

## THE HIGH COURT

Case No. 8528P/2000

BETWEEN

FELIX J. McKENNA

PLAINTIFF

V

ANN FARRELL AND JOHNNY PATRICK MICHAEL FARRELL

DEFENDANTS

**Judgment of Mr. Justice Feeney delivered on the 11th day of October, 2007**

1. This is an application by the First-Named Defendant for an Order pursuant to Order 122, rule 11 of the Rules of the Superior Courts dismissing the proceedings for want of prosecution, the Plaintiff having taken no steps in the said proceedings for two years from the last proceedings had therein, and for an Order pursuant to Article 6 of the European Convention and/or under the inherent jurisdiction of this Honourable Court dismissing these proceedings for want of prosecution, the delay herein being unreasonable, unconscionable and excessive. The Court has jurisdiction both pursuant to Order 122, rule 11 and its inherent jurisdiction to stay or dismiss or strike out proceedings due to delay or for want of prosecution.

2. The essence of this application is that due to delay the Court should dismiss the claim. Central to that consideration by the Court and to this application is for the Court to ascertain whether or not there has been delay and if there has been delay, why that has occurred and to consider whether such delay as might be established is both inordinate and inexcusable and, further, if there is such inordinate and inexcusable delay whether or not it is in the interests of justice to require such proceedings to be dismissed.

3. This application was grounded on a brief and uninformative affidavit of the First-Named Defendant. A full and detailed replying affidavit was sworn by Mr. Cassidy on behalf of the Plaintiff and on the day prior to the hearing, the First-Named Defendant swore a second affidavit that was admitted in evidence.

4. The first affidavit from the First-Named Defendant identified:

(a) that it was nearly seven years from the commencement of the proceedings,

(b) that such delay was compounded by the existence of an interim order restraining the First-Named Defendant "dealing in my property",

(c) that the nature of the proceedings under the 1996 Proceeds of Crime Act made it difficult for her to defend the proceedings and that difficulty was exacerbated by the passage of time

(d) that the proceedings referred back to matters of considerable antiquity as far back as 1977,

(e) that the First-Named Defendant wanted "to get on with her life.",

(f) that the Plaintiff's memory had diminished with time.

5. The First-Named Defendant also averred, without any detail, that the Plaintiff "had not taken steps to have them (i.e. the proceedings) tried." and that the Plaintiff "has been quite content to sit on that order (i.e. the interim order) and not take the requisite steps to progress matters any further.

6. On receipt of the detailed history of these proceedings in a replying affidavit, it is manifest that such is not the case. It is only possible to consider the issue of delay in the real context of the actual conduct of these proceedings. The Court has been provided with a detailed history and chronology of what has occurred and it is against that background that this application must be considered.

7. In the second affidavit of the First Defendant, she referred to "the misleading content of the 1996 Act, the delay in Discovery from the date of request and that such complexity as these has been attributable to legal issues caused by extraordinary bad draftsmanship." It was suggested that these delays arising from those matters were entirely attributable to the organs of State and that since the 28th July 2000, an entire embargo of dealing with the properties the subject of these proceedings and, without any detail, referred to the administration of her late husband's estate as being impeded. That affidavit also referred to her husband's death in 1997.

8. In considering these additional points the Court must have regard not only to the procedural history but also to the scheme under the 1996 Act and the judgment of the Supreme Court in these proceedings concerning the correct interpretation of the 1996 Act. The scheme provides for applications to be brought to vary or alter or amend any order under Section 2, which is an entitlement which was invoked in these proceedings by the Second Named Defendant. The Act also expressly provides for damages under Section 16.

9. The Supreme Court established in *F. McK v. A.F.* [2002] 1 IR 242 the correct legal interpretation of Section 3 of the Act and made it clear that the earlier envisaged interpretation for Section 3 need not have happened after the 18th October 2001. (That was *Murphy v. G.M.* [2001] 4 IR 113, the judgment of the Keane C.J. (as he then was) at p.154.) It is certainly the position that the legal interpretation of the Act was clear after the Supreme Court decision in *F. McK v. A.F.* in 2002, yet that decision was re-opened within these proceedings resulting in the Supreme Court having to reconstitute as a court of five after the appeal had actually commenced before a court of three.

10. I will start by setting out the legal authorities that are of assistance and guidance to this Court in relation to the issue before the Court. I have also referred to the earlier Supreme Court judgment in this case above.

11. In considering the appropriate approach to this application, the Court will not only have regard to the authorities concerning Order 122 and the inherent jurisdiction of the Court but will also have regard to the jurisprudence of the European Court of Human Rights in relation to Article 6 of the Convention and the issue of delay.

12. The first and central authority to assist and guide this Court is the Supreme Court judgment in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459. The decision in that case makes it clear that the primary consideration for the Court in relation to applications to

dismiss because of delay is "to deal with the essential justice of the case before them". In that case, the Supreme Court laid out and identified the general principles to be applied in considering the essential justice of the case before them and having fully re-visited the authorities, it set out those principles in separate paragraphs and did so at pages 475 and 476 of the judgment of Hamilton C.J.. The principles to be applied in relation to applications to dismiss due to delay were set out in the following summary:

"(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 delay has been both inordinate and inexcusable, the Court must exercise a judgment on whether, in its discretion, on the facts the balance of judgment 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 the 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 and 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 merely caused by the delay including damage to the Defendant's reputation and business."

13. This Court will apply these principles to the facts and chronology of this case. These principles have been consistently applied and it is appropriate to note that even after the enactment of the European Convention on Human Rights Act 2003 that "the basic questions which the Court has to address in such cases remain the same". That was identified by Clarke J. in *Stevens v. Paul Flynn Ltd.*, a judgment of the 28th April 2005. The first matter to consider is the issue of inordinate and inexcusable delay and the second matter to consider is where the balance of justice lies. They were the matters identified by Clarke J. as identifying the essence of the basic questions which the Court has to consider.

14. The European Court of Human Rights has determined in many cases that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of each case with due regard to the complexity of the case, the conduct of the parties and the significance of the issues or matters in the litigation. The approach of the European Court of Human Rights is accepted by both parties as being correctly and succinctly identified and summarised in the textbook *Theory and Practice of European Convention on Human Rights* 4th Ed. by Van Dijk et al at para. 10.7.3. That paragraph reads as follows:

"After the length of the relevant period has been established, it must be determined whether this period is to be regarded as reasonable. In many cases, the Court only makes an overall assessment, while in other cases it assesses the lapse of time in each stage of the proceedings. The reasonableness cannot be judged in the abstract but has to be assessed in view of the circumstances of each individual case. The interests of the person concerned in as prompt a decision as possible will have to be weighed against the demands for a careful examination of the case in a proper conduct of the proceedings. According to established case law when assessing the reasonableness of the relevant period, the Court applies in particular three criteria:-

(a) the complexity of the case

(b) the conduct of the applicant and

(c) the conduct of the authorities concerned. However, in an increasing number of cases, the Court applies, in connection with the authorities, a fourth criteria;

(d) the importance of what is at stake for the applicant.

The question of whether the case is complex is in general hard to answer. The Court has attached importance to several factors such as the nature of the facts to be established, the number of the accused person and witnesses, the need to obtain the file of a trial conducted abroad, the joinder of the case to other cases, the intervention of other persons in the procedure and the need to create a special computer programme. The complexity may concern questions of fact as well as legal issues.

An attitude or behaviour of the party in question which led to delay weakens his complaint about that delay. However, an accused person is not required to cooperate actively in expediting the proceedings which may lead to his own conviction. This may be different for parties to civil actions. A party to proceedings cannot be blamed for making use of his right to lodge an appeal. It is evident that this prolongs the proceedings but this prolongation too must stand the test of reasonableness."

15. It is the case that in civil proceedings, an applicant who is an interested party, such as this Defendant, should not become the victim of an unreasonable delay for which public authorities are to be blamed. Systemic delay within the Civil Court process can in some circumstances lead to a breach of Article 6. However, the requirements of the trial process demands not only a decision within a reasonable period but must also allow the parties sufficient time to fully prepare and bring and conclude the necessary and appropriate preliminary legal issues and procedural disputes. This is of particular significance in a case such as this where there has been multiple legal issues and procedural disputes litigated by the two Defendants. Those issues have been properly brought and pursued, including on appeal, but the consideration of delay must allow and permit for a timely, orderly and complete determination of same.

16. Where, as herein, a defendant has been legally advised to raise complex preliminary legal issues of significance, those must be dealt with before the full hearing. This is not a case of a single or unified trial but because of its history is in fact a whole series of trials or hearings of considerable complexity and duration. Time must be allowed to conclude same and a simple calculation of the period from commencement to date is inappropriate as a means of properly considering the issue of delay. The various applications hereinafter outlined in the chronology provide a cogent and compelling explanation for the vast majority of the time involved in the period of seven years. There has in reality been no delay in this case nor is the delay, such as it might be, viewed as inexcusable. The Courts must allow and permit a Defendant to pursue necessary complex preliminary issues to final conclusion.

17. In this case, there are two Defendants necessarily joined within the same proceedings who have both exercised their separate legal right to pursue preliminary legal matters to conclusion. This case is highly unusual in the number and complexity of the legal issues involved and in the fact that the applications overlapped and were brought on an incremental basis by the two Defendants, but such circumstances, unusual if not unique, must be provided for in any consideration of the question of delay.

18. The recent decision of the European Court of Human Rights in *Barry v. Ireland*, a judgment of 15th December 2005, stated at paragraph 46 certain matters which are relevant. The statement contained in that paragraph demonstrates that an appropriate issue to consider in relation to the issue of delay is the effect on the party applying. In that case, the existence of criminal proceedings were a significant factor, together with the denial of the possibility of practising as a doctor and the restrictions imposed by bail terms. In this case, it is property that is the subject matter of the Section 2 Order. The case is being conducted in camera. This deponent can apply at any time to vary the Section 2 Order as her Co-Defendant has done. This Defendant has identified no particular prejudice and has failed in any way or manner to explain how the administration of her husband's estate has been delayed given the fact that she has taken no steps in relation to same as the widow of a man who died intestate.

19. The individual nature of the consideration of each case is demonstrated in the statement adopted by Lord Hope in the case of *Porter v. McGill* in the House of Lords, which is a case reported in 2002 2 AC, the relevant statement being from page 497. Lord Hope said at paragraph 110 on that page:

"In *König v. Federal Republic of Germany* [1978] 2E HHR 170 at p.197 paragraph 99, the European Court gave the following guidance as to the test to be applied in civil proceedings on the question of delay.

The reasonableness of the duration of proceedings covered by Article 6.1 of the Convention must be assessed in each case according to its circumstances. When enquiring into the reasonableness of the duration of criminal proceedings, the Court has regard inter alia to the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities. The Court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated by Article 6.1."

20. The next portion of this judgment shall deal with the chronology. It is necessary to set the chronology out in full in the judgment because it forms the fundamental factual background to the determination by the Court that there has not been inordinate and inexcusable delay.

21. The chronology of the proceedings are as such: On the 20th July 2000 proceedings were commenced by Plenary Summons and at the same time a motion seeking relief under the 1996 Act was brought. On the 26th July, the First-Named Defendant entered an appearance. On the 21st September 2000, the Second Named Defendant entered an appearance. On the 19th November 2000, the Second Named Defendant brought a motion for ad hoc legal aid. On 8th December 2000, the First-Named Defendant brought an order pursuant to Order 60 challenging the constitutionality of the provisions of the 1996 Act. That was the first of a number of significant and complex preliminary legal issues which were raised within these proceedings. On the 15th December 2000, a return date of the Second Named Defendant's motion concerning a Statement of Claim was made. On the 29th January 2001, the High Court dismissed the application concerning the Statement of Claim. On the 12th April 2001, the Second Named Defendant's notice of appeal to the Supreme Court concerning the issue of the Statement of Claim was issued. On the 29th June 2001, there was a return date for the First-Named Defendant's motion seeking to strike out the proceedings on various legal grounds including an application to adjourn the proceedings until the Supreme Court ruled on the constitutionality of the 1996 Act. That Notice of Motion and the grounds identified therein are of relevance and the Court has had regard to same wherein it identifies a significant number of grounds of legal complexity for determination as preliminary issues. On the 4th July 2001, the First-Named Defendant brought a motion for particulars and that was heard and determined by the High Court on that date. On the 6th July 2001, the Supreme Court stayed the proceedings on the application of the Second Named Defendant pending a determination of the appeal in relation to the Statement of Claim. On the 20th November 2001 the First-Named Defendant filed a Notice of Change of Solicitor. On the same day, the First-Named Defendant lodged a notice of appeal to the Supreme Court in relation to the High Court's decision in relation to particulars. On 6th December 2001 the Supreme Court heard the Second Named Defendant's application in relation to the Statement of Claim. That was some five months after the appeal had been lodged and whilst it is a significant period given the fact that it was necessary to appeal to an appeal court consisting of a number of persons was an appropriate and reasonable period of time. On the 30th January 2002 the Supreme Court issued its decision in relation to the Statement of Claim which was less than two months after it had concluded the hearing. On the 5th April 2002, the Statement of Claim was served on both Defendants. That date is of some importance because this chronology later identifies the actual date upon which this Defendant actually delivered a defence and the conduct of the Defendant is a factor to take into account in relation to the issue of delay. On the 8th May 2002, the First-Named Defendant raised a Notice for Particulars arising out of the Statement of Claim. On the 21st June 2002, the Plaintiff delivered replies to the particulars sought by the First-Named Defendant. On the 28th June 2002, the Second Named Defendant applied the High Court to dismiss the claim on the basis that the Statement of Claim was late when it was delivered. On the 5th July 2002, the First-Named Defendant's motion concerning particulars, statute of limitation and the question as to whether or not the legislation applied to crimes committed outside the jurisdiction was issued. That motion overlapped with a number of issues previously raised but raised a new and significant legal point. That point was ultimately determined in proceedings heard before the Supreme Court concerning the applicability of the legislation to crimes committed outside the jurisdiction. On the 19th July 2002, the High Court ruled on the First-Named Defendant's application in relation to particulars. On the 26th July 2002, replies to particulars were furnished to the First Named Defendant. On 9th December

2002, the First-Named Defendant's motion to dismiss the proceedings on various legal grounds was brought. On the 28th January 2003, the High Court heard the First-Named Defendant's motion to strike out. That was a substantial and significant motion raising legal issues of complexity. It lasted a number of days before the High Court and was heard less than two months after the motion had been commenced. The High Court heard the application on the 28th January 2003 for a number of days and during the course of that hearing the First-Named Defendant withdrew the undertaking which had previously been given to court and the High Court in those circumstances had an application for a Section 2 Order made by the Plaintiff and a Section 2 Order was made against the First-Named Defendant's property and it is in fact that Order which forms part of the matters raised by the First-Named Defendant within the affidavit and within this application. The difference between the undertaking and the order being made in January 2003 is not identified in the grounding affidavits.

22. On the 11th February 2003 a Section 3 Motion in respect of the Section 2 Order was issued and returned. On the 24th February 2003, the High Court delivered a judgment refusing the First-Named Defendants the various reliefs which had been sought. On the 15th May 2003, the First-Named Defendant appealed to the Supreme Court. On the 7th July 2004, the Supreme Court, which was a court of three persons, hearing the appeal in relation to particulars, Statute of Limitations and the issue of whether or not the act applied to crimes committed outside the jurisdiction and in relation to hearsay commenced its hearing and early during the hearing it became apparent that Counsel on behalf of this Defendant was urging the Supreme Court to adopt a different view from what the same Court had recently adopted in another case. That resulted directly in it both being necessary and appropriate for the hearing which had commenced being discontinued to allow for the formation of a five person court. This was first raised during the progress of a hearing before the Supreme Court.

23. On the 12th July 2004 the Second Named Defendant's motion in relation to the applicability of the legislation to crimes committed outside the jurisdiction was adjourned to the 22nd November and then adjourned generally. On the 1st December 2004 the Supreme Court had again assigned Judges to deal with the case and a five person court heard the appeal. The delay between the hearing on the 7th July 2004 and the 1st December 2004 being directly caused by the late interjection of argument requiring a five-man court.

24. The main period of delay which is identifiable from the chronology is the delay from 15th May 2003 to the 7th July 2004 and that is a period of not insignificant time amounting to over 13 months whilst the case came on for hearing before the Supreme Court, but in the light of the complexity of the matters, the requirement for a multi-person court and the requirement for legal issues to be argued to conclusion before that court, it is time which can neither be deemed inordinate or inexcusable.

25. On the 1st December 2004, as I have indicated, the Supreme Court re-heard the appeal of the First-Named Defendant and following that hearing, a decision was given on the 23rd February 2005, which upheld the High Court's earlier decisions. On the 18th April 2005 the First-Named Defendant brought a motion in relation to the 2005 Amendment Act and the effect that that act had on these proceedings. On the 13th June 2005 the Plaintiff gave an undertaking in relation to the position that it would not invoke the provisions of the 2005 Act in these proceedings. On the 4th July 2005, the Second Named Defendant's motion seeking payment out under Section 6 was brought. On the 19th March 2006 the First-Named Defendant delivered a defence. On the 14th March 2006 the First-Named Defendant brought a motion for Discovery. On the 3rd April 2006 a Discovery Order was made on consent allowing for a period of eight weeks. On the 3rd July 2006 the First-Named Defendant brought a motion in relation to the delay in making of Discovery and on the 7th July the Discovery affidavit was served. That was some four weeks late, over and above the eight week period allowed by the consent order in April. On the 31st July 2006 the Plaintiff delivered a reply and defence to counterclaim to the defence of the First-Named Defendant. On the 16th October 2006 the Second Named Defendant's motion concerning the Statement of Claim was re-entered by the Plaintiff and the Court refused to extend the time for delivery of a Statement of Claim and referred the matter to the Supreme Court. The Supreme Court on the 8th December 2006 deemed the delivery of the Statement of Claim good and struck out the other two appeals by the Second Named Defendant. On the 15th February 2007 the Second Named Defendant raised a Notice for Particulars. On the 8th March 2007 the Second-Named Defendant filed a Defence and Counterclaim. On 30th April 2007 the Plaintiff replied to that Defence and Counterclaim. On the 16th April 2007 the Second Named Defendant's Section 6 Application, which had been adjourned on a number of occasions, was before the Court. On the 30th July 2007, the Second-Named Defendant's Section 6 application was dealt with to conclusion. This motion was brought in June of 2007 and a hearing date was assigned at the very commencement of the following term immediately after the long vacation.

26. That detailed chronology sets out the actual history of this case and is of crucial and central importance to this Court in arriving at a consideration as to whether or not there has been inordinate or inexcusable delay.

27. Notwithstanding the passage of nearly seven years, the history of this case results in the Court being satisfied that such period cannot be viewed as inordinate. In considering the issue of inordinate, one must also invariably look at whether or not such delay is inexcusable and here, the need to allow and permit the two Defendants pursue necessary and complex legal constitutional and procedural matters must be acknowledged. The vast bulk of the time has been used up by the Defendants' applications which have, considering their complexity and novelty, been dealt with in a timely manner. The only significant delay outside of those matters was a delay of just over twelve months in getting a hearing date before the Supreme Court, but regard must be had to the issues before the Court, the need for legal research and the requirement of a multi-person court.

28. Even if this Court had been satisfied that there was inordinate and inexcusable delay, the Court would still have refused this application as the balance of justice is in favour of proceeding with this case.

29. There is a significant public interest issue involved in these proceedings and allowing the Court to determine whether an asset has been obtained from the proceeds of crime and therefore that the person in possession of same should not benefit from same even though an innocent party. That public interest could be insufficient if real or substantial prejudice was identified due to delay. This Defendant has sought to identify no actual prejudice and the affidavits are silent other than in relation to general prejudice. The only witness suggested as being unavailable is the husband of the Defendant. However he was murdered in 1997 long before these proceedings commenced and any delay in the proceedings cannot in logic have caused prejudice due to his unavailability.

30. The Court accepts that this case is dealing with matters of considerable age, going back into the 1970's, and that there is therefore an onus on the moving party (i.e. the Plaintiff) to be particularly active in pursuing such proceedings. The Plaintiff has done so. The time periods have not in any way been due to the inactivity on the part of the Plaintiff. The only complaint made in relation to the Plaintiff's conduct of these proceedings giving rise to a suggested delay arises in relation to Discovery. It is suggested that from the time Discovery was requested that there was a delay. In fact, what occurred in this case was that Discovery could only be identified insofar as what was relevant at the time that the Defence of this Defendant was delivered. Within a matter of weeks of that Defence being delivered and the issues identified, a Consent Order was made. The time period was substantially complied with, albeit that it was four weeks late from the agreed time period of eight weeks. That period of delay cannot in this Court's view in any way be equated with a sufficient time period as to amount to a period of delay giving rise to the relief such as the relief sought within these proceedings.

31. This Defendant did not deliver her defence until the 19th March 2006, nearly four years after the delivery of the Statement of Claim. That is perfectly explicable due to the other applications but it was not due to the delay of the Plaintiff and this is not a case where there could be criticism on the Plaintiff for not bringing a motion for judgment as the logical position which was being adopted by this Defendant was that pending the determination of substantial and real legal and constitutional issues raised before the Court that those issues required to be disposed of in advance of further steps being taken within the proceedings. The logic of that is self-evident from the fact that if the First-Named Defendant had been successful within those applications, then there would have been no need to incur the time, cost and expense involved in further pursuing this litigation.
32. Also in considering the issue of justice, this Court would have to have regard to the conduct of both parties. Many applications have been brought by the two Defendants. The conduct of the Defendants in these proceedings should not be equated with acquiescence but a similar approach might be considered. The Court must allow and provide for time to apply to the Court in respect of the legal matters and can't properly consider the time period involved in such applications as being a period of delay. There is no evidence whatsoever that there is a substantial risk that the First-Named Defendant cannot obtain a fair trial.
33. A number of issues have been raised in argument by Counsel for the First-Named Defendant. A significant number of those issues can be dealt with at the trial. There has been no evidence before this Court of any damage to the First-Named Defendant's reputation or business and the affidavits are silent in respect of same.
34. The Court has dealt with the issue of the seven-year period and the suggestion that it is delay and holds that the same is not, on the facts herein, albeit unusual if not unique facts, that such period is neither inordinate or inexcusable.
35. The suggestion that the issue of delay must be viewed against the existence of a restraining order might be relevant if there was delay on the part of the Plaintiff, but on the facts herein and given the statutory mechanism to ameliorate any order by application to vary or alter, the same is not relevant in this case.
36. A unique (and entirely unsupported by authority) argument was put forward on behalf of the First-Named Defendant concerning the fact that the State was responsible for the ambiguity in the 1996 Act due to defective draftsmanship and that this should be taken into account as some form of systemic delay for which the State is responsible as it was suggested that the First-Named Defendant was forced, due to such defective draftsmanship to litigate and that such litigation would have been unnecessary in circumstances where the Act would have been properly drafted. This Court is satisfied that there is no logical basis for this argument. The law was passed, the Supreme Court confirmed and clarified any ambiguity and this Court can't act as a review as to the logic of the judgment. It is also the case that within the judgment of Geoghegan J. in the Supreme Court in relation to this matter, he stated on page 4 of his judgment:
- "Although as has turned out and indeed I think could have been anticipated, the use of the expression "interlocutory order" in the 1996 Act given the scheme of the Act is most unfortunate, I do not consider that its use by the Oireachtas or draftsman was in any way irrational or incorrect in terms of English. It is perfectly obvious that when a Section 3 Order is made it is contemplated by everybody that there will be a further order in the future. Either an aggrieved party will bring an application to have the Section 3 Order discharged and the property thereby frozen or in the course of time after seven years have elapsed a Section 4 application will be brought."
37. The determination of the Supreme Court identifies that the interpretation being placed upon it by the Supreme Court, not unsurprisingly, is an interpretation which in relation to terms of English is neither irrational or incorrect. The Supreme Court have determined what was the proper interpretation and the First-Named Defendant has, as was her absolute entitlement, sought to have the law and the meaning of the statute clarified in advance of the hearing. Such relief sought in circumstances where if she had succeeded she would have had the benefit of having the proceedings either terminated or significantly shortened and in those circumstances it is the case that it was appropriate and proper to bring such preliminary matters before the Court and there was an entitlement to appeal those matters to the Supreme Court and have that court conclusively rule. Whilst that is being done it cannot be viewed as a period in respect of which it is appropriate to categorise such time as being delay. That would be for this Court to disregard the fact that this is not in fact a unitary trial dealt with as a simple or single trial but is in fact a series of applications of considerable significance and complexity brought at different times.
38. The Defendant was entitled to seek to clarify the law as contained in the 1996 Act but that entitlement can't be viewed in the context that it amounts to delay or that it was caused by the State. As regards the nature of proceedings under the 1996 Act and any difficulties for the Defendants thereunder, no effort has been made to identify how those have in fact changed with time. If any matter arises as to the fairness of the trial or as to evidence, it can be dealt with at the full hearing by the Trial Judge. This also applies to any issue concerning the antiquity of issues under consideration.
39. The nature of the act relating to any retrospectivity or methods of proof are also matters for the trial judge.
40. The issue raised in relation to no undertaking as to damages is not of real relevance herein given the scheme of the Act it allowing for variation and also given the fact that the Statute expressly provides for damages in specified circumstances under Section 16.
41. The final issue which was raised at the reply stage related to the suggestion that there inevitably be further delay because the estate of the deceased husband was a necessary party. That matter is not relevant, and certainly not relevant at this point in time to this Court. This Court will deal with the parties who are before it, the claim which is made relates to property which it is alleged is in the possession or control of this Defendant and that means that she is properly before this Court.
42. In the light of the above finding, this Court is satisfied that in applying the principles identified by the Supreme Court in the *Primor* case that the First-Named Defendant and moving party has failed to establish that the delay in this instance was inordinate or inexcusable. The Court, for clarification and certainty, also determines that even if any period could be identified is inordinate or inexcusable that in the absence of any identifiable prejudice or any identifiable matter causing particular concern to this Court that the balance of justice is in favour of allowing the proceedings to go ahead. No matters have been identified which would suggest that since the commencement of this trial, delay has in any way caused a substantial risk that it will not be possible to have a fair trial. In the above circumstances, the application brought on behalf of the First-Named Defendant is dismissed.