

THE HIGH COURT**2000 No. 2765 P****BETWEEN****PATRICK JOSEPH FLYNN****PLAINTIFF****AND****ALLIED IRISH BANK PLC****DEFENDANT****AND****THE HIGH COURT****2004 No. 10127 P/18559P/19389P****BETWEEN****PATRICK JOSEPH FLYNN (SUING IN HIS CAPACITY AS ABSOLUTE ASSIGNEE OF ALL THE CAUSES OF ACTION FLYNN'S IRISH GATEAUX HAS AGAINST THE DEFENDANT)****FIRST PLAINTIFF****AND****PATRICK JOSEPH FLYNN (SUING IN HIS CAPACITY AS A SHAREHOLDER IN FLYNN'S IRISH GATEAUX COMPANY LIMITED)****SECOND PLAINTIFF****AND****MARY MARGARET FLYNN (SUING IN HER CAPACITY AS A SHAREHOLDER IN FLYNN'S IRISH GATEAUX COMPANY LIMITED)****THIRD PLAINTIFF****AND****ALLIED IRISH BANK PLC****DEFENDANT****Judgment delivered by Mr. Justice McMahon on the 27th day of June, 2008****Background**

1. Mr. Patrick Joseph Flynn the plaintiff in the first proceedings is a master pastry chef, who was born in Kilrush, Co. Clare, on the 1st March, 1943. In 1979 the plaintiff commenced a confectionary business which was carried on by Flynn's Confectionary Limited ("the Confectionary Company") of which the plaintiff was a shareholder and director. The Confectionary Company successfully produced a broad range of confectionary products and in due course became a major supplier of confectionary to Aer Rianta at Shannon Airport which resulted in confectionary being sold not only in the restaurants at Shannon Airport, but also being supplied for in-flight catering to Aer Lingus and also to all major international airlines using Shannon Airport.

2. Following the first Gulf War in 1991, international air traffic into Shannon was dramatically reduced and this had a direct effect on the volume of business which the Confectionary Company did with Aer Rianta. To address these business difficulties, the plaintiff sought other avenues for his confectionary business which culminated in the incorporation of Flynn's Irish Gateaux Limited ("the Gateaux Company") on the 25th February, 1992, the issue share capital of which was owned as to 52% by the plaintiff and 48% by the plaintiff's spouse. The Gateaux Company developed a business in frozen confectionary and prior to the commencement of this business, the company incurred a capital expenditure amounting to the equivalent of somewhere in the region of IR£470,000.00. On the 18th December, 1992, Mr. Flynn successfully applied to Rural Resource Development Limited ("RRD Limited") for a Leader Programme development grant for this business. On the 23rd December, 1993, a cheque (as part of the grant) in the amount of IR£62,848.76 was lodged by Mr. Flynn to the Gateaux Company's bank account with the defendant bank in Kilrush and on the 11th April, 1994, a further RRD Limited cheque for IR£17,098.00 and payable to the Gateaux Company was also lodged by the plaintiff at the same branch. The essence of Mr. Flynn's complaint is that IR£45,000.00 of the first cheque in the amount of IR£62,848.76 was not lodged to the account of the Gateaux Company but was lodged instead to Allied Irish Leasing Company, a wholly owned subsidiary of the defendant, with whom Mr. Flynn had leasing agreements for some of the equipment used in the manufacturing process. The second tranche of the RRD Trust Funds in the amount of IR£17,098.00 was not lodged to the Gateaux Company and the use to which these funds were put was not known to the plaintiff at the time these proceedings were commenced in 2000.

3. As a result of this, Mr. Flynn alleges that a train of events was set in motion which ultimately ended with the Gateaux Company being put into creditor's insolvent liquidation on the 14th September, 1995, and the Gateaux Company being dissolved on the 14th December, 2001. The dissolution was, on the 8th December, 2003, on the petition of Mr. Flynn as a shareholder in the Gateaux Company, declared void by order of the High Court. On the 21st June, 2004, the liquidator assigned absolutely to Mr. Flynn all the causes of action that the Gateaux Company had against the defendant.

4. There are two sets of proceedings. Mr. Flynn in his personal capacity sues AIB plc claiming damages for breach of contract, negligence and deceit, including damages for personal injuries, stress, inconvenience and disturbance. The second set of proceedings is comprised of three separate actions:

1. An action by Mr. Flynn as absolute assignee of all causes of action that the Gateaux Company had against the AIB;
2. An action by Mr. Flynn suing in his capacity as a shareholder in the Gateaux Company;
3. A similar action by Mrs. Mary Flynn (wife of Patrick Joseph Flynn) who also sues in her capacity as a shareholder in the Gateaux Company.

5. Each of these claims is for damages for breach of contract, breach of duty, negligence, deceit and misrepresentation.

6. Applications in these proceedings are now made by the plaintiff for orders pursuant to O. 122, r. 7 of the Rules of the Superior Courts to enlarge a time for delivering statements of claim in all of these proceedings. The applications issued on the 12th September, 2007. In relation to the second set of proceedings ("the related proceedings") there is also an application for an order pursuant to O. 49, r. 6 of the Rules of the Superior Courts to consolidate the latter three actions.

The second set of proceedings ("the related proceedings")

7. I propose to deal with "the related proceedings" first. Before I consider the entitlement of the plaintiffs to an extension, it is

important first that I set out the dates and the sequence of events as they relate to these proceedings:-

- (a) The plaintiffs' solicitors wrote to the defendant's solicitor on the 12th September, 2003, requesting that the defendant consent to the joinder of Flynn's Irish Gateaux Company Limited as plaintiffs to the personal action commenced by Mr. Flynn in the year 2000.
- (b) By letter dated the 23rd October, 2003, consent was refused by the defendant's solicitors.
- (c) The three plenary summons in the related proceedings were issued on the 25th June, 2004; 16th August, 2004; and the 15th November, 2004. ("the 2004 proceedings").
- (d) The plaintiffs' solicitors wrote to the defendant's solicitors on the 12th May, 2005, enclosing the 2004 summonses and asserting an intention to transfer proceedings to the commercial court.
- (e) The 2004 summonses were served and service was accepted on the 10th June, 2005.
- (f) Notice of intention to proceed was sent on the 7th February, 2006.
- (g) An attempt to deliver a statement of claim was made on the 10th April, 2006.
- (h) The present applications to extend the time for serving the statement of claim were issued on the 17th September, 2006.
- (i) The defendants were notified of the intention by the plaintiffs to bring the present applications on the 10th October, 2006.

8. The defendant objects to the present application, stating that the plaintiffs have been guilty of the following inordinate and inexcusable delay:

- (i) There was a delay of between nine and eleven years from the acts complained of before these three sets of proceedings were issued.
- (ii) There was a further delay of between eighteen months and two years before any attempt was made to deliver statements of claim.
- (iii) Having been advised in July 2006, that the defendant was not accepting delivery of the statements of claim, a further fourteen months elapsed before the present application was issued.

9. Before examining the merits of the objection it is important to note that a company liquidator was appointed on the 8th December, 1995 to the Gateaux Company and his final return was not made until the 29th June, 2001. It is clear that Mr. Flynn would have little, if any, information or access to company documentation during this period. It subsequently transpired that the liquidator, although he considered the possibility, refused to take any action against the defendant Bank on behalf of the company, stating in an affidavit sworn by him on the 8th June, 2004, that he "examined the actions of various parties and found no reason for bringing legal proceedings against Allied Irish Banks plc". Mr. Flynn, of course, had no power to compel the liquidator to take proceedings against the defendant during the period of liquidation. He nevertheless started in 1998 to look for a firm of solicitors that was willing to take proceedings against the defendant. Between the 29th April, 1998, and the 23rd May, 1999, he approached five different firms in Limerick, Ennis and Thurles who all refused to act for him for various reasons. In June, 1999, he succeeded in engaging the service of his present solicitors, now on record. Following advice he received from junior counsel in 2003, he, for the first time discovered the full extent of the actions of the defendant, which he avers caused the company to be put into liquidation. He only received the bank statements from the company for the first time in 2003, which were refused to him until he paid a sum of €206.00 and it was only then that junior counsel advised him of the causes of action which he had against the company and which are the subject of these proceedings. The statement of claim avers deceit, concealment and breach of fiduciary duty among other things.

10. Junior counsel also advised that since the liquidator had refused to commence proceedings against the defendant, the proper route open to Mr. Flynn was to request the Liquidator to assign to him all the rights of action the company had against the defendant Bank and then to sue the defendant in his own name as absolute assignee of all of those rights of action. This involved further prolonged and difficult negotiations with the liquidator before the restoration of the company to the Register of Companies. It involved a number of applications by his junior counsel to the High Court where the Liquidator and (at the judge's direction) the Registrar of Companies were also represented, all of which took approximately ten months from September, 2003, to June 2004. Until this date the plaintiff was not in a position to take any steps on behalf of the company. The first of these summonses was issued on the 25th June, 2004; the second was issued within two months and the third within a further three months. All three were served within the year and service was accepted on the 10th June, 2005. There followed a period of eight months when a notice of intention to proceed was sent to the defendant's solicitor on the 7th February, 2006. An attempt to deliver a statement of claim was made on the 10th April, 2006.

11. Bearing in mind that the first plaintiff, Mr. Flynn, only received the bank statements for the company in January, 2003, having been refused them earlier by the defendant, and further that Mr. Flynn requested, on the 12th September, 2003, that the defendant should consent to the joining of the company in Mr. Flynn's personal action (commenced in 2002) which was refused on 23rd October, 2003, the plaintiffs would appear to have acted with reasonable expedition in the circumstances. Clearly the bank statements had to be submitted to forensic analysis and the draft summonses had to be prepared for three separate plaintiffs in what was a relatively complex situation. Bearing in mind also the difficulty that the first plaintiff had in engaging solicitors and counsel, the delay between June, 2004, when the company was restored to the Registrar, and the issuing of the first plenary summons on the 25th June, 2004, was not extraordinarily lengthy. The other two summonses were issued in August and November of the same year. It is perhaps understandable that the plaintiffs waited until all the summonses were ready before serving them, doing so within about seven months. A further period of ten months followed before an attempt to deliver a statement of claim was made.

12. Any argument advanced by the defendant that it would be prejudiced by the delay in issuing the statements of claim is weakened by the fact that the defendant had brought a claim against the liquidator during liquidation, claiming it was a creditor of the company. Apparently this case was withdrawn by the bank sometime later, but it is worth making the point that in preparing such a claim the bank must have examined all of the relevant documentation and investigated the history of the company's accounts and one must assume that it was in possession of all such information when it issued proceedings against the Liquidator sometime prior to 2003. Any

argument which the defendant makes about the historic nature of this claim must bear this fact in mind. The defendant therefore, should have no difficulty in relation to all its dealings with the company up to that date and in particular would have reviewed at that time all its dealings with the company during the period 1993 to 1995.

13. The defendant submits that the delays of between seven months and twelve months between the issuing of the summonses and the appearance; the delay of ten months between the appearance and an attempt to serve a statement of claim; and the delay of fourteen months between the refusal to accept the statement of claim and the present proceedings, were both inordinate and inexcusable. Furthermore it submits that the balance of justice requires the dismissal of the four sets of proceedings.

14. In assessing whether delays in this type of action are inordinate and inexcusable, the nature of the claim is relevant. In the present case the plaintiffs in all three cases allege that there was a breach of trust and a breach of fiduciary duty as well as deceit and concealment. The defendant has indicated that it intends to plead the statute of limitations in relation to these claims, but that is a matter for the trial court and in any event if the plaintiffs succeed in establishing deceit, concealment or breach of fiduciary duties, the clock against the plaintiffs may have stopped. Nevertheless, the same allegations may, however, be of relevance to this Court when it is considering an allegation of inexcusable or inordinate delay on the part of the plaintiffs.

The Law

15. The principal case which states the law in respect of circumstances in which the court should dismiss proceedings for want of prosecution or refuse to extend the time for procedural steps to be taken by the plaintiff is contained in the Supreme Court decision of *Primor Plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459, and the head note contains the following well known synopsis of the applicable principles:-

"[T]hat 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."

16. In "the related proceedings" the relevant periods for the purpose of considering the allegations of inordinate delay were the following:-

1. The period between the cause of action and the issue of the summonses: between nine years and eleven years.
2. The period between the issue of the summons and the service of the summonses: between seven months and eleven months.
3. The period between the appearance and the statement of claim: ten months.
4. The period between the refusal by the defendant to accept delivery of the statement of claim and the commencement of these proceedings: fourteen months.

17. This comes to a total of thirty one months in all from the issue of the summonses until the commencement of these proceedings.

18. Given the fact that the alleged wrongful act happened more than ten years ago, once the plaintiff had the necessary information, there was a duty to proceed expeditiously. The most inexcusable delay in the present case seems to be the fourteen months which it took the plaintiffs to bring these motions before the court. There was no reason why these motions could not have been brought more speedily in the circumstances. Taken together with the ten month delay between the appearance and the statement of claim, I am of the view that the delay in these circumstances is inordinate.

19. In deciding whether the delay was excusable or not, one must take into account the fact that the first plaintiff only came into

possession of the company's bank statements in January 2003, and because the company was in liquidation and he did not have an assignment, the first plaintiff could not proceed until June, 2004. This was no excuse however, for the fourteen month delay in issuing the present proceedings.

20. Even though I am prepared to find that the delay was inordinate and inexcusable for the above reason, I nevertheless, must exercise a judgment of whether, in the court's discretion, on the facts of the case, that the balance of justice is in favour of or against the case proceeding. In considering the factors relevant to the balance of justice issue, Finlay Geoghegan J. in *Manning v Benson and Hedges Limited* [2004] 3 I.R. 556, identified the following as being of importance:-

1. has the defendant contributed to the lapse of time;
2. the nature of the claims;
3. the probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;
4. the nature of the principal evidence; in particular whether there will be oral evidence;
5. the availability of relevant witnesses;
6. the length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and the probable trial date.

21. Using this list to identify the relevant facts before this Court, I would make the following comments:-

(1) The plaintiffs allege that the defendant could have brought its own motion to dismiss the plaintiffs' cases for want of prosecution but did not see fit to do so. This failure should not in my mind attract criticism in the circumstances of this case. I will consider this matter further later in this judgment when I address the suggestion of the plaintiffs that order 27, Rule 1A of the Rules of the Superior Courts is relevant. More significant however, is the fact that the first plaintiff in his plenary summons and statement of claim, alleges deceit, concealment and breach of fiduciary duty on the part of the defendant. Finally, it must be noted that the defendant was requested in September, 2003 to allow the Gateaux Company be joined in Mr. Flynn's personal action (in existence since 2000) but this was refused.

(2) The nature of the plaintiffs' claims: the plaintiffs claim that Mr. Flynn lodged a cheque in December, 1993 to the company's account but that the defendant, without authority, withdrew £45,000.00 and applied it to Allied Irish Leasing Limited. Further, it is alleged that the defendant unlawfully terminated the overdraft facility provided to the company. The plaintiffs also allege that a cheque in the amount of £17, 098.00 was lodged to the company's account but the plaintiffs have not been able to trace the destination of this lodgement. Finally, the plaintiffs allege that the defendant never actually opened an account in the name of the company, but had nevertheless made a claim against the company when it was in liquidation in the amount of IR£78,556.95. Allegations of deceit and concealment by a fiduciary are very serious allegations indeed and the fact that the records of the relevant accounts were in the control of the defendant and unavailable to the plaintiffs could well be relevant in explaining the plaintiffs' delay up until 2003, when they eventually got copies of the records. The claims themselves, based on an allegation of deceit and breach of fiduciary duty, where the defendant has control of the relevant documentation, raise serious concerns for the Court.

(3) If the matter goes to trial there will be both factual and legal issues to be determined. The factual issues will relate to the instructions given by the plaintiffs to the bank, the determination as to what happened to the lodgement of a cheque in the amount of IR£62,848.76 and whether £45,000.00 of this cheque was withdrawn without authority and applied to Allied Irish Leasing Company without the plaintiffs' permission, consent or authority. It will also be necessary to establish what happened to the cheque of IR£17,098.00 which the first plaintiff alleges he lodged on the 11th April, 1994. It will also have to be determined whether the bank ever actually opened an account in the name of the company. Finally, it will have to be determined as a matter of law whether, if the bank was in breach of some of its duties to the plaintiffs, these breaches caused the company to be put into liquidation and what damage flowed as a result of this breach of duty.

(4) The nature of the principal evidence in particular whether there will be oral evidence. Much of the evidence will be documentary evidence and it is suggested that the bank records will be very significant evidence in determining the fundamental issues in this case. There will, of course, be some oral evidence as well.

(5) In the affidavit sworn by or on behalf of the plaintiffs, three witnesses are mentioned as being relevant. All three witnesses are alive and apparently available in this jurisdiction to give evidence as to what happened in the period 1993 to 1995. The defendant alleges that these were former employees and that the defendant has now lost the opportunity of interviewing them while they were in its employment. I do not consider this to be of huge significance in the circumstances.

(6) The length of lapse of time and in particular the length of time between the acts of omissions in relation to which the Court will be asked to make factual determinations and the probable trial date. It is true that by the time the matter comes to trial it will be some fourteen to sixteen years after the events of which the plaintiffs complain took place. Given that the principal allegations of the plaintiffs should be proved or disproved by the records of the bank, the evidence of the witnesses at that time may not be crucial. It is also important to remember that the defendant, when the company was in liquidation, brought an action against the company claiming that it was owed a sum in the region of IR£78,556.95 in or around 2002 or 2003. It is clear from this that if the defendant company was able to issue proceedings for this amount, it had at that time available to it all the records of the company and I have no doubt it would have preserved those records given the fact that the plaintiff's personal action against the bank was in existence since the year 2000.

22. For these reasons I have come to the conclusion that the balance of justice is for permitting the plaintiffs in the relevant proceedings to proceed with their claim in the circumstances of this case.

23. In coming to this conclusion I am aware of recent comments and dicta made by various Judges in the Supreme Court to the effect that previous indulgence by the Higher Courts in this jurisdiction represents a trend that cannot be expected to continue. Hardiman J. in particular in *Gilroy v. Flynn* [2004] I.E.S.C. 98 indicated that there had been "very significant developments in this area since...*Primor*". He continued:-

"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."

24. Hardiman J. nevertheless allowed an appeal in that case from an order of the Master which dismissed the plaintiff's claim for want of prosecution, emphasising, however, that he was doing so bearing in mind the particular circumstances of the case and "because of the uncontradicted assertion that it will be an assessment"

25. This approach was taken up by Clarke J. in *Stephens v. Paul Flynn Ltd* [2005] I.E.H.C. 148 where he said "[d]elay which would have been tolerated may now be regarded as inordinate" and "[e]xcuses which sufficed may no longer be accepted". Feeney J. in *Flaherty v. Minister for Defence* [2007] I.E.H.C. 371 quoted Clarke J. with approval. In that case the plaintiff, who had retired from An Garda Síochána in 1995, had issued a summons for personal injuries arising out of alleged but unspecific wrongs in the course of his employment in 1998, the summons was served in 1999 and an appearance entered in May, 1999. Thereafter no steps were taken by the plaintiff until 2007, when a statement of claim was delivered, which for the first time identified the claim as being in relation to hearing loss. It is not surprising in that case that the plaintiff's case was struck out. Feeney J. made the following remarks in the course of his judgment:-

"Those developments arose not only from the 2003 Act, the European Convention on Human Rights, and the applicability of that Convention to Irish domestic law, but also from an amendment to Order 27 demonstrating a more critical approach to unexplained or unjustified delay. The European Court has emphasised the effect and importance of Article 6(1) of the European Convention on Human Rights and following on such decisions as *Barry v. Ireland* ECHR judgment of 15th December 2005, it is the case that the national courts, irrespective of the approach of the parties, are obliged to ensure that all proceedings are completed within a reasonable time frame....."

26. Clarke J.'s judgment in *Stephens v. Paul Flynn Ltd.* was upheld in the Supreme Court [2008] I.E.S.C. 4 In that case, Clarke J. held that a period of twenty months is totally outside any period of time that might be considered appropriate or reasonable for the period of the delivering the statement of claim.

27. I have no difficulty in accepting that for the reasons cited in these cases that the Courts will, in this new climate, look at delays on the part of the plaintiff much more closely and will demand of plaintiffs in the future greater urgency in prosecuting their claims. Nevertheless, even in this new climate, the Court must still exercise a judgment on whether, in its discretion, on the facts before it the balance of justice is in favour of the case proceeding. From the facts of this case and in particular because there are serious allegations of deceit, concealment and breach of fiduciary duty, because all the records are within the control of the defendant, because the defendant has clearly used and preserved these records when bringing an action against the liquidator in around 2003, and because the named witnesses are alive, within the jurisdiction and available to give evidence, all of which indicate that there will be little prejudice to the defendants, I am prepared to grant the plaintiffs an order to serve the statement of claim within two weeks of today's date.

28. With regard to the plaintiff's individual claim which was commenced by plenary summons in 2000, I am not prepared to be so indulgent. In that case the plenary summons issued on the 6th March, 2000, and a memorandum of appearance was dated the 20th March, 2001. Notice of intention to proceed was dated the 14th July, 2003, a second notice of intention to proceed was dated the 7th February, 2006, and the statement of claim was only delivered on the 10th April, 2006. The period between the memorandum of appearance and the statement of claim was five years. It is significant to note in this case that the plaintiff was not dependent on any assignment from the liquidator since this was a case taken personally on his own behalf. It is clear that the delay in this case is both inordinate and inexcusable and the statement of claim could have been prepared once he had the bank records in January, 2003. Moreover, in the present case the plaintiff is also claiming for personal injuries and stress, etc, arising out of the breach of contract, breach of fiduciary duty, etc. The lapse of time between the trial and the occurrence of the alleged injuries may prejudice the defendant significantly in its attempt to date and assess the extent of these injuries or to address issues of causation. For these reasons, I do not believe that the balance of justice is in favour of extending the time for delivery of a statement of claim in Mr. Flynn's personal action.

29. The plaintiff also advanced in correspondence an argument based on O. 27 r. 1A of the Rules of the Superior Court to which I should refer. In that order, a defendant who wishes to bring a motion for dismissal of the plaintiff's claim for want of prosecution, because of failure to deliver a statement of claim, must first serve the plaintiff with a notice of intention to bring such a motion and at the same time consent to late delivery within 21 days. From the wording of the order it is clear that O. 27 only applies to a situation where the defendant is being proactive in seeking a dismissal. In the present case it is the plaintiff who brings a motion for leave to file a late statement of claim and on the face of O. 27, it does not apply to his situation. The plaintiff, however, argues that, by necessary inference as the defendant has not written a 21 day letter permitting late delivery of a statement of claim, the Court has no discretion to consider his delay in the prosecution of the proceedings and must permit late delivery of a statement of claim.

30. It is my view that the plaintiff's contention in this regard is flawed and arises from a failure to distinguish between the statutory relief provided to the defendant in cases where the plaintiff has failed to deliver a statement of claim (that being the relief provided by O. 27 r. 1A) and the inherent jurisdiction of the court to dismiss a claim for inordinate and inexcusable delay, which has been exercised by the courts in the *Rainsford* case [1995] 2 I.L.R.M. 561 and in *O'Domhnaill v Merrick* [1984] 1 I.R. 151 and which is now reinforced by the additional considerations referred to by Hardiman J. in the *Gilroy* case and Feeney J. in the *Flaherty* case, referred to in more detail elsewhere in this judgment.

31. If the plaintiff was correct in this argument it would mean that the plaintiff, who had slept on his claim for decades, in such circumstances would not be in danger of having his claim dismissed for want of prosecution, unless and until the defendant invited late delivery of a statement of claim by way of a 21 day letter. Such an argument, in my view is unsustainable.

32. Finally, having extended the period of time for the delivery of the three statements of claim in the relevant proceedings, I think it

is appropriate to make an order, as requested, pursuant to Order 49, Rule 6 of the Rules of the Superior Courts, to consolidate these proceedings, having record numbers 2004/10127P, 2004/18559P and 2004/19389P.