proceedings were not instituted until 2005. In this connection, she argues that in light of the significant delay in the first place in the institution of the proceedings from the time when the incidents giving rise to alleged liability occurred, there was a particular obligation on the plaintiff to prosecute the claim with all due haste. This is of course a reference to the principle enunciated by Henchy J. in *Sheehan v. Amond* [1982] I.R. 235 at 237.

Ms. O'Donnell, points out that even at this stage the plaintiff has not included in the statement of claim he intends to deliver any actual particulars of personal injury, but instead states that such details are not available at present, but will be furnished when available.

### **Position of second defendant, Irish Blood Transfusion Service.**

The affidavit in support of the second defendant's position in support of the motion to dismiss brought by the other defendants is sworn by Ms. Niamh O'Brien, solicitor. She says that some procedural correspondence followed the entry of the second defendant's Appearance which concluded with a letter of the 6th October, 2005. Nothing then occurred until the notice of intention to proceed on the 14<sup>th</sup> November, 2011. Ms. O'Brien says at para. 6:-

"Whilst the second named defendant has every sympathy for the plaintiff in relation to the ill health experienced by him and his partner, the medical evidence relied upon by the plaintiff does not indicate that he was incapable of instructing his solicitors during this period of time. The plaintiff was legally represented at all times throughout this six years period."

She also points out that the statement of claim that the plaintiff intends to deliver if permitted to so, does not actually contain any particulars of personally injury and merely says that the plaintiff is awaiting a report of his review. She says that no proper particulars of special damages had been furnished. And this notwithstanding that six years and eight months have passed since the issue of a plenary summons. Ms. O'Brien contends that the plaintiffs delay has been inordinate and inexcusable. She says that the second defendant has been prejudiced in its defence of the proceedings and has been denied a trial within a reasonable period. She points out that the wrongdoing pleaded against the second defendant is dated between 1991 and 1993.

### **The Plaintiff's Statement of Claim as Intended to be Delivered**

- The first October, 1991 - BTSB introduced testing/screening for Hepatitis C
- February 1992, the plaintiff gave blood donation
- September 1993, the plaintiff gave another donation
- 5th March, 1992, the plaintiff's blood donation of February 1992 tested positive for Hepatitis C and was discarded and

not used.

- 4th October, 1993,- plaintiff's September 1993 donation tested positive for Hepatitis C
- December 1993 BTSB notified the plaintiff of the testing/screening result following which a referral for hepatology review was made
- The BTSB did not inform the plaintiff as soon as was reasonably practicable that his donations had tested positive
- The defendants were guilty of- (a) negligence, (b) breach of duty, (c) intentional or negligent misrepresentation, (d) trespass to the person, (f) breach of constitutional rights to bodily integrity and/or privacy
- Under the heading of Particulars of Personal Injury the following is pleaded:-

As a consequence of the foregoing, the plaintiff was discommoded in his private, personal, working, social, family, domestic and recreational life.

The plaintiff, at this time, is unable to include herein all of the information in relation to the personal injuries he suffered and for which damages are being claimed in these proceedings. That awaits the report of his review, which is not available as of the date of the delivery hereof. Full Particulars of Personal

Injuries, including in relation to such adverse sequelae as may have eventuated, will be furnished when available

- Under the heading Particulars of Special Damages a list of items or headings appears as follows - medical expenses, pharmacy expenses, physiotherapy expenses, travel expenses, hospital charges, loss of earnings, sundry and miscellaneous expenses, which are all stated to be "unascertained and continuing".

## Summary

The position may be summarised as follows.

1. The relevant events giving rise to the claim occurred in 1991 - 1993.
2. The plenary summons was issued on the 23<sup>rd</sup> August, 2005, following which there was some technical, procedural correspondence that concluded in October 2005.
3. Nothing happened for over 6 years.
4. On the 14<sup>th</sup> November, 2011, the plaintiff served notice of intention to proceed.
5. On the 12<sup>th</sup> December, 2011, the notice to dismiss for want of prosecution was issued. Subsequent events were the attempted delivery of the statement of claim and the plaintiff's notice of motion to enlarge the time for such delivery - that motion is dated the 22<sup>nd</sup> February, 2012.
6. The plaintiff was represented by solicitors throughout the period in question.
7. The plaintiff suffered from serious illness from which he had been suffering from 1991 or earlier. Over the period of the delay, however, his condition deteriorated and ultimately he had a liver transplant in January 2009, following which there was a substantial period of recuperation. Among the plaintiff's symptoms were serious depression, fatigue and a number of other troubling physical conditions.
8. It is not expressly stated in the medical reports that the plaintiff's condition would have impaired his capacity to concentrate on his litigation but I think it is manifest by necessary implication from the medical reports that I have and from the facts as they are known that that would have been the case.
9. The plaintiff's condition would, however, not have prevented him from giving instructions to his solicitor during much of the period. I say that of course, without having specific medical evidence dealing with the point. The onus as it seems to me is on the plaintiff to establish any relevant specific incapacity and he has not done so. As I have said, I am satisfied as to his general condition and that his mental and physical capacity to deal with problems would have been less than if he had been fully healthy. And it is also clear from the medical report that the plaintiff has exhibited that he was in a position to discuss with his doctors' details of his symptoms and of the treatment modalities that were available, including making decisions about drug therapy for depression and other issues concerning his illness.
10. There is no information about the plaintiff's solicitor. In *Rainsford v. Limerick Corporation*, Finlay P. referred to the responsibility of a plaintiff for the conduct of his legal advisers and held that there were circumstances in which a plaintiff would not be responsible for failures on the part of his lawyers. But the only person who can provide that information is the plaintiff and he can of course authorise his lawyer to furnish information to the court. The other parties cannot do so because of confidentiality. If therefore, there is a failure to explain delay or to ascribe blame for it to a lawyer, the only person who can provide that information is the plaintiff and if he does not do so, the other party cannot be blamed for it or cannot suffer to his advantage because of the plaintiff's decision not to reveal his transactions. Furthermore, it is of course open to a client to claim against his legal advisers in the event that they fail to comply with their contractual or other legal duties.
11. The plaintiff is still at this stage not in a position to make his claim clear, as is apparent from the lack of any details of personal injury or of special damage in the statement of claim that he purported to deliver.
12. The defendants do not suggest that any relevant witness is unavailable, nor that any documents have been lost or

destroyed so there is no specific prejudice of that kind that would impair the defence of the action.

### The Law

Counsel were agreed that the relevant law was that the defendants had to establish in the first place that the plaintiffs delay in proceeding with his claim was inordinate and inexcusable. Finlay P. was of the view in *Rainsford v. Limerick Corporation* that there was no basis for an application to dismiss unless the delay was inordinate and inexcusable. Secondly, is it in the interest of justice that the case should be dismissed? The first of these tests is not difficult to apply: the two epithets are amply justified. Counsel for the plaintiff, Mr. Ciaran Craven, Barrister made some attempt to suggest that the delay was excusable in light of the circumstances put forward by the plaintiff, specifically- indeed solely- his state of health. However, Mr. Paul O'Neill, Barrister for the State defendants pointed out examples in the papers where the plaintiff had got on with his life during the period of the delay. The only basis on which the plaintiff could hope to escape a finding that the delay was inexcusable is if he could show that he was personally not responsible for the inaction of his legal advisors. Finlay P. said in *Rainsford*:-

"Whilst the party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material to the exercise of the court's discretion".

The first point to be noted about that comment is that it did not arise in considering excusability. It arose at the subsequent second stage when the balance of justice was being considered with a view to the exercise of the court's discretion.

It seems to me that it clear in this case that the delay was indeed inordinate and inexcusable. I think for this purpose that the plaintiff must be identified with his solicitor, or, to put it another way, the plaintiff is vicariously responsible. It is moreover impossible in my view to construct a valid test that could be applied in circumstances where the plaintiff does not reveal any of the transactions that took place between him and his legal advisors or does not make any case to distinguish him from their inactivity. That is the situation here. I think it applies not only to the question of inexcusability but also to the exercise of discretion. Since it is not open to the other parties to explore the communication or correspondence or transactions between plaintiff and his lawyer, the matter is entirely left to the plaintiff. If he does not supply a basis for distinguishing him from his lawyers, he must accept the consequences of identification of client and solicitor.

### The balance of justice test

As to the second limb of the test, whether it is in the interest of justice that the plaintiffs action should be dismissed, the decided cases reveal differences of approach. The traditional mode focuses on the conduct of the defendant and the impact of the delay on his position: see *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor Pic v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.

The second approach looks at the plaintiffs conduct and circumstances, on the basis that the case ought to be dismissed if there is inordinate and inexcusable delay unless the plaintiff is able to adduce some exceptional countervailing argument or circumstances to avert that consequence: *Ó Dómhnaill v. Merrick* [1984] I.R. 151

More recently, the Court itself has expressed concern in the public interest to see to the efficient dispatch of litigation. This has at its heart a conception of the court's function in litigation that is to ensure that cases are brought to expeditious conclusion. Litigation is not simply a matter for the parties and "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." Per Hardiman J. in *Gilroy v. Flynn* [2005] I.L.R.M. 290 at 293/4. This proposition has its source in Article 6(1) of the European Convention on human rights.

In this court in *Stevens v Paul Flynn Limited* [2008] 4 I.R. 31, Clarke J. expressed the view that a radical re-appraisal might now be necessary in determining the balance of justice and it might even extend to the appraisal of the elements of inordinacy and inexcusability.

In his dissenting judgment in *Desmond v. M.G.N Limited* [2009] 1 I.R. 737, Kearns J. endorsed this new approach. He said that the delay in that case was so long that it "almost certainly gave them [the defendants] reasonable grounds to believe that this litigation had simply 'gone away' and would never be brought before a court." Kearns J. in addition to addressing the function of the court having regard to Article 6 of the Convention, cited the review by Fennelly J. of the authorities in his judgment in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510 at 519 where he concluded that in striking the balance of justice, a court

"... will need to find something weighty to cancel out the effects of the plaintiffs behaviour. It will attach weight to the character of the claim and to the character of the plaintiffs. When considering any allegation of delay or acquiescence by the defendants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiff's case dismissed."

A variant of this doctrine derives an obligation on the courts to achieve efficient disposal of court proceedings. On this analysis, the courts have a duty and they also have an interest independent of the concerns of the litigants. This is a public interest which is different from the private interests of the litigants. Peart J. said in *Byrne v Minister for Defence* [2005] 1 I.R. 577:---

"... there is a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up the valuable and important time of the courts, and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their relegation, as well as increase the cost to the Courts service, and through that body to the taxpayers, are providing a service of access to the courts which serves best the public interest."

Hogan J. cited that passage with approval in *Quinn v. Francis Faulkner trading as Faulkner's Garage and MMC. Commercial Limited* [2011] I.E.H.C. 103, in which he held that article 34.1 of the Constitution presupposed an obligation on the courts to ensure the timely administration of justice.

Geoghegan J. in *Desmond v. M.G.N Limited* [2009] 1 I.R. 737 did not agree that the jurisprudence in relation to when an action should be struck out for delay needed to be modified having regard to the incorporation into domestic law of the European Convention on Human Rights by the Act of 2003. The views of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 were obiter dicta. The basic principles in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 represent the law.

This brief discussion illustrates that there is probably no universal test. There may be circumstances that are outside the existing jurisprudence in which the courts will nevertheless accede to dismissal applications. There may be cases in which the stated criteria in the legal authorities are not met but in which the court may nevertheless exercise its discretion in order to achieve justice. As with other common law rules, the general principles as laid down in the cases are not to be considered as exhaustive and comprehensive expositions of the circumstances in which long delay cases may be rejected as if the rules were contained in legislation.

It seems to me that Geoghegan J.'s comments represent the current orthodoxy but the conception of justice in legal thinking is tending to shift the balance but has not yet done so.

In *Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, the Supreme Court focused on whether the delay resulted in prejudice to the defendant in meeting the claim. The Court set the bar high for a defendant applying for a dismissal, holding that the question of particular prejudice was central to the exercise of discretion and it also endorsed and emphasised the importance of the role of the defendant in relation to the plaintiff's delay. The Supreme Court held that the principles of law relevant to an application to dismiss an action for want of prosecution were:-

1. that the courts had an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice so required;
2. that the party who sought the dismissal on the ground of delay in the prosecution of the action must establish that the delay had been inordinate and inexcusable;
3. that even where the delay had been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice was in favour of or against the case proceeding;
4. that when considering this obligation the court was entitled to take into consideration and have regard to -

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

(b) whether the delay and consequent prejudice in the special facts of the case were such that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action,

(c) any delay on the part of the defendant, because litigation was a two party operation and the conduct of both parties should be looked at,

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

(e) the fact that conduct by the defendant which induced the plaintiff to incur further expense in pursuing the action did not, in law, constitute an absolute bar preventing the defendant from obtaining a dismissal but was a relevant factor to be taken into account by the court in exercising its discretion whether or not to dismiss, the weight to be attached to such conduct depending on all the circumstances of the particular case,

(f) whether the delay had given rise to a substantial risk that it was not possible to have a fair trial or it was likely to cause or had caused serious prejudice to the defendant,

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

O'Flaherty J. held that whilst the Court had inherent jurisdiction to dismiss a claim in the interests of justice where the delay in the proceedings was in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself, it was a jurisdiction which should not be frequently or lightly assumed. He also said that where a plaintiff's claim was as infirm as it was in the present case, that could be taken into account on a defendant's motion to dismiss for want of prosecution.

In *Sheehan v. Amond* [1982] I.R. 235, Henchy J. said:

"After eight years of silence, after the infant plaintiff had grown from childhood to manhood, when memories of the circumstances of the accident had inevitably become dulled or distorted with the passing years, when the scene of the accident may possibly have changed, when medical and other evidence may have lost sharpness or reality, when money values had changed out of all recognition, when the many other changes that are the inevitable consequences of the fading of events into the distant past must have taken place, is it any wonder that in those circumstances the response of the defendant to the belated effort of the plaintiff's solicitor to resuscitate this seemingly entombed action was to bring a motion to have it struck out? That is what the defendant did."

### Application of the principles to this case

1. The plaintiff has one substantial point in his favour on the balance of justice test because of the continuing serious illness that he suffered from and that persisted until his recovery from the transplant surgery. But the counterweight is tilted heavily against him by the following features of the case.
2. The delay in this case has not concluded even at this point. The statement of claim does not contain any details of the personal injuries alleged to have been suffered by the plaintiff and neither are there any particulars of special damage. Not only that, there is no indication of when that information will be available.
3. The action is somewhat speculative.
4. The plaintiff has signally failed to offer any explanation for the inactivity of his solicitor over the period of six years, following a long lapse of time from the events giving rise to the claim which was itself a reason for proceeding expeditiously.

5. The plaintiff has known all the facts in his statement of claim at all relevant times since he served the plenary summons and even before that for most of the past 20 years.

6. If the case proceeds, the defendants will have to seek medical evidence as to the impact on the plaintiff of the non-disclosure of test results some 20 years ago. Nothing in the case documents suggests that there is any question of the plaintiff having suffered any physical injury. The enquiry therefore will be directed to whether the plaintiff suffered from psychiatric illness resulting from the event or events complained of in the proposed statement of claim. It is obvious that any doctor will be at an enormous disadvantage in trying to evaluate the effect on the plaintiff of something that did not happen which he claims should have happened.

7. A decision in his favour would start the clock again not even from now but from an unknowable time in the future.

8. The defendants are prejudiced.

9. Looking specifically at the matters enumerated by the Supreme Court in *Primor*, in my view

a. a decision to permit the case to proceed would offend the constitutional principle of fairness of procedures.

b. the delay and consequent prejudice in the circumstances of the case are such that make it unfair to the defendant to allow the action to proceed and make it just to strike out the action

c. the fact that the defendants did not apply earlier to strike out the action did not amount to acquiescence on their part in the plaintiffs delay,

d. the delay caused serious prejudice to the defendant,

e. there is in addition a substantial risk that it may not be possible to have a fair trial because of the very long time since the events that give rise to the claim.

10. If the case were to proceed, the Court's legitimate interest that its own processes be respected would be damaged. It is unacceptable in all the circumstances that such extreme and continuing delay should be tolerated.