

**THE HIGH COURT**

**[1999 4220 P]**

**BETWEEN**

**MICHAEL MURPHY AND PATRICK MURPHY**

**PLAINTIFFS**

**AND**

**COLM C MURPHY AND YVONNE MURPHY PRACTICING UNDER THE STYLE AND TITLE OF COLM C MURPHY AND COMPANY SOLICITORS**

**DEFENDANTS**

**BETWEEN**

**[2008 No. 6094 P]**

**PATRICK MURPHY**

**PLAINTIFF**

**AND**

**JAMES BINCHY, COLM MURPHY (PRACTICING UNDER THE STYLE AND TITLE OF MURPHY AND COMPANY SOLICITORS), YVONNE MURPHY, TOM O GRADY (PRACTICING UNDER THE STYLE AND TILE OF TOM O GRADY SOLICITOR), PATRICK J CADELL AND DEIRDRE LYONS (PRACTICING UNDER THE STYLE AND TILE OF BUTLER, CUNNINGHAM AND MOLONEY SOLICITORS)**

**DEFENDANTS**

**JUDGMENT of Mr. Justice McDermott delivered on the 19th day of June, 2015**

1. Three motions are before the Court. Two motions seek the striking out and/or dismissal of both sets of proceedings before the Court. The third motion issued on the 11th September, 2014 and seeks an order pursuant to Order 49 Rule 6 of the Rules of the Superior Courts consolidating both sets of proceedings. The plaintiff Patrick Murphy represented himself.

**Chronology of Events**

2. By a will dated the 19th January, 1994, Kathleen O'Connor deceased, the grandmother of the plaintiff, Patrick Murphy in the above entitled proceedings bequeathed all her lands to Michael O'Connor, her son, for life with the remainder to her grandson Michael absolutely. She devised to her son Michael O'Connor all the implements and stock on lands at Moyanna, Co. Laois together with a tractor and two motor vehicles. She also devised to him a potato digger, horse, cart and heifer at Rathronshen, Co. Laois. To her grandson Michael she devised a diesel tank at Rathronshen. She gave to her daughter Millie her lands at Rathroughan together with the stock and implements thereon. She further devised and bequeathed to her grandson Patrick three acres acquired by her husband from the Land Commission and located at Ballybrittas, Co. Laois. The residual remainder of her estate was divided between her son Michael and her daughter Millie in equal shares.

3. Kathleen O'Connor died on the 22nd March, 1994. Her son Michael O'Connor took out a grant of probate to her estate but died on the 10th December, 1999. The remainder of the life estate granted to her son Michael O'Connor was bequeathed to "my grandson Michael absolutely". A difficulty arose in the construction of the will because she had two sets of grandsons called Michael and Patrick namely, Michael and Patrick Murphy and Michael and Patrick O'Connor. As a result of this, a construction suit proceeded and was determined in the Circuit Court in proceedings entitled Michael Murphy and Patrick Murphy v. Michael O'Connor and Patrick O'Connor issued in the Midlands Circuit, Co. Laois in 1997 bearing record number E22/97.

4. The learned Circuit Court judge found that Michael and Patrick O'Connor were the Michael and Patrick referred to in the will and entitled to succeed under it. This order was appealed to the High Court which affirmed the Circuit Court order (Ryan J.) on the 11th November, 2004. Before the conclusion of the Circuit Court proceedings a letter was written to the solicitors who had been retained to draft the will who are the defendants in the first set of proceedings and the first, second and third named defendants in the second set of proceedings, which stated that:

"at the direction of counsel, we have issued a plenary summons for professional negligence, the further steps in any High Court proceedings to be entirely conditional upon the outcome of the Equity Civil Bill construction proceedings."

5. This was a reference to the plenary summons issued in proceedings Record Number 1999/4220P which issued on the 21st April, 1999 and to which an appearance was entered on the 21st November, 2000.

6. Though the High Court appeal in respect of the construction of the will was heard on the 10th and 11th November, 2004 no further step was taken in the proceedings until the plaintiff issued a Notice of Intention to Proceed dated 7th March, 2014. That notice was signed personally by the plaintiff and was followed by an Notice of Discharge dated 7th April, 2014 in which Butler, Cunningham and Moloney solicitors who previously acted on behalf of the plaintiff were discharged and notice was given that Patrick Murphy would continue his action and act on his own behalf.

7. The plenary summons claimed damages against the defendants for injury to the plaintiffs caused "by reason of the negligence, breach of duty and professional negligence of the defendants, their servants or agents in and about the drawing up of the last will

and testament of Kathleen O'Connor ..." A statement of claim was not delivered in the case.

8. Though the Circuit Court proceedings issued on 13th August, 1997 a defence was not delivered until 16th September, 1998. Thereafter there were a number of delays caused by the completion of discovery in the case.

9. On the 29th November, 2004 the plaintiffs then solicitors wrote to counsel seeking advice and, if appropriate, a draft statement of claim in the matter in order to pursue the proceedings. Counsel advised that in dealing with a claim for professional negligence the Court would have to determine as a matter of fact whether or not the deceased intended the plaintiffs to be the beneficiaries of the particular gifts expressed in her will. He concluded that a Court would have to be satisfied on the balance of probabilities that the deceased intended to benefit the plaintiffs which involved precisely the same inquiry which was the subject of the Circuit Court proceedings determined against them. Though a Court dealing with the professional negligence claim would not be bound by the finding in the Circuit Court counsel advised that it would be extremely unlikely that a Court would reach a different conclusion to that "already reached by two separate judges who have heard all the evidence". Counsel was not advised of any evidence that might be adduced in the case which was not put before either the Circuit or the High Court judge in Portlaoise. He therefore advised that an action against the defendants in the first set of proceedings for professional negligence was unlikely to succeed and therefore did not propose to draft a statement of claim.

10. Advices were also sought on 2nd June, 2005 from senior counsel in respect of the same issue. The will was prepared by Ms. Yvonne Murphy, solicitor who attended on the late Kathleen O'Connor at a nursing home on 19th January, 1994. The will was in manuscript and the original notes made by Ms. Murphy when she prepared the will were subsequently lost. A typed note of her attendance is said to represent a true record of the handwritten notes. Ms. Murphy admitted in evidence in the Circuit Court that at the time of the making of the will she did not know the full details of the family and in particular that there were two sets of grandsons with the same first names. In an opinion dated 6th October, 2005 senior counsel advised that in order to succeed the plaintiff must establish not only the existence of a duty of care, but also the breach of that duty and loss or damage flowing as a result. A solicitor owed a duty of care to a potential and identified beneficiary under a will to exercise reasonable care in the execution of the will. Senior counsel referred to the fact that the High and Circuit Courts had already determined that the plaintiffs were not in fact the people identified in the will. It followed that they had not in fact suffered a loss on the basis of the authorities cited in the opinion. He noted that in order to succeed the plaintiffs would have to establish that they were the intended beneficiaries of the will. This would clearly mean a rehearing of a matter which had already been determined by two Courts and in respect of an issue which is now *res judicata* or at the very least governed by issue estoppel. Senior counsel concluded that the plaintiffs could not contend that they had suffered any loss under the will as the High Court on appeal had already determined that they were not the intended beneficiaries.

11. I refer to these advices which have been exhibited in affidavits furnished to the Court because it is clear that at that stage on the evidence and material then available to the solicitors and counsel acting on behalf of the plaintiffs, they had been given strong advice not to pursue these proceedings. Mr. Murphy was informed of this advice by letter dated 26th October, 2005 from Butler, Cunningham and Moloney solicitors.

12. The second set of proceedings Record No. 2008/6094P issued in the name of Patrick Murphy, plaintiff against three firms of solicitors James Binchy and Colm Murphy (practicing under the style and title of Murphy and Company solicitors), Yvonne Murphy, Tom O'Grady (practicing under the style and title of Tom O'Grady solicitor), Patrick J. Cadell and Deirdre Lyons (practicing under the style and title of Butler, Cunningham and Moloney solicitors).

13. These proceedings issued on the 24th July, 2008 three years after the notification to the plaintiff of the negative advices of senior counsel in respect of the further pursuit of proceedings Record No. 1999/4220P.

14. In the second proceedings the plaintiff claims damages for negligence and breach of duty, breach of trust or fiduciary duty and breach of contract against each of the defendants. The first, second and third named defendants were alleged to be negligent and in breach of their duty of care to the plaintiff in failing to ensure that the will of the deceased unambiguously gave effect to the intentions of the deceased and failed to name the plaintiff specifically as a beneficiary of the lands at Cortwood, Ballybrittas, Co. Laois. The fourth named defendant are said to owe a duty of care to the plaintiff as an intended beneficiary in and about the administration of the estate and a duty of care to draw to the attention of the Court the fact that in a revenue probate affidavit the plaintiff had been named as the "grandson Patrick" referred to in the will of the deceased. The plaintiff also claimed that the fourth named defendant was in breach of duty to him in delivering a defence in the Circuit Court proceedings dated the 16th September, 1998 which was directly contrary to the sworn revenue probate affidavit which was prepared and filed by him and which was sworn by his client the late Michael O'Connor on 21st October, 1994.

15. The plaintiff alleges against the fifth and sixth named defendants (his former solicitors) in the Circuit Court proceedings and in the first set of High Court proceedings that they failed to properly advise the plaintiff and to prepare for trial in the Circuit Court proceedings and in particular, failed to obtain a copy of the revenue probate affidavit in respect of the deceased. It is alleged that they failed to seek discovery of relevant documents including the revenue probate affidavit.

16. The revenue probate affidavit exhibited in the course of this application sworn by the late Michael O'Connor on the 21st October, 1994 nominates Patrick Murphy, Breenscross, Bellegrove, Ballybrittas, Portlaois, Co. Laois (the plaintiff) as the grandchild of the disponent the value of whose benefit from the will was estimated to be €4,000. It is claimed by the plaintiff that had this fact been brought to the attention of the two Courts hearing the construction suit he would have been recognised as the grandson named as a beneficiary in the will.

17. A statement of claim was delivered in the second set of proceedings on the 26th March, 2009. A defence was delivered on the 2nd February, 2010. A notice for particulars was delivered on the 14th January, 2010 and replied to on the 11th May. Since the 11th May, 2010 no further step was taken in the proceedings.

18. The plaintiff was at that stage represented by solicitor and counsel. Counsel advised by letter dated 28th January, 2011 in respect of the revenue affidavit issue. He noted that an index to the brief for counsel included a document said to be a "copy Inland Revenue affidavit" at paragraph 5.1 which suggested that the document was included in the brief of case papers forwarded to counsel for the hearing of the probate appeal on the 10th and 11th November, 2004. He also noted that the note of the judgment of the High Court records the following:-

"Judge Ryan looked at the valuations in the Inland Revenue affidavit. He said that the matter could be argued either way".

19. On a review of the documentation, counsel concluded that the revenue affidavit was furnished to counsel in advance of the trial and that the trial judge reviewed the document during the course of his judgment:-

"This leads to the consequential conclusion that the trial judge had before him all documents relevant to the case and that we will not be able to argue successfully that the trial judge reached the wrong result because documents were concealed and/or negligently not furnished to him. It follows from this that Mr. Murphy will not be able to establish that he suffered any loss in this action and for this reason he would be unsuccessful in the action."

20. There was nothing in the materials furnished to counsel or in the evidence that the index to counsel's brief or the note of judgment was incorrect. Once again he was advised not to prosecute these proceedings any further.

21. The defence delivered on the 2nd February, 2010 in respect of proceedings Record Number 2008/6094P claims that the plaintiff's claim is statute barred pursuant to the provisions of the Statute of Limitations 1957 to 2001. A second preliminary objection is taken that the matters pleaded in the statement of claim do not give rise to any cause of action against the defendants and that the plaintiff is estopped from asserting that it was the intention of Kathleen O'Connor, deceased to benefit him under her will or that he was entitled to a devise of property under the will since this matter was determined against the plaintiff by a court of competent jurisdiction and any claim for loss was *res judicata*. It is denied that the fourth, fifth and sixth named defendants failed to call or adduce sufficient evidence to prove to the satisfaction of the High Court on appeal that the plaintiff was the grandson "Patrick" named in the will of the deceased. The balance of the plaintiff's claim is otherwise denied in the defence.

22. In respect of the first set of proceedings Mr. Murphy submits that he was advised not to take any further steps in the proceedings against the solicitors who drafted the challenged will until the Circuit Court proceedings concerning its construction had concluded. If he succeeded in those proceedings it was unlikely that these proceedings would have been continued. The matter was only clarified following the High Court judgment on appeal on the 11th December, 2004 some 7 years and 4 months after the initiation of the Circuit Court case. However, thereafter, Mr. Murphy was advised not to proceed with the action on the advice of senior counsel on 5th October, 2005, having received similar advice from junior counsel on 10th January, 2005. He did nothing to progress the matter thereafter. A client is free to accept or reject advice proffered but must proceed with reasonable diligence with the case. An appearance was entered by the defendants on the 21st November, 2000. Nothing happened for the subsequent 14 years until a Notice of Intention to Proceed was delivered on 7th March, 2014 followed by a Notice to Discharge his solicitors whom he was now suing in the second set of proceedings. No explanation is offered for the delay other than in respect of the period up to the date of the High Court judgment on appeal on the 11th December, 2004. Allowance may be made for the time it took to conclude those proceedings but no explanation at all is offered for the complete failure to take any step between 11th December, 2004 and 7th March, 2014 a period of 9 years and 4 months. I am satisfied that the delay in advancing the case during that time was inordinate and inexcusable.

23. As already noted, the second set of proceedings were issued on 24th July, 2008 by new solicitors Ronald J. Egan & Company. There was a delay in delivering the statement of claim until 26th March, 2009. Two applications for judgment in default of defence were made in October and November 2009. A defence was delivered on 2nd October, 2010 and the last relevant step in the proceedings was a reply to a notice for particulars dated 11th May, 2010. The first set of proceedings was not taken over by the solicitors acting on behalf of the plaintiffs in the second set of proceedings.

24. Unfortunately, Mr. Ronald Egan solicitor, died on the 27th October, 2010. An opinion of counsel was received dated 28th January, 2011 and furnished to the plaintiff advising him not to proceed with the second action. The plaintiff was advised that since the late Mr. Egan's practice was being wound down he should endeavour to obtain the services of another solicitor. The plaintiff deposes that he sought assistance from the Incorporated Law Society of Ireland and a number of solicitors in order to secure representation but had no success and exhibits correspondence to that effect. He was advised by solicitors and counsel by way of preliminary advices once they had received papers (including an incomplete file) in respect of the matter, that he did not appear to have a claim that was likely to succeed. Letters have been furnished which indicate that various firms of solicitors declined to act on his behalf on the 16th November, 2011, 8th February, 2012, 8th March, 2012 and 17th April, 2012 (in that instance because the plaintiff failed to make any contact). In effect, the plaintiff took no further action since 2012 to advance the proceedings.

25. The defendants notified the plaintiff by letter dated 15th October, 2010 of their intention to apply to strike out the second set of proceedings on the grounds of the preliminary objections set out in paragraphs 1 and 2 of the defence concerning the plea under the Statute of Limitations and estoppel. By further letter dated 8th February, 2012 the defendants' solicitors inquired of Ms. Mairead Little who had taken over the practice of the late Mr. Ronald Egan whether she continued to represent the plaintiff. They notified her of an intention to issue a motion to strike out the claim on the grounds of delay or want of prosecution. The defendants' solicitors also wrote directly to the plaintiff on the 20th February, 2012 indicating a similar intention. By letter dated 8th March, 2012 the defendants sought further clarification from the plaintiff as to whether he intended to pursue his action. They indicated an intention to issue a motion to dismiss the proceedings on the basis of delay if they did not hear from him within a period of two months. In May 2012 the plaintiff indicated his intention to continue with the first set of proceedings Record Number 1999/4220P. Some further correspondence was exchanged between the defendants' solicitors and the plaintiff up to and including 30th August, 2012. Voluntary discovery was sought by the plaintiff in or about June 2014 in respect of the fourth named defendant's file concerning the deceased's estate. On 9th June, 2014 the defendants' solicitors again threatened a motion to dismiss the proceedings for delay and want of prosecution. By letter dated 12th February, 2014 the defendants served a Notice of Intention to Proceed.

26. The principles applicable to an application to dismiss an action for want of prosecution are well settled and have been set out in a number of Supreme Court decisions including *Domhnaill v. Merrick* [1984] I.R. 151, *Toal v. Dignan & Ors (No. 1)* [1991] ILRM 135 and *Toal v. Dignan & Ors (No. 2)* [1991] ILRM 140, *Primor v. Stokes Kennedy Crowley & Oliver Freaney & Co.* [1996] 2 I.R. 459, and *Gilroy v. Flynn* [2005] 1 ILRM 290.

27. The Supreme Court in *Primor PLC v. Stokes Kennedy Crowley* summarised the principles of law applicable to these applications 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...in exercising... discretion ...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."*

28. In *Manning v. Benson & Hedges Ltd* [2004] 3 I.R. 556 Finlay Geoghegan J. identified the questions to be considered in respect of the facts of each case as:-

*"1. is there, by reason of the lapse of time a real and serious risk of an unfair trial;*

*2. is there by reason of the lapse of time (or delay) a clear and patent unfairness in asking the defendant to defend the action."*

29. The relevant lapses of time are the periods between the wrongful acts alleged on which a court will be asked to make a determination and the probable date of trial. The court must consider the nature of the claims made, the probable issues to be determined by the court and in particular whether factual issues will fall to be determined or only legal issues. In addition the nature of the main evidence and whether it will be oral, the availability of relevant witnesses and the length of the lapse of time between the matters complained of and the probable date of trial must be taken in account. In particular the court must consider whether there is any actual prejudice to the defendant in being required to maintain a defence to the action.

30. I am satisfied that the plaintiff understandably delayed in proceeding with his first action until the conclusion of the construction suit in November, 2004 on the advice of counsel. Thereafter if he wished to proceed with his case he should have continued to do so at the very latest in January, 2005 following the receipt of counsel's advices in the matter. If he wished to issue proceedings against other parties he should have done so at the earliest opportunity, conscious as he must have been of the delay of many years since the relevant events occurred particularly in respect of the drafting of the will. There was no valid excuse after January, 2005 not to advance the first case or to initiate the second. It does not appear to be fair or appropriate having regard to the history of the Circuit Court proceedings and appeal to attribute the delay in the determination of those proceedings to the plaintiff. Nevertheless, the Court is satisfied that there was clearly inordinate and inexcusable delay by the plaintiff in advancing the first set of proceedings since January, 2005. There was undoubtedly an inordinate delay in initiating and processing the second set of proceedings.

31. Mr. Egan, the plaintiff's solicitor in the second set of proceedings died on the 27th October, 2010 a month after the replies to particulars were furnished. I do not criticise the delay in the processing of the claim from the 24th July, 2008 to the date of his death: he dealt with the matter in a businesslike manner. It is clear on the evidence that the plaintiff then engaged with the Incorporated Law Society of Ireland and sought the services of a number of other solicitors until in or about March or April, 2012. I am satisfied that the plaintiff made significant efforts to obtain representation but failed to do so through no fault of his. No further action or step had been taken in the proceedings since his solicitor's death but I am not satisfied that the delay from 2008 to 2012 could be described as inordinate and even if inordinate that it could be regarded as inexcusable.

32. It is of course twenty-one years since the will was drafted for the late Kathleen O'Connor by Ms. Yvonne Murphy, and since the late Mrs. O'Connor's death. It is deeply regrettable that the Circuit Court proceedings and appeal took so long to conclude. But the fault for that does not lie with the plaintiff. Furthermore, the first set of proceedings is inextricably linked to the second set of proceedings. There was an inordinate and inexcusable delay in processing the first set of proceedings and no step whatsoever was taken in respect of that case and no attention appears to have been given to it at all by the plaintiff even to the extent of informing his solicitors in the second set of proceedings that the case was still alive or even existed. This is an unusual aspect of the matter.

33. I am satisfied that the delay in the second set of proceedings was inordinate. It was understandable that the plaintiff would delay pursuing proceedings while the Circuit Court proceedings continued and the death of his solicitor provides some explanation for the delay subsequent to the issuing of proceedings between 2010 and 2012. There remains a period between the conclusion of the High Court appeal and the initiation of the second set of proceedings that is *i.e.* from the 11th November, 2004 to 24th July, 2008. In October 2005, the plaintiff received advice that he had no likelihood of succeeding in respect of the first set of proceedings. There was an obligation on the plaintiff to take steps to advance those proceedings and, if he wished to proceed against any other defendants, either to seek to join them in the first set of proceedings or to initiate proceedings against them. Once the second proceedings were issued, his solicitor advanced them with reasonable expedition until his death in 2010. Thereafter the plaintiff sought to retain new solicitors but was unable to do so. I do not consider that the delay between July 2008 and March/April 2012 could be said on its own to constitute an inordinate and inexcusable delay as a reasonable explanation has been offered in respect of that period. However, I am not satisfied that the entire period from November 2004 to 2014 when taken cumulatively and in the absence of any reasonable excuse for the extended periods of inactivity could be regarded as other than a period of inordinate and inexcusable delay when taken as a whole and viewed with the history of the first set of proceedings.

34. The question then remains whether on the balance of justice the cases should be allowed to proceed. The main issue to be considered is whether any prejudice accrued to the defendants by reason of delay and the continuing delay up to any future date of trial. In particular, the Court must consider whether it is still possible to have a fair trial of this case. There is no doubt that the

continuing existence of a professional negligence suit over a long period of time gives rise to damage to a defendant's reputation. It undoubtedly absorbs a disproportionate amount of time and work and any such cases are of great concern to a solicitor, especially a litigation solicitor whose reputation is under attack. The only specific issue raised in relation to prejudice by the defendants arises from the death of Michael O'Connor on the 10th December, 1999. He swore the Revenue Probate Affidavit and it is said his evidence in relation to it and his dealings with the deceased *testatrix* would be relevant to the defence. However, the death of witnesses is a matter that often arises in litigation and in this instance his death occurred in 1999 before the conclusion of the Circuit Court proceedings and the High Court appeal. Any prejudice arising from the death of the late Michael O'Connor and his unavailability as a witness is not attributable to any delay in the taking of steps in these proceedings having regard to the time of his death. The reality is that this case could not and would not have been brought to trial before his death.

35. The taking of instructions by Ms. Murphy was documented in her attendance and she gave evidence on this issue in the Circuit and High Court. No issue is raised in relation to any failure of memory on her part or her unavailability as a witness. Indeed no specific prejudice is raised in relation to the fading of the memory of any intended witnesses at the hearing of the action. Reliance is placed only on a general proposition which is perhaps, of much more relevance in a different type of action such as a personal injuries action arising out of a road traffic accident. The main contention that emerges from the pleadings in the claims made against the respective defendants focuses on the reference in the Inland Revenue affidavit. It is contended that this affidavit was available and ought to have been heavily deployed on behalf of the plaintiff in the course of the circuit suit and on appeal. Though oral evidence will be adduced at the hearing of the action it does not appear to be of so extensive a nature as to give rise to any specific prejudice caused by the fading of memories over the years and no such specific prejudice is claimed.

36. The Court also notes that the defendants propose to rely on the Statute of Limitation and a defence based on cause of action and/or issue estoppel. Thus there will be considerable emphasises of the hearing of the action on legal issues.

37. I am therefore satisfied that though the delay is inordinate and inexcusable in this case and there are unusual features to it, the balance of justice favours allowing the plaintiff's claims to proceed. I therefore in the exercise of my discretion refuse the application to strike out or dismiss both sets of proceedings.

38. In relation to the application to consolidate the proceedings under Order 49 Rule 1 I am satisfied that the two cases should be heard together and that the proceedings should be consolidated but without prejudice to the right of the defendants to rely on any point of defence open to them in respect of either set of proceedings.