Neutral Citation Number: [2010] IEHC 95

**THE HIGH COURT**

**1993 7693 P**

**BETWEEN**

**JEREMIAH ANTHONY CAHALANE AND CALDON CHEMICAL COMPANY LIMITED**

**PLAINTIFFS**

**AND**

**THE REVENUE COMMISSIONERS AND THE OFFICE OF CUSTOMS AND EXCISE, RAYMOND McSHARRY AND THE MINISTER FOR FINANCE (1987 – 1989)**

**DEFENDANTS**

**Judgment of Miss Justice Laffoy delivered on the 12th day of March, 2010.**

**The application**

1. On this application the defendants seek an order dismissing the plaintiffs' claim on three bases as expressed in their notice of motion as follows: for want of prosecution for inordinate and inexcusable delay; on the grounds of inordinate and inexcusable delay; and for want of prosecution pursuant to Order 122, rule 11 of the Rules of the Superior Courts. The application is grounded on affidavits sworn by Declan Sherlock, a solicitor in the office of the Revenue Solicitor, and it is responded to on affidavit by the first plaintiff.

**The claim and the response**

2. As controversial matters are raised in the affidavits on this application, I propose outlining the plaintiffs' claim and the defendants' response to it by reference to the core pleadings, namely: the statement of claim delivered on 20th February, 1995; the defence and counter-claim delivered on 25th April, 1995; and the reply and defence to counter-claim delivered on 22nd November, 1995.

3. As disclosed in the statement of claim, the first plaintiff is a veterinary surgeon. The second plaintiff was "established", which I take to mean that the first plaintiff procured the incorporation of the second plaintiff, in or about the year 1985 for the purpose of manufacturing, distributing and selling veterinary products including two products, one called Vetichol, which was intended for the domestic market initially, and the other called Irish Sprint, which was intended for the export market, principally, in the United States of America. From March 1982, the first plaintiff had permission from Customs and Excise to use duty free spirits in the manufacture of medical and veterinary medical products. From May 1987, the second plaintiff had authorisation pursuant to s. 8 of the Finance Act 1902 from Customs and Excise to store spirits free from duty at its premises in County Cork. It is alleged by the plaintiffs that in November 1987 the first defendant wrongfully and without statutory authorisation or proper observance of fair procedures withdrew the statutory authorisation without notice to the plaintiffs by reason of suspected abuse of the Vetichol product by certain third parties. It is asserted that at all material times the plaintiffs have emphatically denied that any such abuse was authorised by, or known to, them. It is also alleged that the first defendant also wrongfully removed stock, the property of the plaintiffs, and, despite requests, refused to return it. Further, despite frequent requests, Customs and Excise wrongfully failed, neglected and refuse to restore the statutory authorisation. As a result, the plaintiffs have suffered loss and damage, including loss of income to the first plaintiff and loss of profit to the second plaintiff.

4. The reliefs claimed by the plaintiffs include damages, *inter alia*, for: breach of contract; breach of duty, including breach of statutory and constitutional duty (to include exemplary damages); wrongful interference with the plaintiffs' contractual and economic relations with third parties; actionable misrepresentation; breach of legitimate expectations; and detinue and conversion. The plaintiffs also seek an injunction compelling the first defendant to restore the licence.

5. In their defence, apart from admitting the existence of the authorisations referred to in the statement of claim and the fact that the authorisations were withdrawn on 19th November, 1987, the defendants traverse the allegations made by the plaintiffs. It is pleaded that the issue of the authorisations was induced by representations by the plaintiffs to the defendants that the duty free spirits would be used in the manufacture of veterinary medicines and veterinary preparations for sale and for no other purpose. It is specifically pleaded that the said representations were false and untrue or became false and untrue, in that the plaintiffs, together with others, "conspired together to cheat and defraud" the defendants of excise duty and value added tax "by removing the duty free spirits from the said veterinary medicines and applications" as manufactured by the plaintiffs and "selling same for human consumption as duty paid alcoholic drink, namely vodka and/or whiskey". There is also a plea that any loss or damage suffered by the plaintiffs "was caused solely or contributed to by fraud" on the part of the first plaintiff against the second plaintiff. That plea is particularised as follows: that the first plaintiff "defrauded" the second plaintiff "by converting a significant part of the proceeds of sales by the second plaintiff of the said veterinary medicines and preparations". There is also a plea of laches, which would be relevant to the equitable relief claimed by the plaintiffs.

6. The defence is accompanied by a counter-claim in which the defendants repeat the defence and allege that, by reason of the matters pleaded, the defendants have suffered loss, which is particularised as loss of duty, loss of value added tax, loss of corporation tax and the expenses of investigation. The defendants counter-claim for, *inter alia*, refund of tax, duty and expenses, interest and a tracing order.

7. In the reply and defence to counter-claim, the plaintiffs deny, *inter alia*, each of the serious allegations made by the defendants, including conspiracy to cheat and defraud, that the defendants discovered any fraud, and that either of the plaintiffs was engaged in fraud.

8. In his grounding affidavit, Mr. Sherlock exhibited an indemnity dated 3rd February, 1988 whereby the first plaintiff indemnified

Customs and Excise and Carbery Milk Products (which the Court was told was the source of the alcohol) "against any future claim, demand or action in respect of their removing all alcohol liquids supplied by them from the property of" the second plaintiff and the first plaintiff authorised them "to remove said liquid at any future date convenient to them". The authority was stated to be "irrevocable". In his replying affidavit the first plaintiff has averred that the indemnity was conditional and that the condition has not been fulfilled. In response to that, Mr. Sherlock subsequently averred that the indemnity did have legal standing. Obviously, the Court cannot resolve that conflict on this application. Therefore, in reaching a conclusion on the application, no weight is attached to the significance or otherwise of the indemnity, which, in any event, is not pleaded in the defence.

**Criminal Proceedings**

9. An unusual feature of this application is that the circumstances which gave rise to the withdrawal of the authorisations by Customs and Excise were the subject of a criminal prosecution against the first plaintiff. As is disclosed in *Cahalane v. Judge Murphy* [1994] 2 I.R. 262, on 17th September, 1991 the first plaintiff was charged with nine offences, two of which alleged a conspiracy on the part of the first plaintiff to defraud the second defendant by selling filtered Vetichol as duty paid alcohol. The book of evidence was served on the first plaintiff on 21st January, 1992. On 30th January, 1993 he was returned for trial to the Circuit Court.

10. Subsequently, in judicial review proceedings, in a judgment delivered on 13th August, 1993, his trial was prohibited by the High Court (Carney J.) in relation to all of the charges with the exception of a charge alleging delivery of an incorrect return of income. On appeal, the Supreme Court affirmed the judgment and order of the High Court, on the basis of an infringement of the first plaintiff's right to an expeditious trial. The judgment of the Supreme Court was delivered on 9th March, 1994. On this application, counsel for the plaintiffs pointed to the following passage (at p. 284) at the end of the judgment of Finlay C.J., with which the other Judges of the Supreme Court concurred, as being significant for present purposes:

> "There is no doubt that, apart from the general anxiety which any person facing a trial of a serious criminal charge must feel, there was significant evidence – though it is contested by the State Solicitor in his affidavit – of great hardship having been caused to the applicant by the delay and of financial loss arising from his inability to carry on what he alleges were *bona fide* commercial enterprises arising from the use of duty free alcohol."

The point made by counsel for the plaintiffs was that, in his replying affidavit, the first plaintiff outlined the hardship he suffered, which cannot be ignored by the Court.

11. Mr. Sherlock, in his second affidavit, having made the point that the criminal proceedings were successfully challenged by way of judicial review on the grounds of delay alone, averred that "bogus vodka" was seized from a director of the second plaintiff, Denis Buckley, who subsequently pleaded guilty in the Circuit Criminal Court to criminal charges brought against him relating to conspiracy to cheat and defraud the Revenue by removing duty free spirit for producing illegal whiskey and vodka beverages. In a subsequent affidavit, the first plaintiff referred to that averment and averred that Mr. Buckley had left the employment of the second plaintiff in July 1987, months before the events the subject of the investigation by the first defendant occurred. Again, the Court cannot resolve the conflict of evidence as to the status of Mr. Buckley vis-à-vis the plaintiffs at the material time. Therefore, no weight is attached to the fact that Mr. Buckley pleaded guilty to the charges against him in determining this application.

**Chronology of these proceedings**

12. The timeline in relation to the major step in these proceedings is as follows:

19th November, 1987 Authorisation to receive duty free spirits withdrawn by Customs and Excise

11th November, 1993 Plenary summons issued

November 1994 Plenary summons served

23rd December, 1994 Appearance entered by defendants

20th February, 1995 Statement of claim delivered

25th April, 1995 Defence and counter-claim delivered

4th May, 1995 Notice for particulars raised by defendants

22nd November, 1995 Replies to particulars delivered by plaintiffs

22nd November, 1995 Reply and defence to counter-claim delivered

22nd November, 1995 Notice for particulars raised by plaintiffs

27th February 1996 Order for discovery made by Master against plaintiffs and defendants

30th May, 1996 Reply to particulars delivered by defendants

6th June, 1996/ Plaintiffs' affidavit of discovery sworn/

27th June, 1996 filed

12th July, 1996/ Defendants' affidavit of discovery sworn/

25th July, 1996 filed

12th May 1997/ Plaintiffs' supplemental affidavit of discovery

19th May, 1997 sworn/filed

23rd June 1997/ Defendants' supplemental affidavit of discovery

24th June, 1997 sworn/filed

14th May, 1999 Order of the High Court (McCracken J.) in relation to privilege claimed by defendants on their discovery

June to September 1999 Inspection of defendants' discovered documents and documents supplied by defendants to plaintiffs

1st June, 2004 Notice of change of solicitors for plaintiffs

27th October, 2004 Notice of intention to proceed delivered by plaintiffs

2nd June, 2005 Notice of trial served by plaintiffs

16th June, 2005 Notice of trial filed in the Central Office

3rd June, 2005 Plaintiffs' solicitors wrote to defendants' solicitors suggesting that the issues of liability and quantum be tried separately, liability to be tried first, on the basis of expedience and cost effectiveness

30th September, 2005 Following reminders and holding letters, proposal rejected by defendants' solicitor

9th June, 2008 Defendants' notice of motion on this application

22nd July, 2008 Plaintiffs' Certificate of Readiness, which had been prepared by senior counsel in April 2008, filed.

**Summary proceedings**

13. In justifying the manner in which the plaintiffs have prosecuted these proceedings, the plaintiffs attach significance to the existence of summary proceedings by the Revenue Commissioners against the first plaintiff (*Irwin v. Cahalane*, the High Court, 2001/382R). In those proceedings, which commenced in 2001, the first plaintiff appeared in person and was not represented by a solicitor. Apparently, the proceedings related to a claim by the first defendant against the first plaintiff for unpaid income tax. The first plaintiff has averred that, while he was not disputing that he owed income tax, he was looking for a stay on judgment pending determination of these proceedings. The first plaintiff averred that he explained his position to the Master on each occasion on which the matter was before the Master's Court, and outlined to him that he was doing everything possible to progress these proceedings. The Master was understanding and facilitating towards his dilemma and allowed him numerous adjournments. On each occasion, the first defendant was represented by counsel who objected to the adjournment. Eventually, the Master gave judgment against the plaintiff on 31st July, 2004. The first plaintiff then applied for a stay on execution pending determination of these proceedings. In doing so, he explained to the Master, in the presence of counsel for the Revenue Commissioners, the reasons why these proceedings had not been brought on for hearing at that stage and the difficulties he was encountering in preparing the case for hearing. The Master gave a stay of execution which expired on 11th May, 2005.

14. Subsequently, the first plaintiff applied to this Court, presumably by way of appeal against the order of the Master, to continue the stay pending the determination of these proceedings. That application was heard on 5th May, 2006 by Feeney J., who refused to continue the stay.

15. The defendants' reaction to the plaintiffs' reliance on the summary proceedings as evidence of interaction between the first defendant and the plaintiffs in the broader context of these proceedings is reflected in an averment by Mr. Sherlock to the effect that the plaintiffs served notice of trial in these proceedings purely in an effort to obtain a stay on the execution of the judgment in the summary proceedings. Mr. Sherlock suggested that, were it not for the prosecution of the summary proceedings, it is questionable whether any notice of trial would have been served. Even though the notice of trial was served within about three weeks after the expiry of the stay, that the first plaintiff was so motivated is an inference, which, in my view, it would not be proper to draw on the affidavit evidence before the Court. Further, Mr. Sherlock has taken issue with an averment by the first plaintiff that the defendants in the course of the summary proceedings "did not assert at any stage that there had been any inordinate delay in the prosecution of

these proceedings". Mr. Sherlock's response was that that averment is completely incorrect and lacks candour. He quoted from an affidavit sworn by the Collector-General, Gerard Harrahill, on 13th June, 2005 in which, in responding to an assertion by the first plaintiff that his inability to pay the full amount of the judgment had not been occasioned by his own conduct, act or default, Mr. Harrahill averred as follows:

> "Prior to the institution of these proceedings against him, [the first plaintiff] had failed with sufficient urgency to progress the Cahalane/Caldon action, and had taken no overt further step in those proceedings since 1999. Once the present proceedings commenced, however, he reactivated that action. There has, as he himself acknowledged, been extended further delay in progressing it since then."

16. Mr. Sherlock also averred to the fact that, during the course of his *ex tempore* judgment, Feeney J. made reference to the delay on the part of the plaintiffs in prosecuting these proceedings and advised the first plaintiff that he was at risk of having the proceedings struck out on the grounds of delay.

**The law**

17. Counsel on both sides have relied on the recent authorities in which the Court's jurisdiction, both under the Rules of the Superior Courts and under its inherent jurisdiction, to dismiss proceedings for failure to prosecute expeditiously has been considered. Both sides referred the Court to the seminal decision of the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and, in particular, the following passage from the judgment of Hamilton C.J. (at p. 475) in which the relevant principles of law are set out:

> "The principles of law relevant to the consideration of the issues raised in this appeal may be 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 parties 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 delay, including damage to a defendant's reputation and business."

It is well settled that the considerations listed at (i) to (vii) are not intended to be exhaustive of the matters which the Court may have regard to in determining where the balance of justice lies.

18. Earlier in his judgment, in the course of his review of the authorities, Hamilton C.J. referred to the following passage from the judgment of Diplock L.J. in *Birkett v. James* [1978] A.C. 297:

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

19. In *Anglo Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510, the Supreme Court applied the decision in *Primor Plc v. Stokes Kennedy Crowley*. In his judgment (at p. 518) Fennelly J. gave guidance as to how the principles enunciated by Hamilton C.J. are to be applied. He stated:

> "The governing consideration is that first staged by Hamilton C. J. at p. 475 of the judgment, namely that 'the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim where the interests of justice require them to do so'. It is always necessary for the defendant applicant to demonstrate, and he bears that burden, that the plaintiff has been guilty of inordinate and inexcusable delay. Subject to that, however, the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation. The separate considerations mentioned by Hamilton C.J. should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just."

20. Immediately following that passage, Fennelly J. referred to the judgment of Ó Dálaigh C.J. in *Dowd v. Kerry County Council* [1970] I.R. 27 at p. 42 and, in particular, to the reference therein to litigation being "a two party operation". Later (at p. 519), Fennelly J.

quoted more extensively from the judgment of Ó Dálaigh C.J. (starting at p. 41) where it was stated:

> "… in weighing the extent of one party's delay, the Court should not leave out of account the inactivity of the other party. The rules of court provide for actions being struck out for want of prosecution …. the adage about sleeping dogs may be wise, but it is not specifically conceived to advance the cause of justice. In some instances it is acted upon by a defendant in the hope that he will 'get by' without having to face the peril of being decreed. Litigation is a two party operation, and the conduct of both parties should be looked at."

21. Fennelly J. then observed:

> "In my view, the defendant should not be lightly blamed for delay which is the fault of the plaintiff. In order to be weighed in the balance against him, it would have to amount in the particular circumstances to something 'akin to acquiescence' as indicated in the judgment of Henchy J., cited above."

22. The reference to the judgment of Henchy J. was to a passage from his judgment in *O'Domhnaill v. Merrick* [1984] I.R. 151, where Henchy J. stated (at p. 157):

> "Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a case. However, where, as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant, or inability on the part of an infant plaintiff to control or terminate the delay of his or her agent."

The words underlined are words to which Fennelly J. added emphasis when quoting the passage.

23. In *Desmond v. M.G.N. Ltd.*, [2009] 1 I.R. 737, in his dissenting judgment, Kearns J. quoted from the judgment of Fennelly J. in *Anglo Irish Beef Processors Ltd. v. Montgomery* and referred to an earlier passage (at p. 518), which he considered to be of particular relevance on the appeal then before the Supreme Court, in which Fennelly J. had stated:

> "There may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of a claim. No comparable misfortune has been advanced in the present case. The claim is of a purely commercial character. On the plaintiffs' own version of it, it is perfectly straightforward. The plaintiffs are well-advised, well-known companies and are fully armed with all the means of pursuing their claim to judgment."

24. As has been stated, it is well settled that the seven factors listed by Hamilton C.J. in *Primor Plc v. Stokes Kennedy Crowley* do not constitute an exhaustive list of the factors which may be taken into account in assessing where the balance of justice lies in a given case. Counsel for the plaintiffs referred to the majority judgment of Macken J. in *Desmond v. M.G.N. Ltd*. and, in particular, her statement (at para. 71) to the following effect:

> "In assessing where the balance of justice lies as between the parties, I consider also that the scope and ambit of the defence as filed by the defendant is a factor which, in an appropriate case, may be taken into account."

25. In *Desmond v. M.G.N. Ltd*. the plaintiff's action was for libel in respect of certain articles published in the defendant's newspaper. The defence delivered by the defendant included a plea of justification. Macken J. considered the significance of a plea of justification to a claim for libel in later passages in her judgment (at paras. 71 and 72) in which she stated:

> "A plea of justification is particularly important, having regard to the nature of the obligations imposed in that regard, for the law makes it very clear, as Kelly J. stated in *Cooper Flynn v. Radio Telefís Éireann* [2000] 3 I.R. 344 citing Lord Denning M.R. in *Assoc. Leisure v. Assoc. Newspapers* [1970] 2 Q.B. 450 at p. 456:
>
> > 'Like a charge of fraud, he (counsel) must not put a plea of justification on the record unless he has clear and sufficient evidence to support it.'
>
> I am satisfied that counsel would not put a plea of justification other than in accordance with their obligations in that regard …"

26. Against that pleading background, Macken J. considered the effect of striking out the proceedings (at para. 74), stating:

> "In the ordinary course of events, if the proceedings are struck out his claim for defamation falls. However, the plea of justification included in the defence, although it will never be litigated, remains unchallenged. That is, on any view, a serious injustice to a person seeking to vindicate his good name and reputation, even after a delay. If he is prevented from doing so where a defence of justification is pleaded, and the pleader successfully relies on an absence arising from his own fault, of the very notes it claims will support the plea, the taint of clear wrongdoing of a very serious nature, would remain."

27. Macken J. held that the balance of justice lay in favour of the plaintiff being permitted to vindicate his name. She stated that, even if she were to follow the principle of "countervailing circumstances" found in some of the jurisprudence, which had been cited, she would have been satisfied that countervailing circumstances had been established by the plaintiff.

28. Geoghegan J., who was in complete agreement with the judgment of Macken J., commented on three aspects of the case, including the plea of justification. He made it clear (at para. 3) that the fact that, if the action was to be struck out, the plea of justification would remain on the record and could never be disproved, was a relevant factor in considering where the balance of justice lay.

**The issues**

29. Accordingly, the issues for consideration on this application are:

> (a) whether the defendants have established inordinate and inexcusable delay; and

(b) if they have, whether the balance of justice is in favour or against the proceedings continuing.

**Inordinate and inexcusable delay?**

30. In considering whether the defendants have established inordinate and inexcusable delay on the part of the plaintiffs in prosecuting the proceedings, in my view, the first consideration is the fact that almost six years had elapsed from the time the cause of action accrued when the plenary summons was issued. To adopt the words of Diplock L.J., there was a "late start" which made it more incumbent on the plaintiff to proceed with all due speed. While the point is made on the replying affidavit of the first plaintiff that the plaintiffs were, during the early years after withdrawal of the authorisations, endeavouring to pursue an alternative course to litigation and to have the authorisations restored, in my view, counsel for the defendants correctly identified the cause of action as having accrued when the authorisations were withdrawn on 17th November, 1987. The fact is that the plaintiffs did not issue the plenary summons until 11th November, 1993, that is to say, just over a week before the limitation period was due to expire.

31. Insofar as the plaintiffs' failure to initiate the proceedings is excusable by reason of the fact that the criminal proceedings were hanging over the first plaintiff, and counsel for the defendants made the point that it was almost four years after the cause of action accrued that charges were brought against the plaintiff, that threat was definitively removed when the Supreme Court gave judgment on 9th March, 1994 in the judicial proceedings, just four months after the plenary summons was issued.

32. When this application to dismiss was initiated, over twenty years after the cause of action had accrued and over fourteen years after the plenary summons was issued. Taking an overview of the matter, unquestionably there had been inordinate delay in bringing these proceedings to trial. In my view, it serves no useful purpose to conduct the type of analysis counsel for the plaintiffs conducted on each of the procedural steps in the timeline, and to attempt to characterise each as not involving inordinate delay or otherwise. For instance, while the period between the service of the plenary summons and the delivery of the statement of claim, which was approximately three months, could not be characterised as inordinate delay, that is of little significance on its own. A much more telling picture emerges when one considers the specific post-initiation long periods of inactivity on the part of the plaintiffs highlighted by counsel for the defendants, namely:

(a) the delay of one year in serving the proceedings on the defendants;

(b) the delay of almost six years following the resolution of the discovery issues until notice of trial was served; and

(c) the further delay of three years between the service of notice of trial and the initiation of this application by the defendants.

Most compelling is the fact that the cumulative effect of the periods of delay which may be fairly ascribed to the plaintiffs gave rise to inordinate delay in prosecuting these proceedings.

33. While there has been no acknowledgement on the part of the plaintiffs that the delay in prosecuting the proceedings has been inordinate, in his replying affidavit, the first plaintiff has given a litany of excuses for the length of time it has taken to bring these proceedings to trial. In broad terms, the factors relied on as excusing inactivity on the part of the plaintiffs, after the discovery issues were resolved in September 1999, are as follows:

(a) The first plaintiff suffered from ill health, in that he suffered two heart attacks in June and July 1999 and underwent open heart surgery on 17th August, 1999. It was submitted that he was physically unable to prosecute the case for several months thereafter. That is, obviously, a reasonable excuse.

(b) From May 2000 to October 2003 the first plaintiff was personally engaged in the preparation of the case. Two aspects of the first plaintiff's personal involvement were emphasised. The first was the assessment of the contents of documents discovered by the defendants. The other was procuring reports from marketing and financial experts on the scope of the market for the second named plaintiff's product, Irish Sprint, in the United States in 1987. Particular emphasis was laid on the fact that the first plaintiff had difficulty obtaining a report from the marketing expert who had been involved in the development of Irish Sprint in the United States in 1987, whom the first plaintiff had pursued to London in July 2002 and to South Africa in January 2003. It is hardly surprising that the marketing expert, when contact was made with him, had difficulty in furnishing a report on activities in which he had been involved some fifteen years previously. The plaintiffs' contention that the difficulties encountered by the plaintiffs were outside their control and were, therefore, excusable simply does not stand up. It is entirely the plaintiffs' fault that they had not assembled the relevant advice and evidence earlier.

(c) In the period between November 2003 and February 2005 the plaintiffs ascribe their inactivity to a change of the plaintiffs' legal representation in the proceedings. It was the plaintiffs who discharged the retainer of the solicitors who were then on record for them, in November 2003. Thereafter, the counsel who were briefed at that time withdrew. There was a time lag involved in retaining the services of new solicitors and new counsel and in procuring the transfer of the files to the new solicitors. It is contended on behalf of the plaintiffs that these delays were outside the plaintiffs' control and that the period of delay is excusable. While there are elements which, if isolated, might be regarded as excusable, for example, one junior counsel departing because he discovered that he had a conflict of interest and another junior counsel departing because he was briefed by a Tribunal, as being outside the control of the plaintiffs, the fact is the change of legal representation was brought about by the plaintiffs.

(d) The matters deposed to by the first plaintiff do indicate fairly intense activity in the preparation of the case from the time a new senior counsel was briefed in early Spring of 2005 to early 2007, when witness statements were taken from witnesses and marketing reports were obtained from experts based abroad. During that period, notice of trial was served and the plaintiffs sought to have the issue of liability determined first by consent. It is also clear that the procurement of expert evidence in accordance with the senior counsel's advice on proofs continued through 2007. An aspect of delay during this latter period for which the plaintiffs contend they have no responsibility was a delay in obtaining a report from a forensic accountant between November 2007 and March 2008. As an isolated incident, the plaintiffs could be excused for that delay, because they reasonably promptly engaged a different forensic accountant, who provided a report in March 2008.

34. It is the plaintiffs' case that they obtained a certificate of readiness from senior counsel in April 2008. However, that certificate was not filed, so that the proceedings were not listed in a list of fixed dates, until after this application was initiated on 9th June,

2008. As I have found, by June 2008 there had been inordinate delay on the part of the plaintiffs in prosecuting the proceedings. In general, I am of the view that the excuses put forward by the plaintiffs for their failure for almost nine years after the discovery issues were resolved in September 1999 to bring the matters to trial do not justify a delay of that magnitude. In arriving at that conclusion, I have not overlooked factors which were emphasised by counsel for the plaintiffs: that these proceedings concern lengthy and substantial commercial litigation; that they gave rise to complex factual matters, including the ramifications of the destruction of the plaintiffs' attempt to penetrate what promised to be a lucrative market in the United States; and the difficulty in assembling the documentation necessary to prosecute the case, for example, reports from experts living abroad.

35. Insofar as the plaintiffs have sought to attribute the delay to their professional advisers, the Court has to have regard to the principle stated by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, which has been reiterated consistently by the Supreme Court since it was stated in July 1979, that, 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". In this case, in my view, the first plaintiff has been primarily personally blameworthy for the inordinate delay in bringing these proceedings to a hearing and the excusing factors which he has sought to rely on do not absolve him from blame.

36. Accordingly, I am satisfied that the defendants have established that, as of 9th June, 2008, there had been both inordinate and inexcusable delay on the part of the plaintiffs in prosecuting these proceedings.

**Balance of justice**

37. Having found that there has been inordinate and inexcusable delay on the part of the plaintiffs, it is necessary for the Court to exercise its discretion as to where the balance of justice lies; whether it lies in favour or against this matter proceeding to trial. The factors which it seems to me are relevant to that issue, on the facts of this case, are:

(a) whether the defendants will be prejudiced to the extent that they will not be afforded a fair trial, if the proceedings are allowed to continue;

(b) the character of the plaintiffs;

(c) the conduct of the defendants; and

(d) the scope and ambit of the defendants' defence and counter-claim.

**Prejudice to the defendants**

38. In support of this application to dismiss, the defendants made the point that, as twenty years had elapsed since the events which gave rise to the plaintiffs' claim, the defendants will suffer prejudice, in that because of the passage of time, "numerous servants or agents of the defendants have long retired from their positions and employment with the defendants and, in any event, because of the lapse of time, their memories and recollections may be impaired". In response, the first plaintiff pointed to the vast amount of records which the defendants and other State bodies generated in 1987 and 1988 and subsequently in relation to the events at the heart of these proceedings, which, as early as January 1988, were being described as an "alleged bootlegging operation". In responding to the first plaintiff's replying affidavit, Mr. Sherlock merely reiterated verbatim the basis on which it is alleged the defendants will be prejudiced, as averred to in his grounding affidavit. He gave no further detail of prejudice to which the defendants may be exposed.

39. It is worth observing in this context, that up to March 1994 the Director of Public Prosecutions was pressing to maintain the prosecution against the first plaintiff. As late as November 1995, and at all times since, it is reasonable to infer that the defendants have regarded themselves as being in a position to prosecute the counter-claim against the plaintiffs.

40. In the circumstances, I am not satisfied that the delay in this case will prejudice the defendants to the extent that they will be deprived of a fair trial.

**Character of the plaintiffs**

41. When Fennelly J. spoke of "the character of the plaintiffs" in his judgment in *Anglo Irish Beef Processors Ltd. v. Montgomery*, as I understand it, the type of distinction he had in mind was the disparity between the capacity of an individual of limited means, on the one hand, and a major commercial organisation or a public body, which does not have the same limitation on its resources, on the other hand, to prosecute litigation in the Superior Courts. That distinction does exist in this case. In his replying affidavit, the first plaintiff has deposed to his own personal circumstances and the manner in which he alleges that the defendants' conduct adversely affected him. For instance, he deposed to:

(a) the catastrophic blow to his business, which the withdrawal of the authorisations by the defendants had precipitated;

(b) the stress of the criminal investigation and the criminal proceedings until they were prohibited by the Supreme Court; and

(c) the problems he encountered in maintaining his family of nine, by continuing to operate his veterinary practice, while dealing with creditors, which included staving off threats to repossess his family home.

The first plaintiff has also pointed to the time and money he had expended in bringing the proceedings to the point at which they were, at the time the defendants initiated this application.

42. The personal circumstances of the first plaintiff which affected his financial capacity to prosecute these proceedings thus far, by comparison to the capacity of the defendants to defend them, are, in my view, factors to be weighed in the balance in determining where the justice of the matter lies, although they are by no means decisive factors.

**Conduct of the defendants**

43. I am satisfied that delay on the part of the defendants in defending the claim is not a material factor, notwithstanding the allegations of delay on their part made on behalf of the plaintiffs. In the overall scheme of things, that it took the defendants six months to reply to the plaintiffs' notice for particulars is not a material factor, nor is the attitude adopted by the defendants to the plaintiffs' application for discovery, which involved an adjudication by this Court (McCracken J.) in a judgment delivered on 14th May, 1999 as to whether the defendants' claim for privilege stood up, which they were entitled to test. While it took the defendants three months to respond to the plaintiffs' suggestion that the issue of liability be tried first, I agree with counsel for the defendants that this time lag was not substantial and is also insignificant in the overall context of the case.

44. Whether any delay or conduct of the defendants amounts to acquiescence on the part of the defendants in the plaintiffs' delay is a more difficult issue to determine. While the summary proceedings commenced in 2001 and the first plaintiff entered an appearance in person on 17th August, 2001, it is not clear with what intensity the proceedings were pursued during the three years until the Master gave judgment on 21st July, 2004. What is clear is that the Collector-General was aware of the objective of the first plaintiff in resisting judgment and in seeking a stay after judgment, the objective being for the plaintiff to get an opportunity to pursue these proceedings and, presumably, avail of some sort to set-off. In those circumstances, I think that the behaviour on the part of the defendants does veer towards acquiescence.

45. More significantly, however, I am of the view that the conduct of the defendants induced the plaintiffs to incur further expense in pursuing these proceedings. The plaintiffs' solicitors made a sensible suggestion to the defendants after notice of trial was served in June 2005 that the liability issue be tried first. That suggestion was rejected by the defendants on 30th September, 2005. It must be assumed that the defendants and their advisers realised that the rejection of the suggestion would put the burden on the plaintiffs of dealing with the issue of quantum before the commencement of the trial of the action. On the evidence before the Court, the plaintiffs did incur expense in preparing their case on the question of the loss they had incurred, in obtaining marketing reports from their former marketing adviser in the United States and from another marketing specialist in the United States, as well as a report on the equine industry in the United States around 1987. Moreover, the plaintiffs incurred expense in retaining, and obtaining a report from, a forensic accountant. While the defendants were entitled to adopt the tactical approach of requiring the plaintiffs to pursue the issues of liability and quantum at the same time, a factor to which weight has to be attached in assessing where the balance of justice lies is that it is reasonable to infer that they must have known that their approach would inevitably impose a greater financial burden on the plaintiffs than would have been the case if the liability issue was determined first.

46. Apart from that, at the time, through the medium of the summary proceedings, the defendants were being told that the plaintiffs intended prosecuting these proceedings, while, at the same time, as the averment from the affidavit of the Collector-General in his affidavit sworn on 13th June, 2005 quoted earlier indicates, the defendants were already consciously of the view that there was delay on the part of the plaintiffs in prosecuting the proceedings. Yet they did nothing to ensure that the plaintiffs did not incur further wasteful expense on these proceedings or, alternatively, that the plaintiffs acted thereafter in the knowledge that there was a risk that the defendants would seek to have these proceedings struck out on the ground of delay.

47. That leads to the question whether the fact that the defendants waited until June 2008 to initiate this application to dismiss is a factor to be weighed in the balance. In my view, it is, particularly, as from June 2004 onwards the defendants were on notice that there had been a change of solicitors for the plaintiffs and should have assumed that new solicitors were now actively prosecuting the proceedings. More importantly, from the time the notice of trial was served in June 2005 and the plaintiffs made the suggestion that the liability issue be dealt with first, it should have been obvious to the defendants and their advisers that the plaintiffs were at that stage seriously, and in a focused manner, preparing for the trial. The fact that they let matters run for another three years and then attempted to "pull the plug" at a time when, on the evidence, the plaintiffs were ready to seek a date for hearing, must weigh against acceding to the defendants' application.

**The scope and ambit of the defence**

48. What the defendants have sought on their notice of motion is the dismissal of the plaintiffs' claim. There is no reference therein to their counter-claim. However, counsel for the plaintiffs acknowledged, for the purposes of this application, that the counter-claim falls with the claim. On the other hand, counsel for the plaintiffs acknowledged that, if the plaintiffs succeed in keeping alive these proceedings, the counter-claim also stays alive. Therefore, the counter-claim may be treated as a neutral factor.

49. However, the crucial factor is that, if the plaintiffs' claim is struck out, the defence will remain a matter of record and the allegations of conspiracy to defraud and fraud contained in the defence will remain unchallenged. By analogy to a plaintiff against whom a defence of justification is raised in an action for libel who is precluded from prosecuting his action, the plaintiffs, in this case, against whom allegations that are arguably more serious, allegations of conspiracy to defraud and fraud and attacks on their integrity and reputation, are made, would be treated unfairly and unjustly if they were prevented from vindicating their good name and reputation, even after delay. As Macken J. found as regards the position of the plaintiff in *Desmond v. M.G.N. Ltd.*, a taint of clear wrongdoing of a very serious nature would remain, if the plaintiffs were prevented from prosecuting the proceedings.

50. On the very unusual facts of this case, in my view, it is open to the Court to conclude that to prevent the plaintiffs from prosecuting these proceedings would constitute a greater injustice than precluding a plaintiff in a libel action to which there is a plea of justification in the defence from prosecuting his action. In this case, the defendants are all organs of the State. Another organ of the State, the Director of Public Prosecutions, brought criminal proceedings against the plaintiffs on serious criminal charges based on the very same facts which underlie the defence and the counter-claim of the defendants in this case. Those proceedings were terminated by an order of prohibition granted by the High Court and affirmed by the Supreme Court on appeal. The defence and counter-claim in which the allegations of conspiracy to defraud and fraud are made by the defendants was delivered over a year after the decision of the Supreme Court. While it is true that the State's attempt at a "second bite of the cherry" had been precipitated by the plaintiffs' statement of claim, the degree to which the pleas of conspiracy to defraud and fraud have the potential to be damaging to the plaintiffs, if the plaintiffs are not allowed answer them, is compounded by the existence of the criminal proceedings which the State sought to pursue to the highest level.

51. Although, simply in terms of its duration, the delay in this case is more egregious than the delay in *Desmond v. M.G.N. Ltd*. (where the first publication complained of appeared on the 8th January, 1998, the plenary summons issued in May 1998, the pleadings were deemed closed in February 1999, notice of intention to proceed was served in February 2005 and the motion seeking to dismiss was initiated in May 2005), following the decision of the Supreme Court, I am satisfied that there are countervailing circumstances in this case, on the basis of which justice and fairness dictates that the plaintiffs be allowed to continue to prosecute these proceedings.

**Conclusion on where the balance of justice lies**
52. For all of the foregoing reasons, in my view, the balance of justice favours allowing the proceedings to proceed.

**Order**
53. There will be an order dismissing the defendants' application.