Neutral Citation Number: [2007} IECHC 229

THE HIGH COURT

[2000 No. 639P]

BETWEEN

FLAW SHANAHAN, JOHN THOMAS McCORMACK AND JOHN STEPHENSON

PLAINTIFFS

AND

P.J. CARROLL AND COMPANY LIMITED, PLAYER AND WILLS (IRELAND) LIMITED, GALLAHER (DUBLIN) LIMITED AND BY ORDER THE MINISTER FOR HEALTH AND CHILDREN, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment delivered on the 24th day of April, 2007, by Gilligan J.

1. These proceedings concern the second named plaintiff who was born on the 21st December, 1948, and who resides at Cloonaghmore, Abbeylara in the County of Longford.

2. The first three named defendants are corporate bodies engaged in the manufacture, distribution and supply of tobacco and cigarettes within this jurisdiction. The fourth, fifth and sixth named defendants represent the interests of Ireland.

3. The plaintiff claims damages for personal injuries by reason of the negligence and/or breach of duty and/or breach of statutory duty of the defendants and each of them, their servants and agents and by virtue of the provisions of the Liability for Defective Products Act, 1991. The personal injuries aspect is broken down as to a primary claim for damages caused by the effects of tobacco smoking to the plaintiff since he commenced smoking in 1960/1961 and a secondary claim related to ongoing damage to the plaintiff's health caused by his addiction to nicotine.

4. Further, the plaintiff makes a claim for declaratory relief in the following terms:-

> (a) A declaration that the manufacture, distribution and/or supply of cigarettes is injurious to the public health generally and to the health of the plaintiff specifically;
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> (b) A declaration that the defendants and each of them have violated and/or failed to respect and protect the constitutional rights of the plaintiff;
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> (c) A declaration that the fourth, fifth and sixth named defendants have failed to vindicate the constitutional rights of the plaintiff;
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> (d) A declaration that the plaintiff has been deprived of his constitutional rights as identified in Article 40 of the Constitution of Ireland;
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> (e) A declaration that the continued sale of cigarettes represents a burden on the economic welfare of Ireland and the people of Ireland;
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> (f) A declaration that the first and/or second and/or third named defendants have made extraordinary profits from the sale of products that they knew or ought to have known to be noxious and addictive;
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> (g) A declaration that, notwithstanding the ostensible legality of the manufacture and sale of the first and/or second and/or third named defendants' products, the exercise of such entitlements constitutes an excess of powers due to the injuries knowingly inflicted thereby;
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> (h) Further, the plaintiff claims damages including aggravated and/or exemplary damages for assault and battery, conspiracy, breach of contract, fraud and/or misrepresentation, negligence and/or breach of statutory duty under the Liability for Defective Products Act, 1991, and/or wrongful interference with and failure to protect the rights of the plaintiff under the Constitution of Ireland and/or breach of duty under the laws of the European Union and/or breach of duty under the European Convention of Human Rights.

5. In or about 1960 to 1961, at the age of 12 or 13, the plaintiff commenced smoking cigarettes manufactured and distributed by the first named defendant and marketed as the "Sweet Afton" brand and cigarettes manufactured and distributed by the second named defendant, marketed as the "Star" and "Wild Woodbine" brand (hereinafter referred to as "Woodbine"). On commencing smoking in or about 1960 to 1961 until in or about 1965, the plaintiff smoked approximately 10 "Sweet Afton" and "Woodbine" cigarettes per day. During this period the plaintiff occasionally smoked other brands of cigarettes including the "John Player" and "Gold Flake" brands, manufactured, advertised and/or distributed by the second named defendant. From in or about 1965 to in or about 1968, the plaintiff smoked approximately 15 to 20 "Sweet Afton", "Woodbine" and "John Player" cigarettes per day and occasionally smoked other brands of cigarettes, namely "Embassy", manufactured, advertised and/or distributed by the second named defendant and "Park Drive" cigarettes. From in or about 1968 to in or about 1973, the plaintiff smoked approximately 30 cigarettes per day, primarily "Sweet Afton" and "Woodbine". From in or about 1973, the plaintiff commenced smoking the cigarettes manufactured and distributed by the first named defendant and marketed as "Carrolls No. 1" (hereinafter known as "Carrolls") and "Major Extra Size" (hereinafter known as "Major"). In or about 1973 to in or about 1976, the plaintiff smoked approximately 30 "Major", "Carrolls" and "John Player" cigarettes per day. From in or about 1976, the plaintiff changed the brand that he smoked to the cigarettes manufactured and distributed by the second named defendant and marketed as "Players No. 6" (hereinafter known as "No. 6"). From in or about 1976 to in or about 1978, the plaintiff smoked 40 "Major", "Carrolls", "John Player" and "No. 6" cigarettes per day. From in or about 1978 to in or about 1988, the plaintiff smoked approximately 40 "John Player" cigarettes per day. From in or about 1988 to in or about 1993, the plaintiff smoked approximately 50 to 60 "John Player" cigarettes per day. From in or about 1993 to in or about 2000, the plaintiff smoked approximately 60 to 80 cigarettes per day. From in or about 2000, the plaintiff has smoked approximately 60 cigarettes per day of the "Silk Cut" brand, manufactured, advertised and/or distributed by the third named defendant. In the summer of 1996, the plaintiff began to experience cramping in his legs and pain in his left calf and he went to see his general practitioner in September, 1996, who duly referred him to a consultant vascular surgeon at St. Vincent's Hospital, Dublin, where he attended on 13th September, 1996. Segment Doppler pressures were carried out and confirmed that the plaintiff was suffering from arterial disease with atherosclerosis. The plaintiff was admitted to hospital for angiography and these tests showed narrowing in the femoral artery of the thigh on both sides. As a result balloon angioplasty was performed and the plaintiff's position appears to have improved. Despite his efforts, the plaintiff avers that he was unable to stop smoking and in January, 1999 he first learned that Peter McDonnell and Associates, Solicitors were taking claims on behalf of individuals suffering from smoking related illnesses. The plaintiff avers that he

came to the realisation that, in addition to being addicted to cigarettes, he could suffer ongoing damage to his health as a consequence of his addiction. He contacted Mr. McDonnell in January, 1999 and provided written instructions to him on or about 16th February, 1999, and at the same time was continuing to undergo medical treatment. Having been reviewed by his vascular surgeon in February, 1999 he was advised strongly to cease smoking but was unable to do so.

6. The plaintiff says he gave further and more detailed instructions to Beauchamps, Solicitors, following which a plenary summons was issued on his behalf on 19th January, 2000, the plaintiff stating that he felt at that time unable to focus on a possible legal claim as opposed to the disease he had contracted. The plaintiff says that he was unaware that there was a possibility that he might have a stateable claim against tobacco companies arising out of his personal injuries, ongoing addiction to cigarettes and ongoing health damage and that it was only in January, 1999 when he learned of Peter McDonnell and Associates, Solicitors being involved in taking legal actions, that he was aware of the possibility that he might have a stateable legal claim.

7. In further particulars of personal injury, loss and damage as delivered on 8th November, 2006, the plaintiff indicated that he gave up smoking at Easter, 2004 and as a result has found that he has been able to walk further and has gained weight. The plaintiff has indicated that he was unable to dance for a number of years which he put down to his cigarette smoking and also describes how he had to stop playing handball in 1992, also as a result of smoking. He described his lack of fitness and reported that while in the army, he was one of a number of people who were always lagging behind and he realised that all of these persons were smokers.

8. In the background it appears that in early 1999, Peter McDonnell and Associates realised that they were not in a position to handle the large number of clients who had retained their services in connection with tobacco litigation and in October, 1999 Beauchamps, Solicitors, following consultation with Mr McDonnell, became involved in the prosecution of the cases and came on record for clients in January, 2000 as joint solicitors so that the plenary summons herein as issued on 19th January, 2000, was issued jointly by Beauchamps and Peter McDonnell and Associates.

9. The plenary summons issued on the 19th January, 2000, named only the first three named defendants in the title to the proceedings. The summons issued was not served on the various defendants for a period of approximately eight months, the first named defendant being served on the 18th September, 2000, the second named defendant on 27th September, 2000, and the third named defendant on 10th October, 2000. Appearances were entered within a matter of days by all three defendants to the plenary summons, which appearances called for delivery of a statement of claim within 21 days.

10. On 20th September, 2002, the plaintiff issued a motion to join the fourth, fifth and sixth named defendants (hereinafter referred to as the "State defendants") and to amend the plenary summons pursuant to the grounding affidavit of Mark Heslin as sworn on 19th September, 2002, in which affidavit the deponent sets out that the State defendants ought to have been joined as defendants at the commencement of the proceedings. The motion came on for hearing before this Court (Johnson J.) and an order was made on 3rd February, 2003, giving liberty to the plaintiff to join the fourth, fifth and sixth named defendants and to amend the plenary summons. The amended plenary summons was not served on the first three named defendants until in or about 18th July, 2003.

11. The State defendants proceeded to enter an appearance to the amended plenary summons as served upon them on 29th July, 2003, and a statement of claim was served on 5th December, 2003. The first three named defendants at various times called upon the plaintiff to deliver a statement of claim and referred in general terms to prejudice without identifying any particular aspect of prejudice actually suffered. Approximately three years and two months after the entry by the defendants of their appearances, statements of claim were purportedly delivered on or about the 8th December, 2003, with neither consent to late delivery nor leave of the Court.

12. On 9th March, 2004, the State defendants raised an extensive notice for particulars, which was replied to on the plaintiff's behalf on 21st June, 2005. The notice of motion herein on behalf of the State defendants was issued on 20th June, 2005. It is accepted that from 9th March, 2004, until 21st June, 2005, being the relevant dates between the notice for particulars and replies thereto, no correspondence passed between the solicitors for the State defendants and the solicitors for the plaintiffs and, in particular, no request was made for the replies to particulars to be delivered.

13. The relief as sought by the various defendants in the motions that come before the Court can be summarised as follows:-

> (a) An order dismissing the second named plaintiff's claim against the defendants for want of prosecution on the grounds of the inordinate and inexcusable delay on the part of the plaintiff in the commencement and the prosecution of the proceedings, which delay has prejudiced the defendants such that the balance of justice requires that the claim be dismissed;
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> (b) Further, or in the alternative, and without prejudice to the foregoing, an order pursuant to the inherent jurisdiction of this Honourable Court dismissing the second named plaintiff's claim by reason of lapse of time and/or pursuant to Article 6 of the European Convention

Relevant Legal Principles

14. The first aspect of the application is to dismiss the plaintiff's claim for want of prosecution by reason of inordinate and inexcusable delay in commencing and prosecuting the proceedings, resulting in prejudice such that the balance of justice requires that the claim be dismissed.

15. The *locus classicus* is the decision of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 but the ground was to some extent laid by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 and, in particular, at p. 567 where the four cornerstones were laid in the following terms:-

> (1) Inquiry should be made as to whether the delay on the part of the person seeking to proceed has been firstly inordinate and, even if inordinate, has it been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable would appear to lie upon the party seeking a dismiss and opposing a continuance of the proceedings;
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> (2) Where a delay has not been both inordinate and inexcusable, it would appear that there are no real grounds for dismissing the proceedings;
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> (3) Even where the delay has been both inordinate and inexcusable, the court must further proceed to 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. Delay on the part of a defendant seeking a dismiss of the action, and, to some extent, a failure on his part to exercise his right to apply at any given time for the dismiss of an action for want of prosecution, may be an ingredient in the exercise by the court of its discretion;

(4) 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."

16. Finlay P. at p. 569 of his judgment in *Rainsford* refers to the meaning of the word "inexcusable" and states as follows:-

"It was submitted to me on behalf of the plaintiff that the true explanation of this delay from about 1974 onwards was firstly the fact that the solicitor in the plaintiff's solicitors [sic] office who was dealing with the case in detail left that office towards the end of 1974 and secondly that the senior partner in the office who then took over the conduct of the case was periodically ill for a considerable period and attending only to a limited extent due to illness in his office until his death in September 1978. That makes the delay in the prosecution of this case, in my view, clearly understandable but I do not consider that, using the word as it is intended to be used in the decisions to which I have referred, it makes it excusable. I am therefore forced to the conclusion that the delay in this case on the part of the solicitors for the plaintiff was both inordinate and inexcusable."

17. There is a further helpful passage in respect of the nature of the discretion to be exercised if the court comes to the view that the delay is both inordinate and inexcusable, wherein at p. 570 Finlay P. states as follows:-

"Having come to the conclusion, however, that an inordinate and inexcusable delay did occur it next becomes necessary for me to try and ascertain where in the justice of the case lies the balance between dismissal and its continuance. In my view the first material consideration in the exercise of this discretion is the nature of the case itself. It is clear from the statement of counsel that the injuries to the plaintiff are very severe and that his chance if he has a good cause of action of being compensated for those injuries probably represents the last major opportunity notwithstanding an extreme handicap to provide for himself and his dependents. What the defendants seek to have dismissed is no mere trivial or ordinary action but one which is probably vital to the future material prospects of the plaintiff. No action brought by a litigant to the courts should be considered unimportant or trivial if a bona fide cause of action exists. In relation, however, to the exercise of a discretion as to where the balance of justice may lie it seems to me that a material consideration must be the gravity of the claim concerned and the consequences of its dismissal upon the injured claimant. In this case it seems to me that the consequences would be dire. The second material consideration is the type of claim on the issue of liability which arises in this case. What was alleged against the defendants was a temporary dangerous obstruction on the roadway in the course of some works being carried out by them. Obviously what actually was there on the night in question; what lighting or absence of lighting existed and the extent and visibility of the obstruction were all matters that had to be ascertained by both the plaintiff and his advisers on the one hand and the defendants and their servants or agents on the other hand within a very short period indeed of the accident on 14 May 1971. The plaintiff's solicitor was indeed alive to that fact and had a survey of the scene carried out by a professional witness within an extremely short time. There is therefore a distinction in my view between this type of claim, where if the defendants did not investigate it very soon after the happening of the accident they would probably have never been able satisfactorily to investigate it, and a claim where the evidence of a physical nature might remain much longer but where a really lengthy delay in the prosecution of the proceedings might prevent such evidence from being made available to the defendants. I am quite satisfied that if the defendants had not made the appropriate investigations on the issue of liability long before what I consider to have been the reasonable period for the institution of these proceedings, namely August 1973, that the further delay which occurred between 1975 and now could not have further prejudiced their situation."

18. In *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 Hamilton C.J. at pp. 475 and 476 succinctly sets out the principles of law relevant to the consideration of the issues raised in an application to dismiss an action for want of prosecution and these were summarised as follows:

(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

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

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

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

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

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

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

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

19. Hamilton C.J. at p. 469 of the judgment reviewed the position relating to a late start as follows:-

"In *Birkett v. James* (1978) A.C. 297 Diplock L.J. stated:-

"A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that had already passed before the writ was issued".

19. In the course of his judgment in *Department of Transport v. Chris Smaller (Transport) Ltd.* [1989] A.C. 1197 Lord Griffiths stated at p. 1207:-

"The principles in *Allen v. Sir Alfred McAlpine & Sons Ltd*. and *Birkett v. James* are now well understood and I have not been persuaded that a case has been made out to abandon the need to show that the post writ delay will either make a fair trial impossible or prejudice the defendant. Furthermore, it should not be forgotten that long delay before issue of the writ will have the effect of being looked at critically by the court and more readily being regarded as inordinate and inexcusable than would be the case if the action had been commenced soon after the accrual of the cause of action. And that if the defendant has suffered prejudice as a result of such delay before issue of the writ he will only have to show something more than minimal additional prejudice as a result of the post writ delay to justify striking out the action."

20. The nature of the prejudice regarded as necessary to be shown was discussed in the case of *Biss v. Lambeth Health Authority* [1978] 1 W.L.R. 382 where Denning M.R. quoted from his own judgment in *Sweeney v. Sir Robert McAlpine & Sons Ltd*. [1974] 1 W.L.R. 200:-

" … the court does not look merely at the delay since the writ … The court enquires whether the total delay has been such that a fair trial between the parties cannot now be had."

21. Denning M.R. further referred to a passage from his judgment in *Thorpe v. Alexander Fork Lift Trucks Ltd.* [1975] 1 W.L.R. 1459 where he stated:-

" … the plaintiff is not entitled to delay as of right for four years from the accident, three years before the issuing the writ and another year for service. He has no such right. He is not entitled to delay at all. It is his duty once the writ is issued to serve it promptly and get on with it promptly.'

22. At p. 390 he stated:-

"It is, I believe, accepted on all hands that if the plaintiff is guilty of inordinate and inexcusable delay before issuing the writ, then it is his duty to proceed with it with expedition after the issue of the writ. He must comply with all the Rules of Court and do everything that is reasonable to bring the case quickly for trial. Even a short delay after the writ may in many circumstances be regarded as inordinate and inexcusable and give a basis for an application to dismiss for want of prosecution. So in the present case the delay of nine months was properly admitted to be inordinate and inexcusable. It is a serious problem to the hospital to have the action hanging over its head even for that time. On this simple ground I think this action should be dismissed for want of prosecution."

23. At p. 392 Geoffrey Lane L.J. stated:-

"As Lord Denning M.R. has already indicated, there are many ways in which defendants may be prejudiced by continued delay. A small business concern faced with a huge claim in damages may well suffer continuing financial stringency and loss each week that goes by through having to set aside funds against their contingent liabilities. In the present case the nurses whose competence and standards of care are in question are no doubt suffering at least some apprehension as to what may happen or be said at the trial. Why, one may ask, should they continue to have to suffer? That to my mind provides enough by way of prejudice to entitle one to say in accordance with *Birkett v. James* that extra prejudice beyond that caused by the pre writ delay has occurred to the defendants here, justifying us in dismissing the action.

There are, however, other considerations. It is the duty of the court to prevent its procedures being used to create injustice. A plaintiff who issues a writ outside the normal limitation period under the terms of either the Act of 1963 or the Act of 1975 has only a defeasible right to continue the action. That right will ultimately depend on the decision of the judge at the trial. Whatever the merits of his claim he may find himself defeated because he cannot bring himself within the terms of the particular Act. The defendant meanwhile must expend time and money on preparing for trial. In these circumstances it is incumbent on the plaintiff to prosecute the action with diligence. If he fails to conform with the rules of court as to the various steps in the action and is guilty of serious and inexcusable delay, the court should have and I believe has, the power in its discretion to dismiss the action for want of prosecution. It would not be necessary for the defendant to prove any additional post-writ prejudice. Such prejudice should in these circumstances be presumed.

Thus in cases where (1) the writ was issued after the normal period of limitation had expired, (2) the plaintiff has failed to comply with all the rules of the court as to time, (3) the plaintiff has been guilty since the issues of the writ of serious and inexcusable delay, (4) the totality of the plaintiff's delay either made it substantially impossible for there to be a fair trial of the issues or alternatively has prejudiced the defendant, the court should be entitled in its discretion to dismiss the action."

24. The principles as set out by Hamilton C.J. in *Primor* were resummarised by Hardiman J. in *J O'C v. The Director of Public Prosecutions* [2000] 3 I.R. 478 wherein at pp. 499 and 500 he states:-

"Examples of the application of these principles in civil cases can be multiplied. Enough, however, has been said to indicate that it has consistently been held:-

(a) that a lengthy lapse of time between an event giving rise to litigation, and a trial creates a risk of injustice: "the chances of the courts being able to find out what really happened are progressively reduced as time goes on";

(b) that the lapse of time may be so great as to deprive the party against whom an allegation is made of his "capacity … to be effectively heard";

(c) that such lapse of time may be so great as it would be "contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial in which (he or) she would have to try and to defeat an allegation of negligence on her part in an accident that would have taken place 24 years before the trial …";

(d) that, having regard to the above matters the court may dismiss a claim against a defendant by reason of the delay in bringing it, "whether culpable or not", because a long lapse of time will "necessarily" create "inequity or injustice", amount to "an absolute and obvious injustice" or even "a parody of justice";

(e) that the foregoing principles apply with particular force in a case where "disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past …", as opposed presumably to cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony."

25. Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290 at pp. 293 and 294 of his judgment made the following observations:-

"It is important to make the point that there have been significant developments in this area since the decision of the High Court in Rainsford or in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 IR 459. By S.I. No. 63 of 2004, Order 27 of the Rules of the Superior Courts has been significantly amended in particular by the following provision:

"(1) If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, subject to the provision of rule 1A, at the expiration of that time apply to the Court to dismiss the action, with costs, for want of prosecution; and on the hearing of the first such application, the Court may order the action to be dismissed accordingly, or may make such other order on such terms as the Court shall think just; and on the hearing of any subsequent application, the Court shall order the action to be dismissed as aforesaid, unless the Court is satisfied that special circumstances (to be recited in the order) exist which explain and justify the failure …"

Secondly, the courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. Thirdly, following such cases as *McMullen v. Ireland* ECHR 422 97/98. July 29, 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…It hardly needs saying that any further delay in the taking of any step in this action in the context of the gross delay that has already occurred will expose the plaintiff to a very serious risk of the dismissal of his action."

26. Quirke J. in *O'Connor v. John Player & Sons Limited* [2004] 2 ILRM 321 applied the principles in *Primor* plc in respect of a claim which was one of approximately 138 similar claims commenced by the plaintiff's solicitors on behalf of various claimants against the defendant tobacco companies. The Master of the High Court had made an order dismissing the plaintiff's claim for want of prosecution and from this order the plaintiff appealed to the High Court to have the order of the Master set aside and for an order permitting them to proceed with their claim against the defendants. The headnote contains a particularly useful summary of the judgment and is set out at pp. 322 and 323 in the following terms;

"(1) The principles of law which apply to an application to dismiss an action for want of prosecution are well settled. The application of those principles required consideration of the following questions: whether there was inordinate delay on the part of the plaintiff in prosecuting her claim against the defendants, and, if there was such inordinate delay, whether that delay was excusable and, if the delay has been both inordinate and inexcusable, whether the balance of justice is in favour of or against the case proceeding, having regard to the facts disclosed on the evidence. *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 applied.

(2) The onus of establishing that the delay complained of has been inexcusable rests upon the party so alleging; however, the onus may be discharged by way of evidence and argument demonstrating that no reasonable or credible explanation has been offered or can reasonably be said to exist which would account for or excuse the delay.

(3) The determination of whether, on the facts, the balance of justice is in favour of or against the plaintiff's case requires consideration of (1) the conduct of the defendant since the commencement of the proceedings for the purpose of establishing (a) whether any delay or conduct on the part of the defendant amounted to acquiescence in the plaintiff's delay and (b) whether the defendants were guilty of any conduct which induced the plaintiff to incur further expense in pursuing the action, (2) whether the delay was likely to cause or has caused serious prejudice to the defendants, (a) of a kind that made the provision of a fair trial impossible, or (b) of a kind that made it unfair to the defendant to allow the action to proceed and made it just to strike out the action and (3) whether having regard to the implied constitutional principle of basic fairness of procedures, the plaintiff's claim against the defendants should be allowed to proceed or should be dismissed.

(4) In general, there is no obligation upon a defendant to expedite the prosecution of a claim made against him or her. There was no conduct on the part of the defendants which induced the plaintiff to embark on any particular task thereby causing a delay in the prosecution of her case. Neither was there delay on the part of the defendant in delivering any particular pleading or taking any particular step in the proceedings.

(5) A defendant, faced with a claim, is entitled to be provided with particulars of the wrong alleged, the full nature and extent of the injury and loss claimed and the contention alleged between those two factors. This is required so that the validity of the claim and the extent of the damages sought can be assessed by the defendant. Such particulars must be provided within a reasonable time. Thereafter a defendant is entitled to the trial with reasonable expedition.

(6) It would be difficult to envisage circumstances where a delay of four years and eleven months between the issue and service of proceedings and the delivery of a statement of claim would not be described as inordinate. The fact that the proceedings themselves comprised a claim for damages arising out of alleged events covering a period in excess of 50 years added even greater weight to the contention that the delay on the part of the plaintiff in delivering a statement of claim was inordinate. Accordingly, the defendants had discharged the onus which rested upon them of establishing that there had been inordinate delay on the part of the plaintiff in prosecuting her claim against the defendants.

(7) For a period of almost three years no tangible steps of any kind were taken on behalf of the plaintiff to prosecute her claim. The explanations offered were unsatisfactory and the defendants had discharged the onus of proving that no reasonable explanation or excuse existed which justified the delay complained of.

27. The judgment of Quirke J. in *O'Connor* was followed by the judgment of Finlay Geoghegan J. in *Manning v. Benson and Hedges Limited and Others* [2004] 3 I.R. 556 where she adopted the legal principles as set out in O'Connor particularly relying on the judgment of the Supreme Court in *Primor*.

28. In dealing with the want of prosecution application, Finlay Geoghegan J. took the view that the court cannot, in considering the prejudice caused by delay, take into account any period prior to the date of the accrual of the cause of action. She stated at pp. 563 and 564 of her judgment:-

"Until the cause of action accrues the plaintiff normally cannot commence proceedings. Hence even if as I have concluded the obligation to prosecute includes the obligation to commence proceedings there cannot be any question of delay until the entitlement to commence i.e. the accrual of the cause of action occurs.

Another way of looking at the issue is to consider what would have been the position if subsequent to the date of diagnosis of each of the plaintiffs they had proceeded with alacrity to commence proceedings and prosecuted the proceedings within the time limits in the Rules. If that had been done the defendants could not have applied for an order to dismiss for want of prosecution notwithstanding the long lapse of time between the first occurrence of the alleged wrongful acts and the date of accrual of the cause of action.

It follows from this conclusion that in considering the application to dismiss for want of prosecution, the court should not consider prejudice caused to the defendants or the risk that it is not possible to have a fair trial by reason of lapse of time between the alleged wrongful acts and accrual of the cause of action. The fact that there was such a lapse of time may however be relevant when considering the relevant factors to the balance of justice issues. The court should not ignore the fact that the alleged wrongful acts took place a long time ago. At minimum where there is a long lapse of time between wrongful acts and accrual of a cause of action it may mean that the claim is already difficult for the defendant to deal with and prejudice caused by subsequent delay may have to be more critically examined. Also, such a long lapse of time places a special onus on a plaintiff to proceed with due expedition after the accrual of the cause of action."

29. The Supreme Court in *Keogh v. Wyeth Laboratories Inc* [2006] 1 I.R. 345 made observations as regards the position of a plaintiff suing a multinational company for damages for personal injuries and her personal situation when compared to the might of the defendant and also in respect of the issue of the trial essentially being based on documents and/or the necessity for oral evidence.

30. McCracken J. delivering the judgment of the court stated at p. 352 of the judgment:-

"The trial judge also held that the action in the present case is likely to be tried essentially on documents. The appellants hotly contest this finding, and argue that they will not only suffer the general prejudice of having to give evidence of matters which took place very many years ago, but that they will suffer actual prejudice. They point to the fact that the psychiatrist first consulted by the respondent is not available and while they accept that she was seen by other psychiatrists subsequently in the public health system, nevertheless the evidence of the first psychiatrist would be particularly important. While documentation may certainly go a long way towards showing the origins of the drug and the tests which it underwent, it must be remembered that the negligence alleged against the appellants relates, not to the fact that they put a dangerous drug on the market, but that they failed to warn either the medical profession or the patients being treated with the drug as to the possibility of addiction. To meet this, the appellants will certainly have to try to adduce evidence of the knowledge of members of their staff back in 1979 when the respondent was first prescribed the drug. In addition, the plaintiff's own medical condition between 1979 and 1984 will be of vital importance and will require substantial oral evidence. At p. 41 of his judgment the learned trial judge acknowledged that it might not be possible for the appellants to rely on witnesses whom they might have wished to do so if the trial had taken place earlier, but said that he could not accept that they could not engage alternative experts who could just as ably assist the court. While this may well be true as to expert witnesses who simply review the documents, the learned trial judge went on to say "equally so with regard to employees of the defendants". It seems to me that there must of necessity be many former employees of the appellants who will not now be available to give evidence of events which occurred over twenty years ago, and they could not be replaced by alternative witnesses. In my view the appellants would have serious difficulties in relation to meeting the respondent's case by reason of the unavailability of witnesses."

31. He further stated at pp. 353 and 354 of the judgment:-

"It is urged in the present case that the plaintiff is a person of very limited means and that the solicitor for the plaintiff is a sole practitioner. This is of course true but it is also a situation which arises in a large number of claims for personal injuries. This is not a case where specific blame can be laid at the door of the solicitor, and the court has no evidence of what, if any, attempts were made by the plaintiff personally to progress her case.

The fact that the defendants may be large multi-national pharmaceutical companies does not mean that they are not entitled to a consideration of fairness by the court, nor that any prejudice suffered by them should be ignored. Having considered the same evidence as the trial judge, I am of the view that he erred in the exercise of his discretion and in some of the conclusions which he drew from the evidence. In the light of the enormous delay in this case, I believe that justice would be served by allowing this appeal and striking out the plaintiff's claim and I would order accordingly."

32. Clarke J. in *Stephens v. Flynn* [2005] IEHC 148, dealing with an appeal against an order of the Master of the High Court dismissing the plaintiff's claim for want of prosecution on the grounds of inordinate and inexcusable delay in the commencement and prosecution of the proceedings, applied the law as already referred to herein in *Rainsford, Birkett, Gilroy* and *Primor*. Dealing with the fact that there was a delay in the institution of the proceedings Clarke J. stated that:-

"Based on Hogan it is clear that there was a heavy onus upon the Plaintiff to proceed with extra diligence in progressing these proceedings having regard to the fact that a delay of just a few days short of six years had been allowed to occur prior to the issuance of the proceedings in the first place. In the light of the fact I would have been satisfied that a delay of over 20 months in the filing of a statement of claim was inordinate even on the basis of what I might call the traditional jurisprudence. It is clear that in the light of the factors identified by the Supreme Court in *Gilroy* that view must be taken with even greater strength.As to whether the delay is excusable it would appear that the only real reason put forward was the difficulty encountered in obtaining reports from the Plaintiff's experts necessary to enable counsel to draft the appropriate particulars required for inclusion in the statement of claim. To this may be coupled the fact that it would appear that the relevant expert was ill for at least a portion of the relevant time. However it does not seem to me that having regard to:-

(a) the undoubted need to move with extra expedition in the light of the extraordinary delay in the commencement of proceedings

(b) the lack of any realistic explanation as to why it should have taken the expert concerned as long as it apparently did to produce a report;

(c) the statement in *Gilroy* to the effect that, in particular, delay attributable to a professional advisor may be less excusable than might once have been the case; and

(d) in the light of the need, by virtue of the developments identified by the Supreme Court in *Gilroy*, to exercise a significant degree of additional scrutiny on excuses put forward,

I am satisfied that the delay is inexcusable. Having reached that conclusion it is necessary for me to consider where the balance of justice lies."

33. Clarke J. went on to state that:

"I now turn to the factors which are relevant to a consideration of the balance of justice. For the reasons indicated above it does seem to me that there needs to be a re-calibration of the weight to be attached to many of those factors in favour of imposing a significantly greater obligation on parties to move with expedition. The factors, and my assessment of them, are as follows:-

(a) The degree of delay

For the reasons indicated above I am satisfied that there was a very significant delay indeed particularly having regard to the principle set out in *Birkett* to the effect that a particular obligation to move with expedition lies upon a party who has waited to the last moment to commence proceedings within the limitation period. I am satisfied that a delay which goes beyond the minimum which may be considered inordinate can be an additional factor to be weighed in the balance. I am satisfied that such a delay occurred here.

(b) The excuse tendered

I am also satisfied that the Plaintiff has not only failed to render that delay excusable but has failed to do so by a significant margin and this must also be a factor to be taken into account.

(c) Prejudice

The Defendant contends for prejudice based upon the fact that the evidence which will require to be tendered to the court will be impaired by the lapse of a minimum of ten years between the events and any likely trial date. He has not, however, been able to point to any specific witness who is no longer available. It must also be taken into account that there are, apparently, statements of the relevant witnesses to the events of the 5th December, 1995 taken by the Gardaí on the occasion in question. That being said an issue as to the credibility of witnesses (which will almost certainly arise) will be all the more difficult of resolution where those witnesses are being asked to recollect matters that occurred so long ago. While the prejudice may not be quite as great as the Defendant contends for I am satisfied that it will nonetheless be of some significance. In relation to the evidence which will need to be tendered in respect of quantum I am not so sure that the same level of prejudice has been established. It would appear on the evidence that the Defendant was afforded, at the relevant time, an opportunity to have the premises concerned inspected by an engineer. It has not been contended that the engineer concerned is not available or that his records have become unavailable by the passage of time so as to render his evidence less clear. As the onus will lie upon the Plaintiff to establish his case it will be necessary for the Plaintiff to call all necessary witnesses concerning the quality of the works carried out by the Defendant, the extent of the works which remained to be done as of the date of the departure of the Defendant, and the costs of all additional and remedial works that were required. There will be some additional difficulty placed upon the Defendant at being asked to attempt to evaluate that evidence in respect of events that occurred a very considerable period of time ago. However on the basis of the evidence before me I could not place that prejudice at a higher degree than moderate.

(d) Inaction of the Defendant

It is clear from both *Rainsfort* and *Hogan* that "delay on the part of a Defendant seeking a dismissal of the action and, to some extent, a failure on his part to exercise a right to apply at any given time for the dismissal of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion". In this case there was no significant delay on the part of the Defendant. It might be said that there was some inaction between July 2002 and November 2003. However it is clear that even on the basis of the traditional test inaction is of less weight than delay. It is described as applying "to some extent". While remaining a factor it is one which, in the current context, should be given an even lower weighting.

I am therefore satisfied that the Defendant has suffered prejudice by virtue of the delay, but that same cannot be placed at too high a level. Finally in that regard I have considered the prejudice on the basis of the delay from the time of the incidents giving rise to the proceedings rather than solely in respect of the period from the

commencement of the proceedings to date. While I agree that the court is confined, in determining whether a delay has been inordinate, to the period subsequent to the commencement of proceedings I am of the view that in assessing the balance of justice the court has a wider discretion and can take into account prejudice which may be cumulatively attributable to a delay both prior to and subsequent to the commencement of proceedings.

In all of the above circumstances I am satisfied that the weight to be attributed to both the delay and its excusability coupled with the moderate degree of prejudice and the minor weighting attributable to the limited inaction on the part of the Defendant is such that the balance of justice favours the dismissal of the proceedings."

34. The second aspect of the defendants' application is pursuant to the inherent jurisdiction of the court to dismiss the plaintiff's claims by reason of there being a real and serious risk of an unfair trial or a clear and patent unfairness in asking the defendant to defend the action by reason of the lapse of time. Reliance is also placed on Article 6 of the European Convention on Human Rights.

35. The jurisprudence in respect of an application to dismiss the plaintiff's proceedings by reason of the lapse of time involved, without any reference to culpable delay and pursuant to the inherent jurisdiction of the court, emanates from the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151 wherein at pp. 157 and 158 he stated:-

> "After due regard to all relevant factors I am driven to the conclusion that not only was the delay in this case inordinate and inexcusable but there are no countervailing circumstances which would justify a disregard of that delay. I consider that it would be contrary to natural justice and an abuse of the process of the Courts if the defendant had to face a trial in which she would have to try to defeat an allegation of negligence on her part in an accident that would have taken place 24 years before the trial and a claim for damages of which she first learned 16 years after the accident…. While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial."

36. *O'Domhnaill* was followed in *Toal v. Duignan (No. 1)* [1991] ILRM 135 *and Toal v. Duignan (No. 2)* [1991] ILRM 140 wherein Finlay C.J. upheld the inherent jurisdiction stating at pp. 142 and 143:-

> "In the course of the argument on these appeals a question was raised as to whether the court had jurisdiction to dismiss by reason of delay an action which was in fact commenced within a time limit fixed by Act of the Oireachtas. My judgment in the previous appeal in respect of the other defendants in this case was based on an acceptance of the principles laid down in the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151 with which Griffin J. agreed. I have carefully reconsidered the principles laid down in that judgment on the question as to the jurisdiction of this Court in the interests of justice to dismiss a claim where the length of time which has elapsed between the events out of which it arises and the time when it comes for hearing is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself or herself against the claim made. I have also recognised the dissent from the view expressed by McCarthy J. in the judgment delivered by him in *O'Domhnaill v. Merrick*. I adhere to the view expressed by me in the previous appeal in this case that the court has got such an inherent jurisdiction. It seems to me that to conclude otherwise is to give to the Oireachtas the supremacy over the courts which is inconsistent with the Constitution."

37. There is also the very pertinent judgment of Hardiman J. in *JO'C v. Director of Public Prosecutions* [2000] 3 I.R. as already referred to herein.

38. Kelly J. in *Kelly v. O'Leary* [2001] 2 I.R. 256 ultimately reached his conclusion in holding that the relevant criteria for a dismiss in the interests of justice arise from answering the same two fundamental questions which arise from the two *Toal* decisions and from the *O'Domhnaill* decision which are:-

> 1. Whether, by reason of the lapse of time (or delay), there is a real and serious risk of an unfair trial;
>
> 2. Whether, by reason of the lapse of time (or delay), there is a clear and patent unfairness in asking the defendant to defend the action.

39. Finlay Geoghegan J. succinctly summed up the situation in *Manning* at p. 565 wherein she stated:-

> "I accept that the courts have recognised the existence of a jurisdiction to dismiss a claim by reason of a lapse of time without there being any delay in the sense of culpable delay by a plaintiff and where the requirements of what are variously described as the "interests of justice" or the prevention of "patent unfairness" or the requirements of "constitutional principles of fairness of procedure" or the risk of putting "justice to the hazard" so require."

40. Article 6 of the European Convention of Human Rights states:-

> "In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The European Convention of Human Rights has now been incorporated into domestic law by the European Convention of Human Rights Act 2003 which came into force on 31st December, 2003. Section 2 of the Act of 2003 provides as follows;
>
> > "(1) In interpreting and applying any statutory provision or rule of law the a court shall in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provision.
> >
> > (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

41. Article 6 of the ECHR was considered by Henchy J. in the Supreme Court in the context of an application to dismiss for want of prosecution in *O'Domhnaill v. Merrick* [1984] I.R. 151. Henchy J. stated that one had to assume that the Statute of Limitations 1957 was enacted (giving no indication therein of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law including any relevant treaty obligations. He explained the relevance of this rule of statutory interpretation as follows at p. 159:-

" … [A]rticle 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides:-

'In the determination of its civil rights and obligations or of any criminal charge against him everyone is entitled to a fair hearing *within a reasonable time* by an independent and impartial Tribunal established by law.'

While the Convention is not part of the domestic law of the State, still, because the Statute of Limitations, 1957, was passed after this State ratified the Convention in 1953, it is to be argued that the Statute, since it does not show any contrary intention, should be deemed to be in conformity with the Convention and should be construed and applied accordingly".

42. In *McMullen v. Ireland*, European Court of Human Rights No. 422 97/98 29th July, 2004, the Court of Human Rights held that Ireland had violated Article 6(1) of the Convention because "the proceedings… were not dealt with within a "reasonable time" as required by Article 6.1." In explaining its reasoning the European Court of Human Rights stated *inter alia* as follows:-

"The court recalls that a State is obliged to organise its legal system so as to allow its courts comply with the reasonable time requirement of Article 6. It has held on a number of occasions that a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings does not dispense the State from complying with the requirement to deal with cases in a reasonable time. If a State lets proceedings continue beyond the reasonable time prescribed by Article 6 of the Convention without doing anything to advance them it will be considered responsible for the resultant delay".

43. Hardiman J. in *Gilroy v. Flynn* at p. 294 stated:-

" … [F]ollowing such cases as *McMullen v. Ireland*… 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."

44. In *O'Connor v. John Player & Sons* Quirke J. at p. 342 of his judgment stated;

"However, a defendant faced with a claim, is entitled to be provided with particulars of the wrong alleged, the full nature and extent of the injury and loss claimed and the connection alleged between those two factors. This is required so that the validity of the claim and the extent of the damages sought can be assessed by the defendant. Such particulars must be provided within a reasonable time. Thereafter a defendant is entitled to the trial with reasonable expedition."

45. Finlay Geoghegan J. in *Manning* dealt extensively with this very issue concerning a dismiss in the interests of justice, and having reviewed the various relevant authorities including in particular the views of Hardiman J. as expressed in *J O'C v. DPP* as already referred to herein, went on to say at pp. 568 and 569 of her judgment:-

"The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial. This, was submitted, is required by Article 34 of the Constitution. Accordingly, if a defendant can on the facts establish that having regard to a lapse of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss. Also, if a defendant can establish that a lapse of time for which he is not to blame is such that there is a clear and patent unfairness in asking him now to defend the claim then he may also be entitled to an order to dismiss. This entitlement derives principally from the constitutional guarantee to fair procedures in Article 40.3 of the Constitution. Whilst in some of the cases the judgments have referred to matters under both these headings, they appear to be potentially separate grounds upon which the inherent jurisdiction to dismiss may be exercised. The factor to be considered by the court in relation to each question may overlap. It appears to me that these may include:-

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."

46. There is however one area that appears to require clarification and that is the view that is to be adopted by the court in the exercise of its discretion in an application to dismiss for want of prosecution on the balance of justice and in the interest of justice. Clarke J. noted that, while he agreed that the court is confined in determining whether a delay had been inordinate to the period subsequent to the commencement of proceedings, he was of the view that in assessing the balance of justice the court had a wider discretion and can take into account prejudice which may be cumulatively attributable to a delay both prior to and subsequent to the commencement of proceedings.

47. Finlay Geoghegan J. in *Manning* posed the same question in respect of the dates of the alleged wrongful acts, the date of accrual of the cause of action and the date of commencement of the proceedings and, in considering the balance of justice issue, what period of delay is relevant to the issue of prejudice to the defendant or the risk that it is not possible to have a fair trial.

48. Finlay Geoghegan J. came to the conclusion that it was logical where the application to dismiss was for want of prosecution on the balance of justice, that the court could not, in considering the prejudice caused by delay, take into account any period prior to the accrual of the cause of action, bearing in mind that until the cause of action accrues the plaintiff cannot normally commence proceedings. Finlay Geoghegan J. concludes on this issue by stating that, in considering the application to dismiss for want of prosecution, the court should not consider prejudice caused to the defendants or the risk that it is not possible to have a fair trial by reason of lapse of time between the alleged wrongful act and accrual of the cause of action. Finlay Geoghegan J. appears to modify this stance by stating that "the fact that there was such a lapse of time may however be relevant when considering the relevant

factors to the balance of justice issues and the courts should not ignore the fact that the alleged wrongful acts took place a long time ago." Finlay Geoghegan J. refers to the fact that where a claim as such arises after a long lapse of time it may already be difficult for the defendant to deal with and prejudice caused by subsequent delay may have to be more critically examined. Finlay Geoghegan J. also refers to the fact that a long lapse of time places a special onus on a plaintiff to proceed with due expedition after the accrual of the cause of action.

49. I take the view that a claim to dismiss for want of prosecution cannot arise, if having issued proceedings within the statutory time limits, a plaintiff moves with expediency and within the time limits provided for by the Rules of the Superior Courts. The proceedings can only be instituted once the cause of action accrues, which in the case at instance is the date of diagnosis being September, 1996. I do not consider that it would be appropriate for this Court to consider prejudice caused to the defendants or the risk that it is not possible to have a fair trial by reason of any matter arising prior to September, 1996, being the date when the plaintiff could first have instituted his proceedings. If there is delay in the institution of the proceedings then clearly it follows that a special onus is placed on a plaintiff to proceed with due expediency.

50. In any event, whereas in this case the defendants have also brought a claim for the dismissal of the plaintiff's action pursuant to the inherent jurisdiction of the court because of lapse of time, the relevant period is covered in the sense that the lapse of time aspect clearly goes as far back, as pleaded, to 1942 and to1960/61 when the plaintiff started smoking and continued through the date of accrual of the cause of the action and the institution of these proceedings.

51. Peart J. in *Byrne v. The Minister for Defence, Ireland and the Attorney General* [2005] 1 I.R. 577 in giving judgment in a case where there was inordinate and inexcusable delay took the view that pursuant to the inherent jurisdiction of the court, having regard to the lapse of time involved, the court could dismiss a plaintiff's claim in the absence of any prejudice to the defendant. This was against a background where the plaintiff had been a member of the armed forces for three years from 1974 and issued proceedings in 1998 alleging noise induced hearing loss and tinnitus.

52. Peart J. in the course of his judgment at p. 585, in discussing the particular circumstances that were before him, referred to the fact of a situation where the application was to dismiss pursuant to the inherent jurisdiction of the court by reason of lapse of time, where the delay involved was inordinate and inexcusable but where there was no real evidence of prejudice. He referred to the fact that he had not been referred to any authority where pre-commencement delay was both inordinate and inexcusable and yet there was no prejudice made out to justify a dismissal. He went on to state;

> "In addressing that interesting question, I believe that it would be proper to consider what interests are there to be considered and protected by the court's inherent jurisdiction to dismiss a claim on the grounds of inordinate and inexcusable delay. Certainly there are competing interests. There is first of all the plaintiff's undoubted right of access to the courts. There is also the defendant's right to an expeditious hearing of any claim brought against him and to finality. Linked to this consideration is the defendant's right not to be adversely prejudiced in such defence by delay for which he bears no responsibility. Finally, 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 litigation, as well as increase the cost to the Courts Service and through that body to the taxpayers, of providing a service of access to the courts which serves best the public interest."

53. Peart J. went on to discuss whether the public interest as identified trumps the plaintiff's right of reasonable access to the courts in the case before him and he came to the conclusion that it did so and he dismissed the claim.

54. Insofar as the plaintiff relies on certain provisions of the Liability for Defective Products Act, 1991, it appears that the relevant provisions are as follows:-

> "4.— The onus shall be on the injured person concerned to prove the damage, the defect and the causal relationship between the defect and damage.
>
> 5.—(1) For the purposes of this Act a product is defective if it fails to provide the safety which a person is entitled to expect, taking all circumstances into account, including—
>
> (a) the presentation of the product,
>
> (b) the use to which it could reasonably be expected that the product would be put, and
>
> (c) the time when the product was put into circulation.
>
> (2) A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.
>
> 6.—A producer shall not be liable under this Act if he proves—
>
> (a) that he did not put the product into circulation, or
>
> (b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that that defect came into being afterwards, or
>
> (c) that the product was neither manufactured by him for sale or any form of distribution for an economic purpose nor manufactured or distributed by him in the course of his business, or
>
> (d) that the defect concerned is due to compliance by the product with any requirement imposed by or under any enactment or any requirement of the law of the European Communities, or
>
> (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered, or
>
> (f) in the case of the manufacturer of a component or the producer of a raw material, that the defect is attributable entirely to the design of the product in which the component has been fitted or the raw material has

been incorporated or to the instructions given by the manufacturer of the product.

7.—(1) An action for the recovery of damages under this Act shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date (if later) on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

(2) (a) A right of action under this Act shall be extinguished upon the expiration of the period of ten years from the date on which the producer put into circulation the actual product which caused the damage unless the injured person has in the meantime instituted proceedings against the producer.

(b) *Paragraph* (a) of this subsection shall have effect whether or not the right of action accrued or time began to run during the period referred to in *subsection* (1) of this section.

(3) Sections 9 of the Civil Liability Act, 1961, shall not apply to an action for the recovery of damages under this Act.

(4) The Statutes of Limitation, 1957 and 1991, shall apply to an action under this Act subject to the provisions of this section.

(5) For the purposes of *subsection* (4)—

(a) *subsection* (1) of this section shall be deemed to be a provision of the Statute of Limitations (Amendment) Act, 1991, of the kind referred to in section 2 (1) of that Act,

(b) "injury" where it occurs in that Act except in section 2 (1) (b) thereof includes damage to property, and "person injured" and "injured" shall be construed accordingly, and

(c) the reference in *subsection* (1) of this section to the date when the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer shall be construed in accordance with section 2 of that Act, but nothing in this paragraph shall prejudice the application of section 1 (3) of this Act."

55. In my view, a relevant background feature is that Mr McDonnell, from a point in time as early as the 31st August, 1997, was giving extensive interviews to the media in general. The subject matter of the interviews follows much the same pattern to the effect that the tobacco industry knew of the dangers associated with cigarette smoking since 1957, that they knew the tar in tobacco was carcinogenic, that they knew that nicotine was addictive and that time was a significant factor. As early as 11th September, 1997, Mr. McDonnell was indicating that he would have the cases in the High Court within two years. In particular, on 19th October, 1998, in an interview with Séamus Martin of Tipp FM, Mr. McDonnell indicated that the case was a long drawn out process but he would like to be in court in about 18 months or less than two years but the tobacco companies would like to keep them out of court for 42 years. On 24th March, 2000, Mr. McDonnell in an article in the RTÉ Guide was indicating that work had been ongoing on the tobacco cases for the previous two and a half years and it would be another 12 months before they were likely to be able to be in court. Mr. McDonnell indicated to the public at large that Ireland was leading the way in tobacco cases outside the United States, that they were the furthest on in their preparations and that it was in Ireland that the first individual case would be heard. A central thread of many interviews given by Mr. McDonnell was about time and when the cases would be heard in court.

56. A further feature in the background was the question of the preservation of the individual plaintiffs' lifetime medical records. This aspect of matters was addressed in a letter as dated the 19th February, 1999, from Arthur Cox and Co., solicitors for the third named defendant, to Peter McDonnell and Associates addressing the importance of the individual plaintiffs' lifetime medical records, requesting their collection and preservation and offering to undertake the task of collection with the costs involved being costs in the cause. Several reminders were sent from Arthur Cox to Peter McDonnell and Associates without reply. Following the coming together of Mr. McDonnell and Beauchamps to represent the various plaintiffs including the plaintiff herein, Beauchamps declined the offer of the third named defendant's solicitors to collect the medical records and indicated that the matter would ultimately be dealt with at the discovery stage. Subsequently on 24th January, 2001, motions in respect of the medical records relating to two other similar cases were issued by Arthur Cox on behalf of the third named defendant and these eventually came on for hearing before Butler J. on 25th July, 2001, and certain orders were made directing the collection and preservation of the plaintiffs' lifetime medical records. The order of Butler J. was appealed to the Supreme Court. Subsequent extensive correspondence passed between the relevant parties including a letter of 19th December, 2001, from Beauchamps confirming that they were not prepared to consent to the application of the order of Butler J. to other proceedings in which Gallaher and Benson and Hedges Limited were named as defendants and requesting Arthur Cox and Co as solicitors for the third named defendants to identify any particular cases in which there was a risk of the destruction of the medical records.

57. The appeal from the order of Butler J. was listed for hearing before the Supreme Court on 20th February, 2002, but was withdrawn by the plaintiffs/appellants on the morning of the appeal. This was followed by a letter from Beauchamps of 15th March, 2002, to the solicitors for the defendants indicating that all necessary steps were being taken to collect and preserve the lifetime medical records of all plaintiffs from whom they had instructions to proceed but adding that this confirmation did not constitute a confirmation that the lifetime medical records were necessarily relevant. Subsequent correspondence ensued attempting to reach a precise agreement as regards the preservation of the lifetime medical records in accordance with the order of Butler J. as made originally on 25th July, 2001, and in default of agreement in this regard, a motion was issued on 9th August, 2002, seeking *inter alia* the preservation of the individual plaintiffs' medical records including that of the plaintiff herein and this motion was returnable for 16th December, 2002. Extensive affidavits were filed on behalf of all parties and on 22nd July, 2003, the plaintiff in these proceedings and certain other individual plaintiffs provided undertakings concerning the preservation and collection of the individual plaintiffs' lifetime medical records in accordance with the terms of the order of Butler J. as made on 25th July, 2001, and on the basis of this signed undertaking by consent, an order was made by this Court (Ó Caoimh J.) which said undertaking was annexed as a schedule and the various motions were struck out.

58. Mr. McGonigal, counsel for the plaintiff, quite properly in my view, as the finding was inevitable, conceded on the 11th day of the hearing, that the delay on the part of the plaintiff in advancing the claim against the first three named defendants was inordinate. Counsel also conceded that the delay on the plaintiff's part in advancing the claim against the State defendants was inordinate.

59. The statement of claim was served on the State defendants on the 5th December, 2003 and they raised a notice for particulars

on the 9th March, 2004. On the 10th May, 2004, the Chief State Solicitor on behalf of the State defendants wrote a letter intimating the possible necessity to bring an application to have the plaintiff's proceedings struck out on the grounds of delay. In my view, the content of this letter is of some importance because it put the plaintiff's solicitors on notice of the attitude of the State defendants and that in effect they were considering their position and one of the options being considered was the bringing of an application to the Court to have the plaintiff's claims stayed and/or struck out on the basis of delay, prejudice, and allied grounds. The letter indicated that following receipt of replies to particulars, as sought, the Chief State Solicitor would advise the plaintiff's solicitors as to their intentions in the matter. Notwithstanding this correspondence, the replies to particulars were not furnished and on the 20th June, 2005, the State defendants issued their motion to dismiss the plaintiff's claim and the plaintiff's solicitors on the 22nd July, 2005, delivered the replies to particulars which had been sought as far back as the 9th March 2004. I fully accept that no correspondence of any relevance passed between the Chief State Solicitor's office and the solicitors for the plaintiff after the plaintiff's solicitor's reply of the 13th May, 2004, to the Chief State Solicitor's letter of the 10th May, 2004.

60. Accordingly, I am satisfied that there was inordinate delay in the prosecution of the plaintiff's claim as against all defendants, and that in the circumstances that pertain, the delay involved goes far beyond the minimum which may be considered inordinate.

61. The second issue that arises is as to whether or not the inordinate delay was inexcusable.

62. The excuses advanced on the plaintiff's behalf are as follows:-

1. The need to collect the plaintiff's lifetime medical records and the motions as brought in respect thereof;

2. The streamlining of some 205 claims;

3. The discontinuance of a number of actions other than the plaintiff's case;

4. The collection of evidence and the preparation of the case in relation to liability, and the assembly of expert witnesses;

5. The issue of the liability and joinder of the State defendants.

63. I will deal with each of the excuses as offered on the plaintiff's behalf individually, but before I do so there is a thread running through the plaintiff's submissions to the effect that the plaintiff is a person of inadequate means for the purpose of this litigation and the defendants are owned and controlled by multinational companies, that the plaintiff is a person for the purpose of this litigation of little or no resources whereas the defendants have every available resource at their disposal. The plaintiff was aware in September, 1996, when diagnosed that his illness was smoking related. He consulted his solicitor in January, 1999 against a background where Mr. McDonnell was extremely active in the public domain advertising his expertise as a solicitor to act on behalf of persons who had suffered personal injury as a result of smoking tobacco. It is clear that Mr. McDonnell had access to a number of experienced counsel and Mr. McDonnell was joined by Beauchamps Solicitors in late 1999 and together they continued to act on the plaintiff's behalf with access, as one would expect from the Bar, to a significant number of very experienced counsel.

64. Mr. McDonnell in his affidavit as sworn on the 8th September, 2004, does not accede to any delay or inaction on his part nor any difficulty in prosecuting the plaintiff's claim as against any of the defendants. He refers in particular to a great deal of investigation and analysis that was carried out by his firm in relation to issues of fundamental relevance to proceedings on behalf of this and all other plaintiffs arising out of injuries and loss suffered by them as a result of cigarette smoking. He avers that those issues included causation of various illnesses by cigarette smoking, nicotine addiction, cigarette advertising, government health warnings and various findings made against tobacco companies arising out of litigation in other jurisdictions, as well as an analysis of a large volume of relevant documentation and efforts to source appropriate experts and potential expert witnesses. A non exhaustive schedule of the work that was carried out by Mr. McDonnell is set out in exhibit PMcD1 as attached to his affidavit and from a perusal of this documentation it is clear that he was aware of the relevance of the Surgeon General's reports from the United States. He had liaised extensively with American lawyers involved in very substantial tobacco litigation on behalf of plaintiffs, had attended seminars specifically designed for lawyers acting on behalf of plaintiffs in tobacco litigation and had liaised with Martin Day, Solicitor, of Leigh Day & Company, Solicitors, London, who acted on behalf of a large number of plaintiffs in respect of tobacco litigation in the United Kingdom. He had carried out extensive website research, had liaised with the Department of Health and in particular in November, 1998 had analysed a video lecture by Professor Sir Richard Doll, Professor of Medicine at the University of Oxford which charted the history of the scientific knowledge of the harmful affects of smoking accumulated since the late 18th century. He had involved himself extensively with a lead in to the Houses of the Oireachtas Sub-Committee on Health and Smoking inquiry and perused the relevant legislation pertaining to tobacco products.

65. During 1999, Mr. McDonnell was liaising and engaging in conference calls with Ness Motley, a law firm from South Carolina and was perusing documents prepared by Dr. Gregory Connolly of the Massachusetts Tobacco Control Programme, Boston.

66. Throughout the exhibit, reference is made to Mr. McDonnell liaising with both junior and senior counsel. There is not even a hint from Mr. McDonnell himself of any lack of resources. By the time he came to liaise with Beauchamps to join him as solicitors, he had accumulated approximately 230 clients.

67. I note in particular that Mr. Daly, of Beauchamps, explains the basis for the joining of the two solicitors' firms to represent the various plaintiffs in the following terminology:-

> "The extent and demands of the litigation which had commenced became apparent to Mr. McDonnell and he realised early in 1999 that his firm was not in a position to prosecute the large number of cases and to conduct the investigations on the issue of causation on its own. He therefore approached my firm to establish if we would be willing to assist in jointly prosecuting the actions. I say and believe that my firm considered the matter at length and made the decision to become involved in the prosecution of these claims in October, 1999."

68. Beauchamps joined with Mr. McDonnell in October, 1999 and proceeded to prosecute this claim on the plaintiff's behalf and issued the plenary summons on the 19th January, 2000.

69. Mr. Daly on behalf of the plaintiff has not raised as an excuse for delay any lack of resources in the various affidavits as sworn by him. The only reference to a lack of resources is contained in a letter from the plaintiff's solicitors on the 23rd December, 2003, which simply contains the bare assertion that:-

> "In view of the work which was involved and the resources available to us statements of claim in their final form as

settled by senior counsel could not have been delivered any sooner."

70. There is no question arising on this application of the plaintiff not having access to solicitors and counsel and no real basis for contending that, in some way, the plaintiff suffered from a lack of resources in taking on this litigation. Accordingly, insofar as the question of resources on the plaintiff's behalf is even impliedly put forward, either as a ground of excuse in respect of the inordinate delay or in some way as an explanation for any default on the plaintiff's behalf, the contention is rejected.

71. The first excuse offered on the plaintiff's behalf is the necessity to collect the plaintiff's lifetime medical records and that this took between 2001 and 2003 and deserves significant weight due to their importance.

72. A significant period of time was taken up on the hearing of this application in relation to this aspect. In my view, this aspect can be simplified down to the fact that from the moment Mr. McDonnell took on the plaintiff as a client in January, 1999 the plaintiff's lifetime medical records were clearly going to be of significant relevance, and in my view, it could never have been disputed on a motion for discovery that would inevitably have been brought by the defendants as against the plaintiff, that these records were not relevant to the proceedings, and could not in any sense be the subject matter of a valid claim of privilege. This was, and is, a vital part of the causation aspect of the plaintiff's claim.

73. The third named defendant's solicitors wrote on a number of occasions to Mr. McDonnell seeking to clarify the position as regards the lifetime medical records but no response was received to this correspondence. Subsequently on the 10th March, 2000, Beauchamps replied to a letter of the 6th March, 2000, indicating that they were not agreeable to the collection of the plaintiff's lifetime records by the defendants and that they would continue to review the matter on an ongoing basis and ultimately the matter would have to be decided in document exchange at discovery stage.

74. On the 26th April, 2000, Beauchamps began the process of the collection of the plaintiff's lifetime medical records by forwarding to him a draft letter of authority for his signature which was returned by the plaintiff duly signed on the 9th May, 2000. This process was still continuing three years later and Beauchamps were corresponding and attending with Marie Ruane, Deputy Hospital Manager, Midland Regional Hospital, Mullingar, Co. Westmeath, regarding the plaintiff's medical records and pathology material and the situation was still under review on the 24th November, 2003, as per an internal memorandum regarding the current status regarding identification on preservation of pathology material from each of the hospitals attended by the plaintiff.

75. It has to be borne in mind that the collection of the plaintiff's lifetime medical records represented one of only sixteen remaining cases in which the solicitors acting on behalf of the plaintiff in these proceedings represent the other 15 persons. Nowhere is it indicated that there was some major difficulty and insurmountable obstacle in the collection of these records and yet it appears to have taken, in my view, an inordinate amount of time to complete the task.

76. I accept fully that it was a matter for the plaintiff's solicitors, in the exercise of their discretion and as a matter of tactics in adversarial litigation, to approach the defendant's offer to take up the plaintiff's lifetime medical records as they saw fit and they were perfectly entitled to refuse the defendant's offer in this regard. I cannot, however, see any basis for refusing to indicate that they would collect and preserve the plaintiff's lifetime medical records, and further, that they would make them available to the defendants on request and although it may be easy in hindsight to say so, I come to the conclusion that any reasonable objective overview of the situation pertaining to the collection of the plaintiff's lifetime medical records would indicate that the motion and all the time and effort that went into dealing with that aspect was largely unnecessary, but was, in my view, brought about by the attitude adopted by the plaintiff's solicitors and was carried on through by reason of mutual distrust between the parties.

77. I do not accept that the situation that pertained to the collection of the plaintiff's lifetime medical records, in some way, provides a valid excuse for the inordinate delay as found on the plaintiff's behalf. In any event, I am satisfied from a perusal of the statement of claim that the content of the plaintiff's lifetime medical records are nowhere referred to and were not a necessary ingredient for the preparation of either the plenary summons or the statement of claim.

78. The plaintiff also relies on his solicitors having to deal with initial motions as brought by the defendants in relation to three plaintiffs pertaining to the lifetime medical records, which motions were heard before Butler J. and judgment delivered on 25th July, 2001, and the further motion as issued on the third named defendant's behalf on 9th August, 2002, concerning the preservation of the plaintiff's lifetime medical records. I do not consider it is necessary to set out every intricate detail as to what occurred with regard to this aspect of matters. As already stated herein, all parties accept the absolute importance of collecting and preserving the plaintiff's lifetime medical records. The plaintiff had the initial opportunity to allow the defendants to identify and preserve the plaintiff's lifetime medical records but he chose to decline this offer. Three separate motions were then brought which culminated in a decision in the defendants' favour handed down on 25th July, 2001. The plaintiff, in my view, clearly could have worked within the parameters of the order as handed down but chose instead, in a clear indication as set out in a letter on the 19th day of December, 2001, from Beauchamps to Arthur Cox Solicitors on behalf of the third named defendants, to refuse to apply the procedures as directed by Butler J., rejecting the contentions that there was any risk that the records could be destroyed. Further correspondence passed between the parties and it was not until 15th March, 2002, that Beauchamps wrote confirming that all necessary steps were being taken to collect and preserve the plaintiff's lifetime medical records. This letter was written some three years after the solicitors for the third named defendants first wrote to Mr. McDonnell by letter of 19th February, 1999.

79. On 9th August, 2002, the solicitors on behalf of the third named defendants issued a motion seeking orders in relation to the preservation of the plaintiff's medical records. It is quite clear that during the course of this motion Beauchamps were extremely active in identifying and taking the necessary steps to preserve the medical records and matters began to crystallise in early 2003, when, following delivery of an affidavit by Gabriel Daly of Beauchamps on 11th December, 2002, it was accepted in general terms on the defendants' behalf that the situation was clearer as regards the steps undertaken by the plaintiff's advisors to collect and preserve the medical records but that some issues remained to be clarified.

80. Beauchamps, on behalf of the plaintiff, on or about 13th February, 2003, indicated that they were continuing to clarify the position as regards the finalisation of the identity and preservation of the plaintiff's lifetime medical records. At that point in time, *inter alia*, the plaintiff's entire medical records were being examined by a medical consultant in order to ensure that such records were complete on the basis that, if a medical consultant identifies a reference to other medical providers, they will take immediate steps to identify, collect and preserve the same. Subsequently on 31st July, 2003, a consent order was made in respect of the identity and preservation of the medical records. I have some sympathy with the plaintiff's position and the torrent of paperwork that surrounded a perceived dispute between the plaintiff and the various defendants, but in my view, no greater fault can be attributed to either side. I do not accept that the issuing of both sets of motions was a cynical exercise on the defendants' behalf.

81. I do not consider that the issuing of the original three motions which led to the decision of Butler J. on 25th July, 2001, or the

subsequent issuing of the motion as against this plaintiff with respect to the identity and preservation of his lifetime medical records as issued on 9th August, 2002, and which culminated in a consent order on 31st July, 2003, forms the basis for a valid excuse as to the cause of the inordinate delay in the prosecution of the plaintiff's claim.

82. The second excuse offered is the necessity to streamline some 205 claims, including a perusal of the plaintiff's lifetime medical records and the ensuing discontinuance of all but 17 claims. The streamlining of the cases does not appear to have commenced prior to February, 2002. The necessity for the streamlining appears to have been brought about by the relevant solicitors failing to clarify prior to the institution of proceedings, that the relevant plaintiff had a stateable case. I take the view that the streamlining process in itself occurred at a very late stage having regard to the date of the issuing of the plenary summons. On the basis that I do not consider that there was any lack of resources, I cannot, therefore, see any basis for regarding the streamlining process as a valid excuse for delay in the present proceedings.

83. A further argument advanced by the plaintiff is the necessity to carry out extensive research on the aspect of causation and for the assembly of expert witnesses for the hearing of the action.

84. In this regard Mr. McDonnell in his affidavit as sworn on the 8th September, 2004, avers that a great deal of investigation and analysis was carried out by his firm in relation to issues of fundamental relevance to the proceedings on behalf of the plaintiff herein and all the other plaintiffs, arising out of the injuries allegedly suffered by them from cigarette smoking. Such issues included causation of various illnesses by cigarette smoking, nicotine addiction, cigarette advertising, government health warnings and various findings made against tobacco companies arising out of litigation in other jurisdictions, as well as an analysis of a large volume of relevant documentation and efforts to source appropriate experts and potential expert witnesses.

85. According to Mr. McDonnell, by the time Beauchamps became involved in late 1999, he had, in his view, carried out a great deal of investigation and analysis as is evident from the relevant schedule as referred to.

86. Mr. Daly sets out that the position in January, 2000 was that proceedings had been issued on behalf of some 200 plaintiffs. He then set about reviewing and analysing each case which was an extremely painstaking process. He consulted with the various plaintiffs and then set about preparing a draft proof of evidence. He then wrote to each client's medical experts seeking detailed medical reports and began an analysis of each plaintiff's situation *vis à vis* the Statute of Limitations 1957 and in particular, s. 3 of the Statute of Limitations (Amendment) Act, 1991. He indicates that the analysis of the case with respect to the Statutes of Limitations was carried out at the same time that a Joint Oireachtas Committee on Health and Children had, in November, 1999 issued a report entitled "A National Anti Smoking Strategy". He considered the judgment of Wright J. as delivered in England on 9th February, 1999, in the matter of *Hodgson and Others v. Imperial Tobacco Limited and Others.*

87. Mr. Daly refers to the fact that solicitors and researchers carried out specific items of research on 28 days in a period of five months between 10th April, 2000, and 31st August, 2000. Reference is made to having extensively researched many of the 30 million pages of tobacco industry internal documents made public as a result of a Minnesota Court ruling in 1994. Extensive discussions were held with counsel and the relevant research continued throughout September and October, 2000, but, on the basis of the details as furnished, it appears that the research was only actually carried out over 32 days in a seven month period.

88. From all that has been stated in this regard, I am inclined to the view that the relevant research as to causation can be narrowed down to the Surgeon General's reports and the relevant information that was available from lawyers in the United States involved in tobacco litigation, liaison with United Kingdom solicitors involved in tobacco litigation, the content of the Joint Committee on Health and Children Report on health and smoking as published in November, 1999 and the House of Commons Select Committee on Health's Second Report on The Tobacco Industry and the Health Risks of Smoking as published on 5th June, 2000, and that a reasonable conclusion is that the statement of claim should have been forthcoming shortly thereafter.

89. An analysis of the statement of claim as purportedly delivered on 5th December, 2003, reveals in my view very little specificity.

90. Paragraph 9 contains details relating to the plaintiff, which at all times was available to the plaintiff's solicitors.

91. At para. 13 of Part III of the statement of claim it is pleaded that the first, second and third named defendants knew or ought to have known that cigarettes were harmful and knew or ought to have known that cigarette smoking was likely to cause cancer and/or arterial disease. The particulars of knowledge of the harmfulness of cigarettes were set out in the first schedule as attached to the statement of claim.

92. The first schedule sets out a list of documents, most, if not all, of which were in the public domain since their publication and the vast majority of which preceded the publication of the House of Commons Health Committee Report in June, 2000, save for an Irish document published in December, 2002, being a report on the health effects of environmental tobacco smoke in the workplace and a reference to the then Minister for Health on Thursday 30th October, 2003, launching a national smoking cessation campaign entitled "Every Cigarette is Doing You Damage".

93. At paras 15 and 16 of the statement of claim in Part IV, it is alleged that, at all material times, the first, second and third named defendants knew that cigarettes were addictive. The particulars of knowledge in this regard were set out in the second schedule to the statement of claim. This schedule begins with a document published in 1942 by L.M. Johnston which recognised nicotine as the drug administered by smoking and found that the heavier the smoking, the stronger the subsequent craving and the tendency therefore for heavier smoking to continue, which constitutes a vicious circle. The schedule goes on to list various documents including Surgeon General's reports from the United States of America and Royal College of Physicians of London reports. All of the documentation referred to in this schedule appears to have been available prior to the end of the year 2000.

94. In Part V of the statement of claim at paras. 17 and 18, it is alleged that the first, second and third named defendants designed their cigarettes so as to have widespread appeal to all persons in Ireland, including children and the plaintiff, and particulars in this regard are set out in the third schedule to the statement of claim which schedule does not appear to rely on any specific documentation and is general in nature.

95. In Part VI of the statement of claim at paras. 19, 20 and 21, it is alleged that the first, second and third named defendants marketed and advertised their cigarettes in order to encourage people including the plaintiff to smoke, and that, despite various warnings that were placed on packets of cigarettes and a ban on tobacco advertising on television, the first, second and third named defendants persisted in marketing their product and they did so in such a way as to reinforce the appeal and addictive properties of their cigarettes so as to attract all persons in Ireland including children. Particulars of the advertising and marketing of the defendants' cigarettes are set out in the fourth schedule.

96. The particulars as set out in the fourth schedule go back as far as 17th February, 1950, with a copy of an advertisement from the Irish Times and also concentrates quite extensively on other advertisements throughout the 1950s and 1960s and to a lesser extent from the 1960s onwards.

97. Part VII of the statement of claim and in particular paras. 23, 24 and 25 dealt with the aspect of 'warning', alleging that prior to 1972, no warnings whatsoever were provided and that from in or about 1972 the warnings as provided by the first, second and third named defendants were inadequate and particulars thereof are set out in the fifth schedule to the statement of claim in paragraphs enumerated A to E.

98. Part VIII of the statement of claim deals with the particulars of personal injury, loss and damages suffered by the plaintiff.

99. Part IX of the statement of claim deals with the Liability for Defective Products Act, 1991 and specifically alleges only against the second named defendant, that they were a producer of defective products namely "John Player Blue" cigarettes. It is alleged in Part IX that the fourth, fifth and sixth named defendants being the State defendants, failed to implement Council Directive 85/374/EEC promptly or within the time limit for implementation as set out in the Directive, and as a result of this failure, the plaintiff has been wrongfully denied a recourse for damages pursuant to that Directive against the second named defendant in respect of damage caused between 7th August, 1988, and 16th December, 1991, and has suffered loss.

100. Part X deals with allegations against the State defendants that they failed in their duty to vindicate and protect the plaintiff's right to bodily integrity pursuant to the provisions of Article 40 of the Constitution of Ireland, the law of the European Union and the European Convention on Human Rights.

101. Particulars of breach of duty of the fourth, fifth and sixth named defendants are set out in the sixth schedule to the statement of claim and the particulars as therein set out and enumerated A to Q are of an all-embracing, generalised nature.

102. Part XI of the statement of claim, containing paras. 44 to 49, set out general allegations against the State defendants including allegations of assault and battery and public nuisance and relies on the doctrine of *res ipsa loquitur*.

103. In my view, the publication of the Report of the House of Commons Select Committee on Health on the tobacco industry and the health risks of smoking in June, 2000 is the relevant cut off point for the preparation of the statement of claim. Any type of extensive research with adequate resources clearly would have revealed the necessary information for the preparation of the statement of claim. A thread runs through the submissions made by the plaintiff that a sizeable amount of documentation had to be read and considered and effectively deciphered before decisions were taken as to which was the relevant documentation and which could be left aside. I take the view that this argument holds little weight when one considers the content of the report as published by the Oireachtas Sub-Committee on Health and Children and the House of Commons report.

104. I take the view that all the relevant information was available on reasonably diligent research and the research that was necessary does not, in my view, provide a valid excuse for the inordinate delay in delivering the statement of claim.

105. An addendum to this issue was the necessity to assemble the relevant witnesses and I do not consider that there is any basis for a valid excuse in this regard. No approach was made to any relevant expert witnesses prior to May, 2001. Subsequently an oncologist, Dr. Armstrong appears to have attended a meeting on 28th May, 2001, and there follows subsequent correspondence. An expert in palliative medicine was seen on 31st August, 2001, a consultant radiologist was corresponded with in May, 2002 and a consultant histopathologist was written to on the 18th November, 2002. None of these events appear to me to have any relevance in explaining the inordinate delay in delivering the statement of claim.

106. The final reason advanced by the plaintiff relates to the issue of liability and joinder of the State defendants.

107. The plenary summons itself was not amended until 3rd July, 2003, and was served on the State defendants on July 25th, 2003. A statement of claim was then delivered on December 5th, 2003. The grounding affidavit in respect of the application to amend the plenary summons to join the State defendants does not explain why they were not joined as defendants in the original plenary summons nor does it offer any explanation for the delay in moving to join them.

108. The reality of the situation appears to have been that, following the publication of the report of the Joint Oireachtas Committee on Health and Children in November, 1999, the plaintiff's legal advisors were of the opinion that there was a prospect that proceedings may have been taken against each of the various tobacco companies by the State authorities in respect of those companies whose cigarettes were sold and distributed in Ireland. The plaintiff's advisors believed that there was a realistic prospect that the State would commence such proceedings and they took the decision that it would be prudent to consolidate these present proceedings with the State's anticipated proceedings, as they were of the view that much of the evidence would be common to both actions. The plaintiff's legal advisors believed that they could co-operate with the State in bringing litigation and met with the Minister for Health on two separate occasions to discuss the possibility of the State authorities offering a form of legal aid to assist persons such as the plaintiff in the present proceedings against the tobacco companies.

109. In effect the plaintiff's legal advisors adopted a "wait and see" attitude as to whether or not the State authorities would consider instituting litigation against the tobacco companies for the cost of State health care involved in treating persons allegedly suffering from smoking related illness and as to whether there was any possibility of some form of special legal aid being made available. When it became apparent that neither aspect was going to come to fruition, it was only then that the plaintiff's solicitors proceeded to investigate the potential liability of the State and when this research was concluded, senior counsel advised that it would appropriate to seek to join the State defendants.

110. In my view, the sequence of events and background circumstances which pertained relative to the joining of the State defendants does not provide a valid excuse for the inordinate delay in the prosecution of the plaintiff's claim.

111. The test involved is whether the plaintiff can point to factors which excuse his acknowledged failure to prosecute his claim with reasonable diligence, evidenced by the failure to meet the objective milestones of civil litigation within the period stipulated in the rules or within any reasonable period of time. In my view, overall no valid excuse has been offered which explains the plaintiff's failure to prosecute his claim and in the circumstances, I find that not only is the delay involved in this instance inordinate, but it is also inexcusable.

112. Notwithstanding that I find that the delay has been both inordinate and inexcusable, I have an obligation to exercise a judgment on whether, in my discretion, on the facts, the balance of justice is in favour of or against the proceeding of the case.

113. As previously discussed herein, I make a distinction between an application to dismiss for want of prosecution where I have to consider the balance of justice and an application to dismiss for want of prosecution pursuant to the inherent jurisdiction of the court relating to "lapse of time". The distinction to be made in my view is that, in the former, a relevant starting date is the date of the accrual of the cause of action which in this case is September, 1996, whereas in the latter, the relevant starting date in this instance is 1942, being the earliest reference to certain alleged relevant material.

114. In my view, the approach to be taken is on the basis of the plaintiff's primary claim for damages for personal injuries caused by smoking cigarettes, the secondary continuing addiction claim, the claim pursuant to the Act of 1991 and the claim for the declaratory reliefs.

115. The broad thrust of the submissions made by the defendants follows much the same pattern. Each defendant submits that they cannot now obtain a fair trial and that it would be grossly unfair to require them to defend the proceedings having regard to the delays and lapses of time which have occurred. Each puts forward evidence of prejudice, that the prejudice is multi-faceted and increasing with the passage of time. The defendants collectively submit that they would not now receive fair procedures.

116. It is quite apparent that one of the central issues in the case is the actual knowledge of each of the defendants and, on the basis of the plaintiff's pleadings, the issue of knowledge arises as early as 1942 and continues right to the present day. The plaintiff commenced smoking in 1960/1961 and government warnings appeared on cigarette packaging in 1972 and, accordingly, it is reasonable to take the view that the defendants' state of knowledge prior to 1972 is going to be a relevant feature in respect of the determination of liability. As Ms. Foley avers in her affidavit grounding the application on behalf of the third named defendant, the plaintiff alleges that the third named defendant knew or ought to have known since 1942 that cigarettes were addictive and knew or ought to have known since 1950 that cigarettes were harmful, yet the plaintiff refrained from initiating proceedings until January, 2000, almost 60 years later. She refers specifically to the health warnings which were printed on packets of cigarettes since 1972 and that, for instance, from 1972 until 1979, the third named defendant printed a warning on its cigarette packets and advertisements which stated "Government Warning – smoking can damage your health". From 1979 until 1986, the warning as printed read "smoking seriously damages your health – Government Warning" and from 1986 until 1991, the warning read "smoking is a health hazard" and, in addition, three of the following four warnings had to be rotated with equal frequency on packets of cigarettes – "smoking causes cancer", "smokers die younger", "smoking kills" and "smoking causes heart disease". Ms. Foley refers to the specific plea that, since at least 1950, the risks that smoking might cause harm to one's health, including potentially fatal diseases such as cancer have been widely known.

117. It is contended on behalf of the various defendants that the statement of claim as purportedly delivered to the solicitors for the first three named defendants on the 5th December, 2003 and as actually delivered on that day to the Chief State Solicitor on behalf of the State defendants is, by its very content, a wide ranging document and centres on the issue of the knowledge of the defendants, the alleged deliberate sale and marketing of a product which, it is alleged, the first three named defendants knew to be harmful and addictive and the alleged failure by the various defendants to provide adequate health warnings.

118. In relation to the nature, breadth and complexity of the plaintiff's allegations, it is submitted on behalf of the first three named defendants that even as of today, the proceedings have not advanced beyond the delivery of a purported statement of claim, the plaintiff having purported to do so over three years outside the period prescribed by the Rules of the Superior Courts. In this regard, the first three named defendants submit that:-

119. The plaintiff alleges that the defendants owed a duty of care to the plaintiff and claims damages for negligence and for breach of duty, yet the plaintiff has not provided any particulars of alleged negligence and breach of duty on the part of the first three named defendants;

120. The plaintiff alleges assault and battery but provides no details;

121. The plaintiff alleges that cigarette smoking constitutes a public nuisance but provides no details;

122. The plaintiff claims a declaration that the defendants have violated and/or failed to respect and protect the plaintiff's constitutional rights but no details are provided;

123. The plaintiff claims damages including aggravated and/or exemplary damages for wrongful interference with his constitutional rights, yet has not identified those alleged constitutional rights or provided any particulars of the manner in which the third named defendant allegedly wrongfully interfered with them;

124. The plaintiff claims damages for conspiracy, breach of contract and fraud, but no details are provided;

125. The plaintiff claims damages for breach of duty under the law of the European Union but has not identified any relevant provisions of law or provided any particulars of the manner in which the first three named defendants allegedly breached their duties arising thereunder.

126. It is contended by the first three named defendants that, despite the purported delivery of the statement of claim, they do not know the full extent of the claim or even the most basic information in relation to the claim being made by the plaintiff.

127. It is further contended by the first three named defendants that the current state of the proceedings is such that further very substantial delays are likely to occur if the action is to proceed, that clearly there would be a need for a very extensive notice for particulars, extensive replies, discovery, possibly interrogatories, and that, in effect, the reality of the situation is that an actual hearing of the plaintiff's claim is still some years off, against a background where the cause of action accrued in September, 1996. The common thread running through the submissions on behalf of all the defendants is the non-availability of witnesses with direct knowledge of events which are relevant to the allegations made by the plaintiff and which are essential both to enable the defendants to properly defend themselves against the allegations made and also to enable the Court to fairly determine the issues before it. The defendants contend that the passage of time resulting from the plaintiff's delay has greatly affected the availability and/or quality of the evidence available, making it substantially more difficult for the Court to properly assess the merits of the case.

128. It is contended by the defendants that the problems with adducing evidence are now very real. The vast majority of critical witnesses for the issues arising in this litigation are either deceased or infirm or very aged or living abroad, all of which give rise to the very significant statement as made by Ms. Foley on behalf of the third named defendant that, having regard to the breath and complexity of the allegations, she does not believe that independent expert witnesses will be able to compensate for the absence of first hand testimony by employees of the third named defendant or other personnel employed by them.

129. Clearly there is a considerable amount of documentary evidence but equally it is contended by the defendants that documentation which may have been of relevance to the defence is no longer available. For example, it is contended on behalf of the third named defendant that in 1986, by virtue of a change of offices, a considerable amount of documentation was no longer retained. Furthermore, it is specifically averred to on behalf of the third named defendant that it has a very limited database for the period prior to 1960 and even for the period during the 1960s, documentation relating to the activities of the third named defendant is very scarce. The matter is put very succinctly by Ms. Foley when she states that "the position is simply that paper records from that time were not retained".

130. As regards the State defendants, the statement of claim as delivered, arising on foot of the amended proceedings was the first occasion upon which the State defendants had any indication as to the extent of the claims being made against them. The State defendants raised particulars by way of a notice as dated 9th March, 2004, and no replies to those particulars were delivered prior to the institution of the motion herein.

131. The statement of claim and the cases made out against the State defendants are extraordinarily wide in their scope.

132. Mr. Eamonn Corcoran of the Department of Health and Children avers in his affidavit sworn on 20th June, 2005, that copy documents in the 1940s, 1950s and 1960s were produced on manual typewriters using carbon paper. Record keeping was confined to essential materials and was usually effected by manual systems. The sort of facilities which are now taken for granted and which have resulted in copies of most documents being preserved in many different media including fax machines, high resolution copiers, electric typewriters, and later word processors were many years in the future to the events relied on in much of the plaintiff's statement of claim. In addition, Mr. Corcoran avers that it must be remembered that the implications of tobacco use was just one of many issues being dealt with by the Minister's predecessors and officials from the 1940s onwards. Mr. Corcoran avers to the fact that the importance of retaining information of historical application would not have been appreciated.

133. The scale of the documents' position pertaining to the Department of Health is outlined by Mr. Corcoran when he avers that in autumn, 2001, work commenced within the Department on a records management renewal project. This project was set up in part to address the issue of the historical records of the Department that were not listed anywhere and that were being sought on an increasing basis for inquiries, discovery orders, court cases and freedom of information requests.

134. The general position pertaining to the State defendants' documentation appears to be that there was no documentation in the files selected relating to the 1940s. The only information available relating to that period of time emanates from a departmental record prepared, seemingly, in 1979. The files contain no copies of any documents relating to smoking generated by government officials in the 1950s, although documents from later decades did refer to documents having been generated earlier by the Department of Health. It thus appears that there were documents created but they have not been located. There is a 1964 Memorandum for Government relating to smoking and health which is on the file as is a departmental document entitled "Smoking and Health – A Summary of Surveys of the Evidence". From the 1970s onwards there is more information available on the files. It is significant to note that the Chief Medical Officers who were responsible for advising the Department of Health on medical issues and who held that position prior to 1983 are now all deceased. A similar position pertains to the tobacco companies. Many of the essential personnel who would be in a position to deal with the defendants' state of knowledge from the 1940s onwards are deceased or infirm or no longer available to give evidence.

135. It is contended by the plaintiff that there was a voluminous amount of work carried out by the solicitors for the plaintiff between 1999 and 2004 and the conduct of the plaintiff's solicitor should not be judged by the standard of perfection. The plaintiff's lifetime medical reports have been obtained and preserved, some 205 claims have been streamlined and discontinued so that there are only at present 16 individual claims left remaining, and considerable work has been carried out in respect of the collection of the evidence and the preparation of the case in relation to liability.

136. It is contended that the statement of claim is a full and detailed document and demonstrates the visible progression of the plaintiff's case.

137. Professor Armstrong has been retained to assist in relation to causation and the engagement of other expert witnesses is ongoing.

138. In respect of the balance of justice, it is contended by the plaintiff that an achievement of the present motion to dismiss is to delay further the trial of the action as against defendants and that the matter could be simplified with, in the first instance, the liability issue being determined. Insofar as prejudice is alleged, the plaintiff contends that the tobacco defendants were meeting regularly through ITMAC and the TAC committees and that, from as early as 1992, the tobacco defendants and their solicitors had formed agreements in relation to dealing with tobacco related litigation. It is submitted by the plaintiff that the Oireachtas committee report, as published in 1999, indicated that the third named defendant was aware of tobacco related litigation and had collected documentation relevant to that litigation to produce in court, if necessary.

139. It is further submitted by the plaintiff that the motion to dismiss should have been brought following service of the plenary summons in January, 2000 and that there was no need as such to wait until March, 2004. Further, the motion to compel the collection of the plaintiff's lifetime medical records was unnecessary and cynical and delayed work on the plaintiff's claim. It is contended by the plaintiff that there are a number of ongoing "present day" claims in respect of which the defendants cannot possibly be prejudiced and these are the ongoing claim arising from the plaintiff's addiction to nicotine, the claims pursuant to the Liability for Defective Products Act, 1991 and the declaratory reliefs as sought.

140. The plaintiff contends that no issues of prejudice have been identified by the defendants and that this in turn leads to a situation where no witnesses have been identified in respect of those matters and no evidence has been described which the witnesses would have given had they been available. Therefore, in the absence of the identification of the issues in the case, it is impossible for the Court to reach a conclusion that prejudice has occurred. Counsel for the plaintiff urges that the defendants have focused exclusively on the historical nature of the plaintiff's claim. Counsel refers to the fact that the plaintiff has sought a declaration that cigarettes are injurious to the public health generally, and the outcome to this aspect will depend to a large extent on the knowledge that the defendants had in relation to the dangers of cigarettes and the knowledge that the State defendants had in relation to the dangers and their duties under the Health Acts.

141. Counsel refers to the fact that the plaintiff is trying to show that, at the time he commenced smoking in 1960/1961, the tobacco company defendants knew or ought to have known that smoking was dangerous and that this appears to be the position in the House of Commons Report. Counsel emphasises that the defendants are not saying what the position is and in respect of the Houses of the Oireachtas Report and the House of Commons Report, no issue was raised having regard to the passage of time.

142. As regards the issue of prejudice, counsel refers to the fact that the first and second named defendant, effectively, is involved in the proceedings since the 1940s but the third named defendant is only implicated from 1965 through until 1968 in relation to the occasional smoking of the third named defendant's product "Park Drive". The plaintiff also smoked the third named defendant's products from 2000 until 2004 following his diagnosis. The continuing injury claimed does not involve the first named defendant.

143. Counsel submits that there can be no possible prejudice in respect of the modern claims and, in particular, the continuing addiction claim and the plaintiff relies on the decision of the Supreme Court in *Delahunty v. Player and Wills (Ireland) Limited and Others* [2006] 1 I.R. 304 to the effect that the court will look at the reality of the case pleaded rather than look to every literal plea in the statement of claim, that a good stateable case can be made that continued smoking is capable of causing continuing injury even after diagnosis with a smoking related injury, that the Liability for Defective Products Act, 1991 is a live issue in smoking related litigation and that the case made by the plaintiff is of enormous public importance.

144. Counsel for the plaintiff refers extensively to the judgment of Fennelly J. in *Delahunty* referring to the fact that the plaintiff in those proceedings changed to "Silk Cut" post-diagnosis in October, 1995, "Silk Cut" being a Gallahers product. He refers to the fact that, in the present case, Mr. McCormack was diagnosed in 1996 and changed to "Silk Cut" in the year 2000. Counsel asks that the Court consider the aspect of cigarettes being smoked with precision and not be constrained by the very general plea in the earlier part of the statement of claim. Counsel urges that it is appropriate, right and proper that this Court should look carefully at the reality of the case pleaded and not be taken up with pleas relating to 1942 which have no bearing on this case and further urges that the plaintiff in these proceedings make no bones but that his case is that cigarettes should not be available on the market.

145. Counsel refers to a particular passage from the judgment of Fennelly J. in *Delahunty* wherein he states at p.310:-

> "In my opinion, this is not a suitable case for the remedy either under the Rules of the Superior Courts or the inherent jurisdiction of the court. There are complex and difficult issues of both law and fact to be decided which are more appropriately argued and tested at the full hearing of the action".

146. Counsel emphasises that the continuing addiction claim relates to issues of fact that post date 1996.

147. Fennelly J. went on to state at p. 311:-

> "I do not think a court could possibly decide, on a motion of the type before the court on this appeal, whether cigarettes "fail to provide the safety which a person is entitled to expect". That will require a great deal of evidence to be given at the trial. It is also highly material that the Act of 1991 was passed in order to transpose into Irish law the provisions of the Council Directive of 1985 mentioned above. The definition of defective product is based on article 6 of the Directive. The Act must be interpreted in the light of the Directive. If the matter comes before this court in circumstances where a decision on such an interpretation is necessary for the decision of the court, it would appear that the obligation of the court to refer this matter to the Court of Justice of the European Communities pursuant to Article 234 of the Treaty would arise. That will, of course, depend on whether such an interpretation is necessary for its decision. For that reason alone, it would be impossible to determine such an important issue at this stage. Furthermore, the High Court may wish to refer such questions to the Court of Justice and may do so at any stage of the proceedings."

148. Counsel for the plaintiff refers further to the judgment of Fennelly J. in stating that there is explicit recognition therein contained that in a suitable smoking litigation case, it is reasonable to expect continuing damage from smoking and refers to a further passage in the judgment of Fennelly J. wherein at p. 312, he states:-

> "Finally, I turn to the apparently attractive argument based on causation, which I have summarised above. On the hypothesis that the plaintiff was addicted as a result of smoking the cigarettes of the first named defendant and that she knew smoking causes cancer when she commenced smoking the second named defendant's cigarettes, the second named defendant was neither responsible for the addiction nor for the consequences of the addiction. On the other hand, the plaintiff claims that the second named defendant's "Silk Cut" cigarettes were targeted at vulnerable people such as the plaintiff. It was foreseeable that such people would consume cigarettes placed on the market by them. Issues of causation can be some of the most difficult in tort law. While the second named defendant has raised an arguable point, I cannot agree that it is decisive."

149. Counsel refers to the fact that on the issue of prejudice, having collected the plaintiff's lifetime medical records, no effort has been made by any of the defendants to examine those records yet the defendant's expert Nigel Standfield has indicated that the identification, assembly, preservation and careful early review of the plaintiff's lifetime medical records are essential for the defence of the claim. Counsel relies on the fact that Mr. Standfield has unequivocally stated that he can reach a conclusion as to the nature of the disease and its causes and the date of diagnosis from the plaintiff's lifetime medical records and he does not anywhere suggest that there is any need for oral evidence.

150. Counsel contends that there is no reason why this Court cannot look at documents from the archives of the various defendant companies or documents that are in the public domain and come to a proper decision as to what was known or ought to have been known at a particular time. The central thrust of the claim that is being advanced by the plaintiff is that, on the balance of probabilities, the tobacco companies knew at all material times to these proceedings that smoking was dangerous and, further, that nicotine was addictive. Counsel at the same time suggests that the defendants will not be prohibited from getting a fair trial and there is a duty on this Court to ensure that anything that they have to say, anything that they produce in evidence or any expert witness which they may wish to call in relation to the issues, will be heard and this evidence will be given full credence. Counsel contends that the Irish courts have never been shy of granting a fair trial to every person or company in a civil or criminal matter. Emphasis is placed on the particular circumstances of this case to the effect that what is concerned is the knowledge of the defendant companies at a particular time and that knowledge, the plaintiff contends, can be garnered from the documents in the schedule to the statement of claim.

151. Counsel submits that the claim relating to the Liability for Defective Products Act, 1991 only relates to matters coming into being after December, 1991 and there is no averment of prejudice in this regard. The only debate that will be involved, arising under the Liability for Defective Products Act, 1991, will be as to whether cigarettes from 1991 onwards failed to provide the safety which a person is entitled to expect taking all the circumstances into account.

152. Counsel for the plaintiff contends that the reality of the situation is that the defendants in these proceedings have available to them relevant documentation which not only is documentation in the public domain but also documentation that has been preserved over the years and the nature of this documentation should have been indicated to the Court together with an indication of the

material or evidence which they will be deprived of being able to use at the trial which is so essential for whatever reason. Counsel instances the fact of Peter Wilson who was the then Managing Director of the third named defendant company giving evidence to the House of Commons Committee in January, 2000 in relation to the company's state of mind from the 1960s on. No indication has been given as to whether Mr. Wilson is now available to give evidence or not. Counsel refers to the fact that the third named defendant when giving evidence to the Houses of the Oireachtas Committee never indicated he was prejudiced in any way and, furthermore, both Mr. Goodrich and Mr. Birks gave evidence on behalf of the third named defendant to the joint committee and both are still alive but neither are mentioned in the affidavit delivered on behalf of the third named defendant. An indication has been given that they will have no relevant information to give to the Court but that is as far as the matter is put. In essence, counsel contends that it is clear from the Joint Houses of the Oireachtas Committee Report that the defendants have already collected the necessary documents.

153. Counsel contends that the plaintiff's trial will involve witnesses, documentary evidence and witnesses to explain some of the documentary evidence. It has not been shown by the defendants that the persons identified in their various affidavits as not being available are necessary witnesses. The issue in this case can be dealt with by other witnesses available to the defendants including expert witnesses.

154. Counsel submits that the plaintiff will be ready to proceed with the action at the latest by January, 2008.

155. Counsel for the plaintiff submits that other jurisdictions have managed without difficulty to deal with cases involving facts of some antiquity.

156. Reference is made to *Thompson v. Smiths Ship Repairers (North Shields) Limited* (1984) 1 QB 405 which was in relation to a hearing loss case covering a period in excess of 40 years.

157. Counsel submits that the handling of the case demonstrates that a court will take steps to ensure that the defendants will receive a fair trial despite a lapse of time. It is clear that the onus of proving the case remains firmly on the plaintiff and, further, that the court will not draw any adverse inferences against the defendant who is, as a consequence of lapse of time, unable to call witnesses or produce documents.

158. Counsel relies on a passage from p. 417 of the judgment of Mustill J. in the following terms:-

> "Plainly, the further back into history the inquiry is taken, the more difficult it is to find anyone with personal knowledge of the individual employer's processes of thought. But such persons exist in respect of more recent times, and the omission to call them has ruled out any possibility of a finding that the defendants specifically addressed themselves to the question, and took a decision which was reasonable at the time, even if appearing mistaken in retrospect. On the other hand, I do not think it legitimate to draw inferences adverse to the defendant from the complete absence of factual evidence on their side, and in particular to infer that at some date in the past the management considered the problem and cynically decided to do nothing about it. It would be proper, before drawing such an inference, to test it against the contemporary documents, and this is no longer possible because, with a few exceptions, none prior to the 1970s remain in existence. It is not the defendants' fault that the case is so old, and it would be unfair to assume against them that the missing documents would have revealed something damaging. This being so, I consider that the right course is to proceed on the basis that, until such dates as existing documents begin to provide concrete information, the defendants simply shared in the indifference and inertia which characterised the industry as a whole."

159. Further reference is made to the fact that Mustill J. considered what the defendants could have done to provide ear protection and this analysis covered a period of at least 100 years. The judge considered the employer's means of knowing what appliances were available to minimise the effect of noise and this involved examining literature and publications that were years old. Mustill J. went on to hold the defendants liable from the year 1963.

160. Further reference is made to asbestos litigation and the case of *Holtby v. Brigham and Cowan (Hull) Limited* [2000] 3 All E.R. 421 which involved a plaintiff who was exposed to asbestos dust for many years of his working life as a marine fitter from 1942 to 1981. In 1996 the plaintiff was diagnosed as suffering from asbestosis and claimed damages. Stuart-Smith L.J. in the course of his judgment stated as follows at p. 429:-

> "Cases of this sort, where the disease manifests itself many years after the exposure, present great problems, because much of the detail is inevitably lost. I can see that in *Borel's* case, where the defendants were manufacturers as opposed to employers, the position may be particularly difficult. But in my view the court must do the best it can to achieve justice, not only to the claimant but also to the defendant, and among defendants."

161. Further reference is made to the judgment of Hale J. in *Jeromson v. Shell Tankers (UK) Limited* [2001] ICR 1223 which again involved exposure to asbestos. The plaintiff's husband had been employed by the defendant from 1956 to 1961 and in June, 1996 died after developing malignant mesothelioma due to exposure to asbestos. Hale L.J., having considered the law and the factual findings, proceeded to consider the literature available to a careful employer at the time and stated as follows:-

> "It is necessary therefore to consider the literature itself and what an employer such as Shell should have made of it. This is not an issue which an expert opinion could determine. The experts were helpful in producing the literature but what a reasonable and prudent employer should have made of it was a matter for the court…. The judge was entitled to conclude that a prudent employer would have taken precautions or at the very least made enquiries about what precautions, if any, they should take. If Shell had made enquiries, the judge was in little doubt what advice they would have received…. Accordingly, the judge having correctly directed himself on the law, having made findings of fact about the nature and extent of potential exposure to asbestos dust, was entitled to draw the conclusions he did from the foreseeability of harm flowing from such exposure at the relevant time".

162. Further reference is made to *McTear v. Imperial Tobacco Limited* [2005] CSOH 69. Counsel refers to the fact that it was clear from the judgment of Lord Nimmo Smith that, despite the lapse of time from 1964 to 2004, the defendant was able to defend the claim and particular reference is made to the fact that more than 10 years had elapsed between the date of the accrual of the cause of action and the hearing. Further reference is made to the New Zealand case of *Pou v. British American Tobacco (New Zealand) Limited and WD & HO Wills (New Zealand) Limited* [2006] 1 NZLR 661 in which Lang J. stated at paragraph 40 of his judgment that he was proceeding:-

> "[O]n the basis that it is probable that the defendants, in common with other major manufacturers of tobacco products,

kept abreast of the growing concern during the 1960s that there was likely to be link between smoking tobacco and the incidence of lung cancer. These developments are considered in greater detail later in this judgment. In particular, I have no doubt that they were aware of the principal conclusions reached in 1962 by the Royal College of Physicians in the United Kingdom and in 1964 by the advisory committee to the United States Surgeon General. Those conclusions were expressed in clear and unmistakable terms, and were also the subject of significant comment in the media when the reports were released. The reports, and the publicity that followed, would have been obvious and of immediate relevance to all the major players in the tobacco industry throughout the world at that time. They of all people would have appreciated the potential ramifications of these matters both from their own prospective and that of the industry as a whole".

163. Lang J. stated at paragraph 42 of his judgment that:-

> "Given the level of knowledge that the tobacco manufacturers, including the defendants, must have had in 1968, I am satisfied that a prima facie duty to warn is likely to have existed at common law by that time. The duty to warn would include a requirement to warn consumers that smoking cigarettes may be very hard to give up and that it could be injurious to health."

164. Counsel refers to the fact that Lang J. considered the history and development of smoking in New Zealand and then considered the level of information that was available to the community at large in the 1960s regarding the dangers of smoking.

165. Counsel submits that these various cases are authority for the proposition that this type of litigation involving tobacco companies can be conducted in a fair manner despite the lapse of time between the date of commencement of smoking, the date of accrual of the cause of action and the date of the hearing of the action itself.

166. Counsel for the plaintiff emphasises that no personal blame attaches to the plaintiff, that such delay as there has been is not characterised by a complete absence of activity and in this regard the Court is entitled to have regard to the reality of the situation in which the plaintiff's solicitors have found themselves, acting for a large number of plaintiffs in complex litigation and that there are contemporary claims in respect of which there can be no allegation of delay or prejudice which it is submitted must proceed to trial. These claims have had an obvious link and/or overlap with the historical claims in respect of which there are allegations of delay and/or prejudice. It is submitted that it is just and convenient to have all matters proceed to trial. Further, to grant the reliefs sought is to preclude the plaintiff absolutely, whereas to deny the reliefs sought does not deny the defendants the opportunity to defend. In other jurisdictions they have demonstrated an ability to defend and to defend successfully claims of similar antiquity.

167. It is submitted by way of reply by the defendants that, in effect, the plaintiff is attempting to distinguish the facts of the instant case from those that pertained in *O'Connor* and *Manning*, by reason of the fact that the plaintiff's lawyers were engaged in work relating to the case during the period which they now accept resulted in inordinate delay, that the defendants have failed to provide a sufficient degree of particularity of prejudice suffered as a consequence of the delay, that the plaintiff has a distinct claim in respect of his addiction to smoking on an ongoing basis and a claim pursuant to the provisions of the Liability for Defective Products Act, 1991. It is suggested by the plaintiff that these aspects of the claim are not affected by the historical position and, further, that in respect of the declaratory relief claimed, this is directed to the present rather than to the past.

168. Counsel for the first named defendant, in reply, contends that proceedings in this jurisdiction are governed exclusively by the provisions of the Statute of Limitations Act, 1957, as amended, and by the Rules of the Superior Courts. Once proceedings are commenced within the period provided for by the statute and once they are progressed within the periods identified in the Rules, the plaintiff has the right to proceed with his action and the court has an obligation to hear and determine the issue.

169. Counsel contends that the critical consideration is as to whether or not it is possible for the action to proceed in a manner that is compatible with the principles of fair procedures and any references to what occurs in other jurisdictions such as smoking cases or asbestos cases involving a significant lapse of time, are of limited assistance. Counsel contends that the constitutional guarantee in this jurisdiction is the right to fair process which is rooted in the entitlement to a fair hearing. The crucial right is to adduce evidence in support of one's case and to confront one's accusers and if a party is deprived of this entitlement then a case cannot be presented in a manner that secures the entitlement to constitutional fair procedures and, in effect, is a fair trial possible not upon the perceived strengths or weaknesses of the position of either party but in the context of a fair hearing?

170. Counsel also contends that, in determining the effect of the right of fair process, what is critical is not merely the impact of delay upon the ability to present one's defence, but also the nature and extent of the claim that has to be met. In this instance the plaintiff's case is pleaded in a very broad manner. Counsel emphasises that central to the claim is the situation pertaining to knowledge and in this regard the plaintiff is urging upon the Court that there was a breach of duty because the defendants knew or ought to have known that their actions were likely to cause arterial disease in the plaintiff, that the defendants knew or ought to have known that cigarette smoking was addictive, that the defendants designed their cigarettes so as to deliver nicotine and at the same time reduce negative sensations associated with cigarettes, designed their cigarettes so as to appeal to children and to the plaintiff, designed their marketing so as to reinforce the appeal and addictive quality of cigarettes, and deliberately concealed and suppressed information. Each of these claims of knowledge occurs at every point on a continuum from at the very earliest, having regard to the references as made by the plaintiff, being 1942, but certainly from 1980 onwards.

171. Counsel contends that the plaintiff has deliberately gone back in history in formulating his claim in the belief that this may assist him in asserting that at the time he began smoking he did not appreciate that smoking was a risk factor and that he became addicted before he realised that fact so that, in effect, the case is that the plaintiff became addicted to cigarettes from in or about 1960/1961 and that at that time the defendants knew or ought to have known that cigarettes were addictive. The further the plaintiff goes back in time the more difficult it becomes for the defendants to counter the allegations that the plaintiff makes. Counsel contends that this is particularly invidious, as in these proceedings the plaintiff seeks to mount his claim by reference to a plethora of documents which he will presumably seek to adduce in evidence through the vehicle of an expert but whose authors are not available for cross examination. The crucial question which the plaintiff does not answer is as to how the defendants are to counter the allegations made against them as to their state of mind and knowledge, when, as is the case for this defendant, the critical decision makers for the relevant knowledge at the relevant times are deceased or unable to give evidence.

172. As regards the plaintiff's claim pursuant to the provisions to the Liability for Defective Products Act, 1991, counsel for the first named defendant contends that the plaintiff does not and cannot make a case based solely upon events post-1991. He has to establish that he has been injured by the product and must establish that he consumed it unaware of risks associated with it and, to do this, he inevitably has to base his case back in the 1960s at a point in time when he started smoking. An important aspect of this part of the claim is that the defendants knew or ought to have known that cigarettes were addictive and if the plaintiff alleges that

he became addicted in the 1960s, the only knowledge of the defendants relevant to the addiction issue is the knowledge of the defendants in the 1960s and thus knowledge is central to a claim brought under the Liability for Defective Products Act, 1991.

173. As regards the declaratory proceedings, it is clear that if the plaintiff's claim is dismissed in respect of damages, it must also fall in respect of the declaratory reliefs. Counsel contends that the declaration sought at para. 3 confers no benefit of any kind on the plaintiff given that he is a person who has ceased smoking. The claims at paras. 4, 5, 6 and 8 are historical. The claims at paras. 7 and 9 are not pleaded in the plenary summons and are not properly before the Court at all. Paragraph 11 is a matter exclusively for the State defendants and para. 12, being a legislative decree from the High Court that cigarettes are to be banned, is a relief which, apart from its inherent implausibility, could only be made when all the persons having an interest in the matter are before the Court and, as a number of the tobacco companies are not before the Court in this case, the relief sought, in truth affords no basis for salvaging the plaintiff's claim.

174. Counsel on behalf of the second named defendant further emphasises that the significant issue in these proceedings is what the second named defendant knew or ought to have known at any particular point in time as to the alleged harmfulness of smoking and what the second named defendant did or ought to have done as a result and why. The plaintiff cannot be under any misapprehension as to the position of the second named defendant in this regard as is evident from the hearings before the Oireachtas Joint Committee on Health and Children and the House of Commons Health Committee. The second named defendant has consistently maintained that it at all times acted reasonably in all the circumstances.

175. Counsel refers to the debate as to whether the reality of the situation is that the relevant period of time flows in this case from 1960 when the plaintiff started smoking or as far back as 1942, bearing in mind the reference to certain documentation. Counsel refers to a particular passage of discussion on day 9 of the hearing of the motion between counsel for the plaintiff and the court, wherein the question was asked "so are you saying that any period of time before 1960 is irrelevant to this case?" to which the answer was "except in the sense that insofar as there are documents which are relevant to a prior period, they are documents which would go to the knowledge".

176. Counsel relies on this answer as bringing this claim back to a starting point in 1942 and that in truth and in substance there has been no resiling from the dates set out in the statement of claim, nor any material limitation of the period of time to which the court is going to have to have regard.

177. With reference to the reliance placed on the judgment in *Thompson* by counsel for the plaintiff, Mr. Collins, counsel for the second named defendant, refers to a particular passage from the judgment at p. 416 wherein Mustill J. States:-

> "An employer who took an interest in the subject might, for most of the 20th century have had to be content with published material which was incomplete and in some instances misleading. But those employers who were engaged in ship building and ship repair had no need for published material. With one exception the whole of the oral evidence and the voluminous written material very properly collected and adduced at the trial point to the same conclusion; namely that every one in those industries took the existence of the problem for granted".

178. The problem related to hearing loss associated with occupational exposure and Mustill J. went on to state at p. 417:-

> "The next step is to consider what means the defendants took to combat this risk….Here we come to a striking feature of the case. Not one witness has been called from any of the three defendants to explain what if any consideration they gave to the problem, what decisions were taken, and for what reason. The defendants were not obliged to account for their choice of witnesses and did not do so. Plainly, the further back into history the inquiry is taken, the more difficult it is to find anyone with personal knowledge of the individual employer's processes of thought. But such persons must exist in respect of more recent times, and the omission to call them has ruled out any possibility of a finding that the defendants specifically addressed themselves to the question, and took a decision which was reasonable at the time, even if appearing mistaken in retrospect".

179. Counsel refers to the fact that there are a number of points which arise from these passages. Firstly, there is no suggestion in the passages or anywhere in the judgment that it had been explained to the Court that in fact there were no witnesses available or that the explanation referred to, was one which was beyond the power of the defendant company to give. On the contrary, the tenor of the passage suggests that the Court regarded the failure to call such witnesses as one which had not been explained.

180. The other matter arising is that of the consideration that the defendants gave to the issue of the alleged risks associated with smoking, what decisions were taken and for what reason. Counsel refers to the fact that, in terms of a claim for negligence, as the claim is made here, an issue arises or may arise as to whether a party, to use the words of Mustill J., "specifically addressed themselves to the question, and took a decision which was reasonable at the time, even if appearing mistaken in retrospect".

181. Counsel specifically refers to the content of the statement of claim and that it is not suggested or pleaded that the ongoing injury has any different derivation or any different legal basis to the injury apparently diagnosed in 1996. It is not presented as such and is not capable of constituting on the pleadings a separate claim because it is entirely co-terminus with what is characterised as the historical claim and relates to precisely the same alleged wrongful conduct stretching back to 1942. Counsel emphasises that the claim relates to ongoing injury and commences with the plaintiff starting to smoke, the product being addictive, and his being unable to stop.

182. Counsel for the second named defendant emphasises that the defendants need only rely on general prejudice as a basis for the application to dismiss the plaintiff's claim for want of prosecution and it is not necessary to establish specific prejudice. Even where specific prejudice is asserted, as it is in this instance, it has never been necessary to establish a complete absence of witnesses. The argument as advanced on the plaintiff's behalf that the tobacco companies were able to produce witnesses to give evidence to parliamentary hearings, is wholly misconceived in that it ignores the fundamental distinction between a parliamentary inquiry and civil litigation in this jurisdiction. The former is concerned with informing the legislature in its legislative capacity, not with the determination of civil legal liability, and, further, the rules of evidence are wholly different to those which pertain before a parliamentary inquiry. Insofar as the plaintiff relies on the decision of the Supreme Court in Delahunty, counsel observes that no issue as to delay was raised or considered in the application before the Court and the only issue was whether the claim ought to be dismissed as disclosing no reasonable cause of action and that was the context in which the case was dealt with.

183. As regards the Liability of Defective Products Act, 1991, that claim has to be viewed against the background of precisely the same delay and any claim pursuant to the Act of 1991 cannot be divorced from the events prior to the coming into force of that Act.

184. Counsel contends that the Court has jurisdiction to dismiss only part of the plaintiff's claim.

185. It is submitted by way of reply by the third named defendant that, having regard to the nature and extent of the plaintiff's allegations, this case is not a straightforward case in relation to the plaintiff suffering injury but is a type of action that appears, in effect, to be a public inquiry that the Court is invited to conduct into the tobacco industry. The central thrust of the statement of claim focuses on knowledge, action, and inaction. It raises the question as to the knowledge of the defendant company at certain points in time and that knowledge is proved by internal witnesses. In counsel's submission, it goes further in asking the questions: what did you do? Why did you do it? Why did you not do it? The statement of claim in counsel's submissions discloses huge controversy in relation to, amongst other things, areas where knowledge has changed and where it has been cumulative, the historical controversy on scientific issues, the controversy on design, what was done or not done, what was possible or not possible at different points in time, and the interface between the tobacco companies and the regulators through various organisations. The plaintiff relies on the documentary side, but in the particular circumstances of such wide ranging complaints, counsel contends that in order to defend themselves the defendants have to have witnesses who were there at the time, who can testify from their contemporary knowledge and with a reasonable recollection not rendered largely useless by the passage of time. Counsel contends that it is hard to imagine any case in which the plaintiffs are so clearly intent on using such a broad range of documents from regulatory authorities in many countries including Ireland, the United Kingdom, and the United States, from other companies in the same industry, from other geographic markets dealing with issues of chemistry, science, public health, marketing, public awareness, causation, psychiatry and addiction, over such a massive spread of time. The defendants simply do not have contemporary witnesses who have a sufficiently good recollection or could be expected to have a sufficiently good recollection to deal with the many issues that the plaintiff pleads against the defendants. Counsel for the third named defendant points out that there is no claim under the Act of 1991 against the third named defendant in the purported statement of claim as delivered in December, 2003. Counsel contends that this was a conscious decision, as the case was carefully pleaded against individual defendants who potentially could have had an exposure under the Act of 1991. One reason may be that it was realised that the plaintiff had started smoking "Silk Cut", one of the third named defendant's brand of cigarettes after the writ had been issued.

186. It is contended by way of reply on behalf of the State defendants, that the reliefs in general pertain to the tobacco company defendants as distinct to the State defendants. The relevant declaratory reliefs as sought, germane to the State defendants, appear to be reliefs 11 and 12 which, in effect, seek an order prohibiting the sale of tobacco products, including cigarettes, and an order directing the defendants to make available to the general public all material available to them relating to the health risks posed by cigarettes and their component parts. Essentially, counsel submits that the court is being asked to direct the Minister to exercise discretionary powers under two statutory provisions. In effect, these are judicial review applications which are governed by very strict time limits as set forth in the Rules of the Superior Courts and, in essence, are now hopelessly out of time. Further, counsel contends that the plaintiff is straying into government policy matters against a background where no formal request has been made by the plaintiff for any of the actual declaratory reliefs as sought and these, in any event, would be entirely a discretionary matter for the relevant Minister. If this relief is genuinely being pursued by the plaintiff, it has to be dealt with as a judicial review application and not as some constituent part of what in effect is a personal injuries action. Insofar as relief is being sought that the relevant Minister should make available to the public, or particularly to the plaintiff, information which he has previously obtained under the two relevant statutory powers which are specifically invoked, such an application is amenable to a Freedom of Information application and is a completely unnecessary application in this type of action.

187. With regard to striking out the whole or part of the plaintiff's claim, counsel emphasises that the State defendants are seeking to strike out the plaintiff's claim in its entirety. It is for the plaintiff to say whether there is something in the information in the pleadings that can still stand up despite the present application but this has not been done.

188. Counsel for the State defendants asserts that tobacco is not a new item. Cigarettes have been on sale since the beginning of the 20th century and tobacco has been in circulation in the western world probably going back to the time of Walter Raleigh. In order to be able to meet a case in relation to what has been the policy of the State, counsel submits that you can not look at what happened from 1996 onwards and ascertain whether a State policy is flawed or not. Policy by definition is an evolving matter in the part of the running of a State. Counsel says that, in order for the State to meet a claim of this kind, it is necessary to look at the steps that were taken at particular times along the way in the light of the knowledge that the State had and what steps were to be taken and whether those steps were or were not taken at the particular time. The policy of the State cannot be judged on a snapshot exercise as to what has been the state of knowledge or the activity on the part of the framers of policy made over the last number of years.

189. The case that counsel for the State defendants emphasises is very simple: knowledge is one thing but that does not necessarily explain the thinking behind the policy of policy framers and policy makers over the relevant period of time, which in this instance, appears to date back as far as 1942. The proper person to deal with the framing of government policy is not somebody coming in at this stage applying some sort of learned, historical perspective to documents which were framed and drafted in another era; the proper person is the person who was actually the thinker or the framer behind the particular policy at the time of its inception.

190. The plaintiff pleads that the State defendants knew or ought to have known that, from around 1942, cigarettes were addictive and that, from 1950, cigarettes were harmful. The claim accordingly is not a contemporary claim and on any view is a historical claim.

191. Insofar as the thrust of the plaintiff's claim against the State defendants is concerned, counsel submits that the plaintiff is really tackling the policy making of successive governments from the Finance Act of 1950 onwards.

192. Counsel specifically refers to the averments of Mr. Corcoran on behalf of the State defendants that the precise difficulty for the State defendants is that they are now being asked to assemble evidence and to call witnesses relating to the events leading up to the enactment of relevant legislation, some of which has been on the statute books for almost 30 years.

193. Counsel submits that the representations made by the plaintiff fall well short of providing an answer to the position that the State defendants find themselves in, of not being in a position to represent themselves at any trial of this action because the documentary evidence or the documentary trails as identified, does not elaborate on the philosophy behind the policy making, and only gives a snapshot of what happened at various legislative or administrative milestones over a period of time.

194. As regards the 1964 Memorandum to Government, a document which was opened during the course of the hearing, counsel advises that every key civil servant and politician connected with this particular document is now deceased.

195. In counsel's submission, there is no explanation as to why the State defendants were not joined in the proceedings at the same time as the tobacco companies. In order to conduct a balancing exercise, counsel submits that the Court has to have something on the other side of the scale by way of an explanation that excuses or even explains why the State defendants were not joined in at

the same time as the tobacco companies and counsel contends that the scales only tip one way.

196. Counsel contends that no assertion is made on the plaintiff's behalf to the effect that reliance had been placed on the Report of the Oireachtas Committee to the detriment of the plaintiff. Nor is it said that the plaintiff was lulled into any sense of false security and that, as regards this aspect of the case, the plaintiff adopted a 'wait and see' policy.

197. In essence, counsel submits that the only way that the events of 30 years ago, as far as policy making is concerned, can properly be judged in a court is not by a public inquiry or by historians, but by a court having the first hand testimony of the persons actually behind the thinking and the framing of the policy at the particular time.

198. Counsel refers to the recent decision of this Court (Peart J.) in *Byrne v. The Minister for Defence* [2005] 1 I.R. at p. 577 where the Court was specifically asked to look at delay on the basis that the defendants claimed that, as a result of the time which had elapsed before the commencement of the proceedings, they were greatly prejudiced in the conduct of their defence against a background where the plaintiff had served as a member of the armed forces for three years from 1974, during which time he was exposed to noise from rifles, mortars and machine guns. In 1998, he commenced proceedings against the defendants seeking damages for hearing loss and injuries which he alleged resulted from his exposure to noise while in the Defence Forces and while not provided with any ear protection. Counsel refers to the view as adopted by Peart J., which is instructive in contrasting what is the appropriate approach to be taken in the Irish jurisdiction as opposed to the approach taken in certain other jurisdictions.

199. Peart J., in dismissing the plaintiff's claim, took the view that where there was inordinate and inexcusable delay on the part of a plaintiff in bringing proceedings to dismiss the proceedings in the absence of any prejudice to the defendant, that an army deafness claim was in a category of its own and that there had been a very large number of such claims wherein the State's capacity to deal with a claim had not been hampered and prejudiced and there had not been a risk of an unfair trial.

200. Peart J. took the specific view that, in exercising its inherent jurisdiction on the grounds of inordinate and inexcusable delay, the Court had to consider and protect competing interests which were the plaintiff's right of access to the courts and the defendant's right to an expeditious hearing, to finality and not to be adversely prejudiced by delay, and the public interest which was independent of the parties, in not permitting claims which had not been brought in a timely fashion to take up the valuable and important time of the courts and thereby reduce the availability of the much used and needed resource to plaintiffs and defendants who had acted promptly in the conduct of their litigation, as well as the increased cost to taxpayers for providing a service of access to the courts which best served the public interest.

201. Accordingly, in *Byrne* the court found that there was no disadvantage to the Department of Defence in meeting a deafness case because they had previously dealt with many similar type cases and they appeared to have the appropriate documentary records. Counsel contends that this point applies, a *fortiori* in the instant case, where the defendants have shown prejudice and the plaintiffs have been unable to show any countervailing matter of justice to be put into the balance which is based on an explanation or excuse as to why the State defendants were not sued earlier.

202. As regards Article 6 of the European Convention on Human Rights, counsel contends that it is an extra factor to be taken into consideration by the Court in the application of existing Irish law and jurisprudence. The legislation bringing the European Convention on Human Rights into domestic law operates only from the 31st December, 2005, and it affects the conduct of a trial that the State defendants are now contemplating. It affects the State defendants and the possible prejudice to them in meeting a trial at this stage or a trial at any stage in the future, and in that way, the State defendants are entitled, as are the tobacco company defendants, to call to their assistance, Article 6 of the European Convention on Human Rights as an extra factor to be put in the balance along side the protections under Article 34 of the Constitution.

Conclusion

203. Accordingly, the first issue now to be determined is as to whether or not in the Court's discretion, on the facts, the balance of justice is in favour of or against the proceeding of the case.

204. The basic criteria is whether the delay has given 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.

205. An issue arises as regards whether or not a statement of claim has actually been delivered on the first three named defendants on 5th December, 2003. The Rules of the Superior Courts are quite clear in stipulating the relevant periods of time for the delivery of a statement of claim. In the case of each of the first three named defendants the relevant period of time had long since elapsed.

206. It is clear that the plaintiff's solicitors did not, at the relevant point in time, seek the consent of the solicitors for the defendants to the late delivery of a statement of claim and proceeded unilaterally to forward a statement of claim to the respective solicitors for the first three named defendants in December, 2003. The situation has become even further complicated by reason of the fact that apparently through an alleged error, no claim was made out against the third named defendant for a claim in respect of relief pursuant to the Liability for Defective Products Act, 1991 and counsel for the plaintiff handed into court, during the course of the hearing, a further amended statement of claim. I would regard the situation pertaining to the purported delivery of the statement of claim as unsatisfactory in itself and I come to the conclusion that the amended statement of claim as submitted, represents most probably the final version of a statement of claim that would be delivered by the plaintiff if this Court saw fit in the appropriate circumstances to grant the relevant extension of time. Accordingly, in referring to the "purported delivery of the statement of claim", that is the status which, in my view, the document merits *vis à vis* the position of the first three named defendants.

207. In my view, it is clear from a perusal of the statement of claim that the claims being advanced by the plaintiff as against each of the defendants are very wide ranging and non specific with sparse particulars. The wrongful acts alleged go back as far as a specific reference, to certain events in 1942, followed by references to other specific acts in the 1950s and to the plaintiff having commenced smoking in 1960/1961.

208. If the statement of claim is delivered to the first three named defendants at this stage by leave of the Court, it is inevitable that detailed notices for particulars will be raised and one only has to look at the history of events in this regard to come to a conclusion, as a matter of probability, that replies to particulars will take some considerable period of time. There may well be a preliminary issue raised as regards the Statute of Limitations and there may well be interrogatories. Clearly there will be orders for discovery sought and cross orders and there will be side bar motions in respect of claims of privilege as referred to in the arguments as made before the Court. I fully accept that, the submission made by counsel for the plaintiff, as regards a potential hearing date of January, 2008, is made in good faith, but I do not accept that there is any reality to that proposition. My overall conclusion is that, at best, it may be possible to have a full hearing of this claim in the latter half of 2009.

209. In my view, having regard to the passage of time since the accrual of the cause of action in September, 1996, there is presumed prejudice on the part of all of the defendants.

210. The affidavits sworn for each of the defendants clearly make out a case of actual prejudice and ongoing prejudice due to delay and lack of progress in the prosecution of the proceedings, not only from the date of the accrual of the cause of action in September, 1996, but also from the date of the institution of the proceedings. A number of relevant persons have died since the date of the accrual of the cause of action and the ongoing delay of a number of years, as a matter of probability, will further reduce the potential witnesses who will be available to the defendants to give any or any meaningful assistance. I am satisfied that this is not, despite the voluminous documentation, a document's case. There are issues before the Court which can only properly be addressed, indeed fairly addressed, in *viva voce* evidence from those who can speak from their own knowledge of the events and happenings during the relevant period to these proceedings. With the passage of time, clearly there will be the fading of memories for those who are alive and available and there is the increasing likelihood of there being deficiencies in documentary records, documents lost or misplaced and a significantly increased difficulty in ascertaining what was done and crucially, why it was done or not done, at the relevant periods of time regarding the issues before the court.

211. It is necessary to consider the conduct of the defendants since the commencement of the proceedings for the purpose of establishing whether any delay or conduct on the part of the defendants amounted to acquiescence in the plaintiff's delay and as to whether the defendants were guilty of any conduct which induced the plaintiff to incur further expense in pursing the action.

212. Counsel for the plaintiff raises the issue that the defendants collectively could have brought the motion to dismiss for want of prosecution following the issue of the plenary summons and that by waiting until March, 2004 to bring this motion they and each of them acquiesced in the plaintiff's inordinate delay.

213. I am satisfied that the steps taken by the defendants in relation to the plaintiff were reasonable and were not such as to debar their entitlement to an order for a dismiss if the facts otherwise so dictate. I do not consider that the motion as brought by the defendants in respect of the collection and preservation of the plaintiff's lifetime records was an unnecessary step or that it put the plaintiff to unnecessary expense. I do not consider that it was incumbent on the defendants to bring the motion to dismiss for want of prosecution following the issue of the plenary summons. In respect of the State defendants, it was reasonable, having received the statement of claim, to raise a detailed notice for further and better particulars and to have anticipated a reply thereto within a reasonable period of time. Accordingly, I do not fault the defendants in the manner in which they have conducted the defence of the plaintiff's claim against them. Counsel for the plaintiff emphasises the fact that, in essence, on any reasonable appraisal of the voluminous documentation that has been made available, and in particular, but not exclusively, having regard to the information contained in the Houses of the Oireachtas Report and the House of Commons Report, the plaintiff has a strong case on grounds of causation and foreseeability. I do not consider in the particular circumstances of a motion such as this to strike out proceedings for want of prosecution, that the question of whether a plaintiff has a strong case or not is a relevant feature, because the motion is only concerned with a failure to prosecute based on inordinate and inexcusable delay linked into prejudice and the issue to be decided is governed by the principles as set out in '*Primor'*, which does not indicate that the strength or otherwise of the plaintiff's claim is a relevant factor to be taken into account.

214. I do not consider that there was any delay on the part of the defendant or that the conduct of the defendants amounts to acquiescence in any way in respect of the plaintiff's inordinate and inexcusable delay.

215. I take the view, that insofar as the State defendants are concerned, the plaintiff, in effect, adopted a 'wait and see' policy, hoping initially that the State may have taken some action against the tobacco industry or, alternatively, that they may have subsidised in some way the present litigation on behalf of individual plaintiffs against the tobacco industry. While there may have been a recommendation from an Oireachtas committee that litigation against the tobacco industry could be contemplated by the State, there is no evidence before me that the government of the day itself actually ever gave any realistic consideration to instituting legal proceedings against the tobacco industry nor any indication that the State was ever giving hope to individual plaintiffs that some form of special arrangement would be made to assist them financially with litigation against the tobacco industry. In the circumstances, I do not differentiate between the relevant time factors arising from the date of the accrual of the cause of action and the date of the actual delivery of the statement of claim by the plaintiffs to the State defendants and the purported delivery of the statement of claim to the first three named defendants. The crucial period is from the date of the accrual of the cause of action and clearly the proceedings against the State defendants should have been instituted at the same time as the proceedings against the first three named defendants. In my view, there is no material difference in the delay involved and no different considerations apply merely because, as a result of the manner in which things worked out, the statement of claim was actually served on the State defendants.

216. In the particular circumstances of this case, the plaintiff complains of having suffered a significant illness and these proceedings, if he has a good cause of action, represent the only opportunity in which he has to recover compensation.

217. I am satisfied that the dismissal of the claim would have serious consequences for the plaintiff. I am further satisfied, for the sole purpose of this motion, on the facts as known to me and having regard to the submissions as made on the defendant's behalf that no blame, in the circumstances, attaches to the plaintiff personally.

218. I am satisfied, having regard to the judgment of Clarke J. in *Rogers*, that this Court has an entitlement to dismiss all or any part of the plaintiff's claim as it sees fit. An argument was raised during the course of the submissions that the Court has jurisdiction only to strike out the entire of the plaintiff's claim or none of it at all, the logic of this argument being that, even if the Court considered that several aspects of the plaintiff's claim should be dismissed for want of prosecution, if there were any saving aspects which, in the Court's view, should not be dismissed then the entire claim must go forward to a hearing. I do not accept that there is any merit in this contention and consider that, pursuant to the inherent jurisdiction of the Court, I am entitled to dismiss the plaintiff's claim in its entirety or any aspect thereof, as I deem fit.

219. I do not consider that any conduct by any of the defendants herein induced the plaintiff to incur further expense in pursuing the action. I appreciate that the solicitors on behalf of the State defendants called for the delivery of a statement of claim and in turn, when delivered, raised an extensive notice for further and better particulars, but I do not consider, in the exercise of my discretion, that any significant weight is to be attached to this conduct and I do not consider that it was conduct which induced the plaintiff to incur further expense in pursuing the action to such an extent as to constitute an absolute bar preventing the defendant from obtaining the reliefs as sought herein.

220. Counsel for the plaintiff has argued that there are considerable differences between the factual situations that pertain in both *O'Connor* and *Manning*, which should lead this Court to a different conclusion in the plaintiff's favour.

221. I accept that clearly there are factual differences between this case and the *O'Connor* and *Manning* cases. For example, in *O'Connor*, Quirke J. came to the conclusion that, following the issue of the proceedings, for a period of almost three years no tangible steps of any kind were made on behalf of the plaintiff to prosecute her claim. No evidence was adduced before the trial judge of investigations into the claim or of the collection of evidence as to liability and no claim was advanced that such activity caused or contributed in anyway to the delay in the prosecution of the claim. Quirke J. went so far as to state that it was difficult to avoid the conclusion that virtually nothing was done to prosecute the plaintiff's claim between March, 1999 and November, 2001.

222. In *Manning*, Finlay Geoghegan J. came to the conclusion that, in essence, no explanation whatsoever was offered for the delay in the issue of proceedings and no plaintiff in those proceedings had sworn an affidavit. Further, Finlay Geoghegan J. stated that there was absolutely no explanation as to why in each case no proceedings were issued until almost three years after the date of diagnosis relied upon or indeed why the summons was not served in each case for approximately eleven months after issue.

223. As previously indicated, I take the view that, having regard to all of the research as carried out by Mr. McDonnell prior to his joining with Beauchamps in the autumn of 1999 to represent the plaintiff, and with the publication of the Houses of the Oireachtas Report in October, 1999 and of the House of Commons Report in June, 2000, the relevant information was available for the purpose of the delivery of a statement of claim, and, as previously indicated, any further alleged research and work carried out does not, in my view, provide a valid excuse for the delay in the delivery and purported delivery of the statement of claim in December, 2003. Accordingly, while I accept that there are factual differences between what occurred in *O'Connor* and *Manning*, in contrasting a situation where nothing at all may have happened, as opposed to the nature of the work as outlined that was carried out on the plaintiff's behalf, the factual circumstances do not, in my view, enhance the present plaintiff's situation and as accepted by the plaintiff, do not alter in any way the legal principles to be applied.

224. As regards the work done, I am satisfied to accept the submission made by Mr. Murray, counsel for the first named defendant, that no satisfactory explanation is offered as to why a plenary summons was not issued for over one year following consultation with the plaintiff or why, having been so issued, it was not served for a period of eight months and why no statement of claim was delivered or purportedly delivered for period of four years following the initial consultation with the plaintiff. In my view, after mid 2000, there is very little, if anything, of real relevance that can be related to the final end product in the statement of claim. The lifetime medical records that were gathered do not, in my view, manifest themselves in any way in the statement of claim with the account of the plaintiff's medical condition finishing with his attendance with Mr. Meighan in May, 2000. The lifetime medical records were not required for the statement of claim and are not reflected in any way in the statement of claim, and in any event, only related to the remaining seventeen claims at the relevant time.

225. The streamlining of the various cases was necessitated by reason of the fact that Mr. McDonnell was seeking clients in the public arena without due regard as to the realistic prospect of sustainable litigation against the relevant tobacco companies. This was a situation that could easily have been ascertained with due diligence and would, in my view, be regarded as the most minimal of precautions to have been taken when a solicitor takes on a new client in what clearly was going to be a matter involving complex litigation. This issue has previously been determined herein as not being a valid excuse for the type of period of delay that has occurred.

226. Insofar as the plaintiff relies on contact with relevant witnesses, it does appear that no approach was made to a single witness prior to May, 2001. At its highpoint, this work involved a meeting with Mr. Armstrong, several items of correspondence with him, meeting an expert in palliative medicine, the sending of three letters to a consultant radiologist and the writing of a letter to a consultant histopathologist, none of which appears to have been relevant to disposing of the case with due expedience, having regard to the fact that the first port of call was the delivery of a statement of claim following the receipt of an appearance from the defendant's solicitor and the consideration of the issue of suing the State defendants.

227. As previously indicated, I take the view that, while there was some ongoing work being performed by the plaintiff's solicitors, the nature of the work does not excuse the failure to prosecute the claim with due expediency or at all.

228. As regards the two central issues of causation and foreseeability, I take the view that there is merit in the submission by counsel for the plaintiff that the actual issue of causation is not likely to lead to any undue prejudice as the plaintiff's lifetime medical records have now been assembled and preserved and the identification, assembly, preservation and careful, early review of the plaintiff's lifetime medical records have been described by the defendant's medical expert, Mr. Nigel Standfield, as essential to the defence of the claim that is made herein. Further, Mr. Standfield has unequivocally stated that he can reach a conclusion as to the nature of the disease and its causes and the date of diagnosis from the plaintiff's lifetime medical records and nowhere is it suggested on the defendant's behalf that there is any actual need for other information in this regard. In any event, it has been open to the defendants to examine the plaintiff's lifetime medical records since the time of their final assembly, but the defendants have chosen not to do so, and further, it has been open to the defendants to have the plaintiff medically examined and they have chosen not to do so.

229. As regards the issue of foreseeability, the plaintiff relies very heavily on the existence of documentation both in the public and private domain. Documents can be prepared on the basis of a great number of reasons. Houses of the Oireachtas reports and House of Commons reports represent merely the opinions of those persons sitting on the relevant committee. It has never been the practice in the Irish courts to decide issues on the basis of unproven documentation. It would, in my view, be entirely inappropriate for a trial judge to sift through and consider all the documentation that, for instance, is set out in the schedules attached to the statement of claim and rely on same in the absence of oral evidence, having proved the documentation as a basis for a conclusion on the balance of probabilities as to the issue of foreseeability arising herein. Further, it would be inappropriate, in my view, for a trial judge to rely on the opinions of other persons formed on the basis of information contained in documents and evidence as adduced before them in a situation not governed by the rules of evidence as applicable in the Irish courts and in accordance with the applicable rules of practice and procedure.

230. I accept that there were personnel available on the defendants/defendants parent companies' behalf to assist the Houses of the Oireachtas Committee and the House of Commons Committee. However, I do not accept that there is any merit in the plaintiff's argument that because the defendants or their parent companies were in a position to produce witnesses to give evidence to these parliamentary hearings, there should be now no difficulty in the same or similar witnesses giving evidence at the hearing of the trial of this action. There is a fundamental distinction between a parliamentary inquiry and civil litigation of the type involved here. The rules of evidence are wholly different as are the objectives sought. In any event, with the passage of time, it appears that it would be some nine years between the hearings before the Houses of the Oireachtas and the House of Commons Committee and the hearing of these proceedings and, as I have already stated, I am satisfied that there is not only presumed prejudice but also actual prejudice which is running on a continuing basis.

231. Counsel for the plaintiff has relied on a number of foreign judgments. With regard to *Thompson* which was a case about shipyard noise, there does not appear to have been any factual issue involved and there is nothing in the judgment which suggests that there was any impossibility as regards calling evidence or anything to suggest that the defendants took issue with their capacity to defend the case.

232. A similar position arises in *Jeromson* and *Holtby*. In neither of these cases was there any significant factual issue. The jurisprudence of this Court is governed by *Primor* and *Manning*. The courts in this jurisdiction have never taken the view that they must do the best they can, or that defendants have to accept the best the court can do, in whatever the circumstances and irrespective of whether there is prejudice or not. In any event, no issue arose, in any of the cases referred to, of impairment caused to the defendants in the defence of their case. Nor was there any suggestion of, or culpable delay on the part of the plaintiff.

233. With regard to *Pou* and *McTear* it appears to me that the issues are different. It does not appear to have been suggested that there was any particular difficulty arising in either case and it does not appear that there was any evidence before either court of any prejudice.

234. Roderick Bourke, solicitor for the second named defendant, in his supplemental affidavit as sworn on 16th day of November, 2004, referred specifically to the *McTear* case as heard in Scotland. He set out that there were very significant differences between the Scottish legal procedure and the procedure governing civil litigation in this jurisdiction. He contrasts the allegations in the *McTear* case with the very wide and broader allegations that are made herein.

235. The averments of Mr. Bourke in this regard are not challenged.

236. The issue before this Court is whether the proposed trial would be fair and would be just having regard to the factors as set out in the jurisprudence which binds this court.

237. Insofar as the plaintiff makes a secondary claim for continuing addiction to nicotine, that claim is only made out as against the second named defendant, no claim having been made against the first named defendant in this regard due to the particular factual circumstances, and no claim having been made against the third named defendant due, apparently, to error.

238. I note that nowhere in the affidavits delivered on the plaintiff's behalf is there a reference to the plaintiff's alleged addiction to nicotine being a continuing injury claim or a contemporary or modern claim and neither is that particular characterisation of the plaintiff's claim reflected in the statement of claim. Nowhere in the statement of claim is the point in time when the plaintiff says he became addicted to cigarettes set out and the only continuing claim identified in the statement of claim is for continuing injury as opposed to a continuing wrong. The specific averment at para. 8 of the statement of claim is to the effect that, due to his addiction to cigarettes, the plaintiff has been unable to cease smoking and continues to sustain ongoing damage to his health as a result. I take the view that this claim only has relevance to the point in time when the plaintiff became addicted and clearly this claim is historical, the plaintiff having commenced smoking in 1960/1961. Further, the claim is directed to causation and knowledge extending over an extensive period of time and, in my view, involves the same defects as the primary claim for personal injuries and creates the same problems.

239. As regards the claim pursuant to the Act of 1991, it is quite clear that the plaintiff has to establish causation and damage.

240. The plaintiff has placed considerable emphasis on the decision in *Delahunty* but it is clear that no issue of delay was ever raised in *Delahunty* and the sole issue before the court was whether the claim ought to be dismissed as disclosing no reasonable cause of action. Further, the Court was not asked to consider, nor did it express, any view as to whether a claim in respect of continuing injury inevitably requires consideration of the knowledge and conduct of the manufacturers at all material times.

241. The claim in respect of the Liability for Defective Products Act, 1991 is presented as a fresh or current claim. In my view, the plaintiff in the circumstances of this case, does not and cannot make out a case based solely upon events subsequent to 1991. The plaintiff has to establish that he was injured by the product and that he consumed it unaware of the risks associated with it and to do this he inevitably has to base his case back in the 1960s at a point in time when he started smoking, bearing in mind that he has smoked on his own admission continuously since 1960/1961 through until a point in time when he ceased smoking in 2004. The central issue will be as to whether the defendants knew or ought to have known that cigarettes were addictive and the only relevant knowledge in that regard is at the point in time when the plaintiff became addicted. That claim, in my view, is characterised by exactly the same delay as the plaintiff's claim in negligence. I do not consider that the plaintiff's claim under the Act of 1991 can be divorced from the events prior to the coming into force of the Act, and in particular, ss. 4 and 5 necessarily involve a consideration and analysis of events prior to 1991.

242. I take the view that the claim for declaratory reliefs suffers from precisely the same difficulty. I note that the plaintiff ceased smoking in 2004. In my view, each of the declarations sought by the plaintiff are directed to matters of historical fact and are closely related to the causes of action on foot of which the plaintiff claims damages. I do not consider that the claim for declaratory reliefs can stand alone.

243. In overall conclusion, on the issue of the balance of justice, the plaintiff commenced smoking tobacco in 1960/1961 and was diagnosed as suffering from a smoking related illness in September, 1996, which becomes the date of the accrual of the cause of action. The plaintiff first contacted his solicitor in January, 1999. It was necessary for the solicitors to institute proceedings on the plaintiff's behalf within three years of the date of the accrual of the cause of action in order to satisfy the relevant provisions of the Statute of Limitations Act, 1957, as amended, and a plenary summons duly issued on the 19th January, 2000. The plaintiff's solicitors were aware that this was a late start in the proceedings and that, as a matter of law, accordingly, they had to move with due expediency. They were also aware from their research and their instructions that the plaintiff had started smoking in 1960/1961 and that knowledge on the defendant's part going back in time was going to be one factor if not the crucial factor in the case. They failed to serve the plenary summons for a period of eight months and only served a statement of claim in December, 2003 on the State defendants and purported to deliver the statement of claim on the first three named defendants at the same time. Taking into account the date of the accrual of the cause of action and the date of the issue of the proceedings, the plaintiff failed to move with due expediency after a late start. The delay involved goes far beyond the minimum which may be considered inordinate. I fully accept that the tobacco companies were aware for quite some time of impending litigation and had an association which monitored ongoing events in this regard and were in a position to give evidence both to the Houses of the Oireachtas Committee and the House of Commons Committee and that the relevant solicitors for the tobacco companies have been working together since 1992, pursuant to an agreement to protect their clients' common interest. A presumed prejudice, however, clearly arises in the particular circumstances and I am satisfied from the affidavits as sworn on behalf of the various defendants that there is evidence of actual prejudice on a continuing basis and with a trial date unlikely until late 2009, thirteen years after the date of the accrual of the cause of action, I

take the view that the delay involved has given rise to a substantial risk that it is not possible to have a fair trial and the defendants have been caused serious prejudice. I am further satisfied that, in late 2009, to ask the defendants to meet the plaintiff's claim, some 13 years after the date of the accrual of the cause of action, runs contrary to the implied constitutional principles of basic fairness of procedures.

244. In these circumstances I dismiss the plaintiff's claim on the balance of justice by reason of inordinate and inexcusable delay and for want of prosecution.

245. I turn now to the application to dismiss the plaintiff's claim by reason of lapse of time, pursuant to the inherent jurisdiction of the Court. The order as sought in this regard differs from the earlier claim to dismiss for want of prosecution because it necessarily involves in the circumstances of this case matters going back in time to 1942, and further involves no culpable delay. However, the relevant findings I have already made herein apply equally to this aspect of the application.

246. The essential questions that arise are whether, by reason of the lapse of time, there is a real and serious risk of an unfair trial and whether there is clear and patent unfairness in asking the defendants to defend the action. The same six criteria that were referred to by Finlay Geoghegan J. in *Manning* arise in this instance and they are that none of the defendants, in my view, can be considered to have contributed in any significant way to the relevant lapse of time. The claims being made are extremely wide ranging both in the nature of the wrongful acts alleged and the time over which they are alleged to have occurred. There will be significant factual issues to be determined by the Court if the claim went to trial, there will inevitably have to be much oral evidence and, as I have previously indicated, the essential issue in this case probably will be the knowledge of the defendants, which is going to involve knowledge of the relevant personnel at the relevant periods of time and the fact that I am satisfied on the affidavits sworn by the solicitors for each of the defendants, that a significant number of relevant witnesses for the fundamental claims made will not now be available to the defendants given the lapse of time involved since 1942.

247. In addition to the allegations regarding what the first three named defendants knew or ought to have known about cigarettes and cigarette smoking, as set out earlier in the judgment, further serious allegations are made, namely that the first three named defendants added ammonia to facilitate the absorption of nicotine, manipulated nicotine levels to maintain addiction, conspiracy and fraud.

248. It is clear from the statement of claim that the allegations being made by the plaintiff go back prior to 1960/1961 and that the statement of claim focuses on knowledge, action and inaction and raises questions as to the knowledge on the part of the defendant companies at various points in time. The statement of claim discloses huge controversy in relation to, amongst other things, areas where knowledge has changed and where it has been cumulative, the historical controversy on scientific issues, the controversy on design, what was done or not done, what was possible or not possible at different points in time and the interface between the drug companies and the regulators through various organisations.

249. As previously referred to, while there may be voluminous documentation in this case, in my view it is a case which will have to be decided on oral testimony rather than on documentation alone.

250. Not only have I decided that there is presumed prejudice but also actual prejudice and that was in the context of deciding the issue on the balance of justice from the date of the accrual of the cause of action being September, 1996. Now, in effect, the Court is asked to look at the entire period involved in the case, which period goes back some 66 years, but even taking it from the point in time when the plaintiff commenced smoking, the relevant period of time is some 49 years.

251. The European Convention on Human Rights was incorporated into Irish law by virtue of the enactment of the European Convention on Human Rights Act, 2003, the Act coming into effect on 31st December, 2003. The Act of 2003 operates prospectively only from that date. Article 6 of the European Convention is an extra factor to be added into consideration by the court but subject to the application of existing Irish law and jurisprudence.

252. For a court to be asked in late 2009, to determine issues of fact of the nature which would be required by this claim, in the absence of many of the persons actually involved, as clearly demonstrated in the various affidavits sworn on behalf of the defendants, would, in my view, result in a basic unfairness of procedures, give rise to a real and serious risk of an unfair trial, create a clear and patent unfairness in asking the defendants to defend the action, fail to provide the defendants with a fair hearing within a reasonable time of the wrongful acts complained of and would, in the words of Henchy J. in *O'Domhnaill*, "put justice to the hazard". In these circumstances, there is no alternative but to dismiss the plaintiff's claim for want of prosecution by reason of lapse of time pursuant to the inherent jurisdiction of the Court.