Neutral Citation: [2014] IEHC 368

THE HIGH COURT

[2002 No. 2189 P]

BETWEEN

WILLIAM MOFFETT AND ANSON LOGUE

PLAINTIFFS

AND

O'HARE AND McGOVERN LIMITED

AND

THOMAS ALAN McNEILL, ALISTAIR GRIFFEN, COLIN W REID, PhiLIP J McMAHON, ROY J.C. McNEILL, STEPHEN B McBRIAR, WESLEY McCAMLEY, JOHN McFADDEN, ERNEST McKEEGAN AND COLIN G. SHAW trading as WDR & RT TAGGART

DEFENDANTS

JUDGMENT of Mr. Justice Barrett delivered on the 25th day of July, 2014

1. These proceedings comprise an application by respectively the first defendant and the second to eleventh defendants to dismiss the plaintiffs' proceedings for want of prosecution pursuant to the inherent jurisdiction of the court. There is some discrepancy in the documentation before the court as to whether the surname of the first-named plaintiff is 'Moffett' or 'Moffat'; the court has proceeded on the basis that it is 'Moffett'.

2. Newbay Properties, of whom the plaintiffs are the remaining partners, were the developers of a shopping centre in Monaghan Town. The centre was substantially completed in or about November 1996. Taggart were engaged by Newbay in June 1994, to supervise and procure the erection of the shopping centre (the works). It was agreed that Power Supermarkets Limited would be the anchor tenant of the shopping centre pursuant to a lease dated 2nd December, 1994. O'Hare and McGovern Limited was engaged to construct the shopping centre by Newbay under a written agreement of 20th February, 1996. The works were carried out between April and November 1996, by which later time they were substantially completed. Subsequent to construction, severe settlement ensued at the site. Tesco Ireland Limited, the successor in title to Power, alleges that this is due to poor design and construction. Tesco commenced arbitration proceedings against Newbay in 2001 and Messrs. Moffett and Logue, who had bought out the interest of the other partners of Newbay, initiated court proceedings against the defendants in these proceedings in 2002. After some initial delay, the pace of those proceedings was relatively quick. Thus the plenary summons issued on 8th February, 2002. The Statement of Claim was delivered on 13th March, 2003. O'Hare and McGovern's notice for particulars issued on 3rd June, 2003. Replies to same issued on 14th July, 2003. A defence for Taggart issued on 30th April, 2003. Taggart also issued a notice for particulars on the same date and a reply to same issued on 4th June, 2003. A defence and counterclaim for O'Hare and McGovern was delivered on 8th December, 2003. The plaintiffs issued a notice for particulars to O'Hare and McGovern on or about 8th December, 2003. Then nothing of substance happened for a time. A notice of change of solicitor for the first-named defendant issued on 21st January, 2005. After that, just over eight years passed until the issuance, on 22nd February, 2013, of a notice of change of solicitor for Messrs Moffett and Logue, along with a notice of the plaintiffs' intention to proceed with their litigation. Why did the litigation effectively go into abeyance for the better part of a decade? In a nutshell, because Tesco and Newbay had entered into protracted arbitration of the dispute between them and this took centre-stage in the years that followed: thus they appointed an arbitrator effective 10th January 2001; he issued two interim awards, one on 14th January, 2004 and another on 2nd February, 2007; following his death, a second arbitrator was appointed and issued a final award on 6th March, 2013. The sequence of correspondence that flowed over the years between the plaintiffs and the defendants concerning the arbitration and the litigation is worth reciting in some detail:-

> - on 7th December, 2001, a letter issued from the solicitors for Newbay to O'Hare and McGovern indicating that a dispute had arisen with Tesco and furnishing the points of claim served in the course of arbitration. This letter indicates that in the event of Tesco succeeding against Newbay in the arbitration, Newbay will hold O'Hare and McGovern responsible.
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> - on 22nd May, 2002, a letter issued from Taggart to Newbay indicating that the terms of their appointment to give technical advice in the arbitration proceedings had been accepted by Newbay.
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> - on 27th August, 2002, a letter issued from the solicitors for Newbay to the solicitors for O'Hare and McGovern advising that high court proceedings had issued and that if O'Hare and McGovern and also Taggart did not wish to join in the ongoing arbitration between Tesco and Newbay *"then our Clients will have no alternative but to pursue their High Court proceedings against both your Clients and Taggarts. It seems to us that this would not be in anyone's interests as it will involve an entirely separate set of Proceedings to the Arbitration presently under-way ...".* This letter contemplates contemporaneous arbitration and litigation and does not, for example, suggest that the litigation would be postponed until after the arbitration. No response appears to have issued to this letter.
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> - on 30th August, 2002, a similar letter issued to Taggart as that which issued to O'Hare and McGovern on 27th August, 2002. Again, this letter contemplates immediate litigation contemporaneous with the arbitration, stating that *"[T]o protect their interests, Newbay ...have instituted proceedings in the High Court in Dublin against both Taggarts and O'Hare McGovern, and we must now call upon both Taggarts and O'Hare McGovern, to agree to indemnify Newbay ...against all liability, costs and damages which may be awarded to Tesco in this Arbitration. In default of an acknowledgement of such liability ...the High Court proceedings referred to will be served and prosecuted'.*
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> - on 11th September, 2002, the solicitors for Taggart issued a letter to the solicitors for Newbay declining to join the arbitration and urging a different course of action, writing:- *"You say that you have issued proceedings in Dublin and that they will be served on our clients if they do not join the arbitration. Whilst this is a decision for your clients, we would have thought it was in their interests for them to await the conclusion of the arbitration before deciding what further steps, if any, need to be taken. If they are successful in the arbitration, having previously served legal proceedings, they*

would then have to withdraw the legal proceedings and pay our and the contractor's costs. We urge your clients to take this approach."

- on 18th September, 2002, a letter issued from the solicitors for Newbay to the solicitors for Taggart noting that neither Taggart nor O'Hare and McGovern had consented to joining the arbitration and also stating that the deferral of the litigation as proposed in the letter of 11th September, 2002, would not suit Newbay.

- on 5th November, 2002, a letter issued from the solicitors for Newbay to the solicitors for Taggart referring to their letter of 11th September, 2002, and enclosing a copy of the plenary summons in the High Court proceedings.

3. The progress of the litigation between the parties has already been detailed above. The next significant items of correspondence to which the court has been referred are:-

- a letter of 4th August, 2004, from the solicitors for Newbay to the solicitors whom they believed were still acting for O'Hare and McGovern. This letter, which issued more than 3½ years after the first arbitrator was appointed, noted that *"The Claimants in the Arbitration have recently served particulars of their claims, so the Arbitration will now be proceeding and in the circumstances, the High Court Proceedings will also be proceeding"*. Again, the continuing suggestion is that litigation will be contemporaneous with the arbitration.

- a letter of 20th December, 2004, from the solicitors for Newbay to the new solicitors for O'Hare and McGovern indicating, for the first time, that matters might be sequenced so that the litigation would follow the arbitration, stating that *"the results of [the]...Arbitration will dictate the future course of this High Court litigation".*

- a letter of 9th February, 2005, from the solicitors for Newbay to Taggart referring in some detail to the ongoing arbitration and some issues arising in the context of same.

- a letter of 24th June, 2007, from the solicitors for Newbay to Taggart referring in some detail to the ongoing arbitration and some issues arising in the context of same.

- a letter of 4th July, 2007, from the solicitors for Newbay to the solicitors for Taggart indicating that the litigation against Taggart had not proceeded further *"pending the outcome of the Arbitration".* The sequencing of matters so that any litigation would follow the arbitration is again made apparent in this letter.

- a letter of 4th July, 2007, from the solicitors for Newbay to the solicitors for Hare and McGovern identifying the progress of the arbitration.

-a letter of 31st October, 2007, from the solicitors for Newbay to the solicitors for Taggart advising as to the progress of the arbitration and inviting Taggart to take over the defence of the arbitration *"given the savings in legal costs"*, a reference to the already commenced litigation, that will otherwise ensue.

- a letter of 12th November, 2007, from the solicitors for Taggart to the solicitors for Newbay denying any liability towards Newbay and declining to assume the defence of the arbitration even if this were possible, which was disputed.

- a letter of 10th March, 2011, from the solicitors for Newbay to the solicitors for Taggart advising Taggart as to the progress of the arbitration, in particular the quantum of claim formulated by Tesco and inviting Taggart's input into the process of discussion regarding quantum.

- a like letter of 10th March, 2011 from the solicitors for Newbay to the solicitors for O'Hare and McGovern.

- a letter of 15th March, 2011, from the solicitors for Taggart to the solicitors for Newbay acknowledging receipt of the letter of 10th March.

- a letter of 4th January, 2012, from the solicitors for Newbay to the solicitors for O'Hare & McGovern advising of the appointment of a new arbitrator following the death of the previous arbitrator.

- a like letter of 4th January, 2012 from the solicitors for Newbay to the solicitors for Taggart.

- a letter of 31st January, 2012, from the solicitors for Taggart to the solicitors for Newbay seeking further details about any proposed settlement with Tesco and raising various questions as to proposed remedial works.

- a letter of 2nd February, 2012, from the solicitors for Newbay to the solicitors for Taggart detailing a settlement offer and providing certain further details regarding the still ongoing arbitration.

- a letter of 10th February, 2012, from the solicitors for Taggart to the solicitors for Newbay, referring to the issue of quantum and inputting on the issue of remediation.

- a letter of 24th May, 2012, from the solicitors for Taggart to the solicitors for Newbay indicating, amongst other matters, that in any litigation that follows the arbitration Taggart will challenge Newbay's handling of the arbitration unless a particular step is taken.

- a letter of 6th June, 2012 from the solicitors for Newbay to Taggart in which input is sought of Taggart into a legal response being formulated in response to a claim made by Tesco, presumably as regards quantum, though this is not expressly mentioned in the letter.

- a letter of 21st September, 2012, from the solicitors for Newbay to the solicitors for Taggart indicating that by virtue of bankruptcy proceedings taken against them Mesrs. Moffett and Logue were no longer in a position to participate in the arbitration, that the solicitors had no instructions from certain previous partners of Newbay who were named as defendants in the arbitration proceedings, and inviting Taggart to take over the defence of the arbitration.

4. The above-mentioned correspondence does not represent the entirety of the correspondence that passed between the parties to these proceedings in relation to the subject-matter of same. It is what the court considers to be the more significant correspondence

that passed between them. As mentioned above, a final award issued in the arbitration proceedings issued on 6th March, 2013.

5. What conclusions of fact can be drawn from the above facts and correspondence? As regards O'Hare and McGovern, the court concludes that (1) from the time it received the letter of 7th December, 2001, it knew of the arbitration and that Newbay was alleging liability on the part of O'Hare and McGovern; (2) from at least the time of the receipt of the letter of 27th August, 2002, it knew that Newbay's litigation was pending against them; (3) initially it looked as though this litigation would be contemporaneous with the arbitration but from at least the time of the letter of 20th December, 2004, it was apparent that the intent was that matters would be sequenced so that litigation would follow the arbitration; (4) thereafter, in 2007, 2011 and 2012, O'Hare and McGovern was kept apprised of the progress of the arbitration which finally concluded in early-2013; (5) it appears from the correspondence put before this Court that at no point prior to the instant application did O'Hare and McGovern apply to have the court proceedings that had been commenced against it dismissed on grounds of delay in prosecution of the claim.

6. As regards Taggart, the court concludes that (1) for some time previous to the issuance of the letter of 22nd May, 2002, they knew of the arbitration between Tesco and Newbay; (2) from at least the time of receipt of the letter of 30th August, 2002, they knew that related litigation against them was being commenced by Newbay; (3) as a result of the letter of 18th September, 2002, they had every reason to believe that the litigation would run contemporaneous with the arbitration; (4) from at least the time of the letter of 4th July, 2007, it was apparent that the intent was that matters would be sequenced so that litigation would likely follow the arbitration; (5) thereafter, in 2007, 2011 and 2012, Taggart were kept apprised of the progress of the arbitration and inputted into same, with the arbitration finally concluding, of course, in early-2013.

7. Having regard to all of the foregoing, it is difficult to avoid the conclusions, and the court concludes in respect of O'Hare and McGovern and Taggart, that:-

> (i) they were both satisfied for the arbitration proceedings to continue for as long as they took;
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> (ii) they were both aware that litigation had been commenced against them;
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> (iii) they both knew that the litigation which had been commenced against them would effectively be put on stay until after the arbitration concluded, in the case of O'Hare and McGovern from at least the time of receiving the letter of 20th December, 2004, and in the case of Taggart from at least the time of receiving the letter of 4th July, 2007;
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> (iv) they both made no, certainly no material objection to this proposed sequencing;
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> (v) prior to the present application being made, at no point throughout the period when the arbitration was ongoing and the instant proceedings remained live against them does it appear that either O'Hare and McGovern or Taggart sought to have the instant proceedings dismissed for want of prosecution;
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> (vi) both O'Hare and McGovern and also Taggart at least implicitly acquiesced in the sequencing of the litigation-arbitration process and hence the resultant timing of the litigation.

Some general legal principles applicable

8. There are two key lines of authority governing an application for dismissal for want of prosecution. They arise respectively from the Supreme Court decisions in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and *O'Domhnaill v. Merrick* [1984] I.R. 151. In *Primor*, Hamilton C.J., at p. 475, summarises the principles to be applied in an application such as that now before the court. The Primor principles have since been recited with approval in a number of later cases and the court does not propose to repeat them here. In essence, the *Primor* case establishes a three-limb test to be applied in cases of delay: (1) is the delay inordinate? (2) is the delay inexcusable? (3) even if inordinate and inexcusable, is the balance of justice in favour of or against a case proceeding? There is suggestion in recent case-law, such as *JMacH v. JM* [2004] 3 I.R. 385, that the *Primor* case ought to be viewed as concerned with post-commencement delay only and it is true that on its facts *Primor* was an application to dismiss based on post-commencement delay. However, there are other cases such as *Guerin v. Guerin* [1992] 2 I.R. 287, which pre-date but appear consistent with *Primor*, in which regard has been had to the full backdrop of delay arising. When delay is inordinate and inexcusable the third limb of the Primor test may nonetheless require that a case be allowed to proceed because the balance of justice favours such a result. In all cases the court must also have regard also to the line of authorities commencing with the decision of the Supreme Court in *O'Domhnaill v. Merrick*. In that case, Henchy J. referred, at p.157, to the need:-

> "to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend'.

9. The interaction and concurrent validity of both lines of authority has been approved recently by the Supreme Court in *McBrearty v. North Western Health Board & Others* [2010] IESC 27. Thus, having tested the proceedings by reference to the *Primor* principles, it falls to the court also to consider the present application specifically by reference to the standard established in *O'Domhnaill*.

10. The above are the leading precedents and the general principles currently applicable to any proceedings concerned with dismissal for want of prosecution. The same precedents and principles appear to apply regardless of whether the application to dismiss is grounded on o.122 of the Rules of the Superior Courts or the inherent jurisdiction of the court. The court turns now to apply the tests established in *Primor* and *O'Domhnaill,* as well as certain other authorities that are of particular relevance to the present proceedings.

Is the delay arising inordinate?

11. The question of whether a period of inactivity constitutes inordinate delay is primarily one of fact that falls to be determined on a case-by-case basis: no universal benchmark exists. In *O'Connor v. John Player and Sons Ltd.* [2004] 2 I.L.R.M. 321, Quirke J. held that a delay of 4 years and 11 months between the issue of a plenary summons and the delivery of a statement of claim was inordinate. Clarke J. opined in *Comcast International Holdings Incorporated & Others v. Minister for Public Enterprise & Others* [2012] IESC 50, at para. 5.1 of his judgment, that even in cases where the formulation of a detailed statement of claim would undoubtedly take some time *"delays of a fraction of five years have been considered inordinate"*. Sometimes much longer delay is tolerated because of the specific circumstances pertaining in a particular case. In the present case the court considers that the elapse of over nine years between the delivery of the defence and counterclaim on 8th December, 2003, and the issuance on 22nd February, 2013, of the plaintiffs' notice of demand, constitutes inordinate delay.

Is the delay arising inexcusable?

12. There is an abundance of authority on the issue of when delay is to be considered inexcusable. Some of the leading applicable authorities are considered hereafter.

13. In *Truck and Machinery Sales Ltd. v. General Accident Fire and Life Assurance Corporation plc* [1999] IEHC 201, the plaintiff sought to excuse delay by virtue of the fact that it had been distracted by its involvement in other litigation. Geoghegan J. doubted that such an excuse could render a delay excusable, stating, at p.4, that:-

> *"Strictly speaking it would seem to me that the excuses relied on should relate in some way to the actual proceedings in hand because an opposing party can hardly be expected to stand aside and wait while the other party resolves its problems which have nothing to do with the litigation. Nevertheless I am satisfied that all the surrounding circumstances including so called excuses based on extraneous activities must to some extent be taken into account and weighed in the balance in finally considering whether justice requires that the action be struck out or allowed to proceed"*

14. In these proceedings the *"excuses based on extraneous activities"*, namely the pacing of the arbitration and the consequent impact on litigation that they knew was commenced and/or pending, were well known to each of O'Hare and McGowan and also Taggart. They were both aware that litigation had been commenced against them. They knew from the dates identified above that the litigation would effectively be put on stay until after the arbitration concluded, in the case of O'Hare and McGovern from at least the time of receiving the letter of 20th December, 2004, and in the case of Taggart from at least the time of receiving the letter of 4th July, 2007, and neither made objection, certainly no material objection to this proposed sequencing.

15. In *Comcast*, the Supreme Court decided that the delay in prosecuting the proceedings was excusable in circumstances where the plaintiffs said that they were waiting for the completion of the investigative stage of a tribunal of inquiry, the Moriarty Tribunal, into the granting of the State's second mobile phone licence. The plaintiffs' claim in that case involved serious allegations of corruption and misfeasance of public office by a Government minister. The Supreme Court considered that the case was exceptional and that in the unique circumstances it presented it was legitimate for the plaintiffs to wait until evidence had been heard at the tribunal which might assist it in framing its claim against the State. In the course of her judgment, Denham C.J. noted, at para. 40, that:-

> *"In general, it is not open to a party to decide unilaterally not to proceed with proceedings in a case for a particular time and reason. However, in the interests of fair and just proceedings, there are exceptions. This is one such exception, where in the interests of justice, I find that the delay is excusable."*

16. The situation that arose in *Comcast* does not appear to the court to be entirely analogous with that which confronts the court in these proceedings. As the above quoted segment of Denham C.J.'s judgment makes clear, that case was concerned with an occasion of unilateral and unsignalled delay. By contrast, the present case is concerned with signalled delay, and in this context the observations of Clarke J. in *Comcast* acquire an especial significance. Clarke J. considered that a party wishing to 'park' its claim pending the outcome of some external event cannot rely on a unilateral, unsignalled decision by it to do so as an excuse for its delay, stating, at paragraph 5.8 *et seq.* of his judgment:-

> *"[I]t seems to me that a party, who wishes to adopt what might, in ordinary circumstances, be considered to be an unorthodox approach to litigation (such as by putting the proceedings on hold pending some event), is required to, at a minimum, place on record with all other parties to the litigation, that that course of action is being adopted. It does not seem to me that it is legitimate for a party to adopt an unorthodox approach to litigation on a unilateral basis ...Unorthodox action signalled contemporaneously and not contested at the time is likely to be more readily accepted by the court as providing an excuse than the same action taken unilaterally and only referred to after the event as retrospectively providing an explanation."*

17. The court does not consider that a decision to proceed with arbitration and then with related litigation can properly be described as *"unorthodox"*. However, if all of the factors identified at paragraph 7 above present, and the court has concluded that they do, then, consistent with the judgment of Clarke J. in *Comcast*, the court considers that any delay arising by virtue of that initial decision can be pleaded successfully to be excusable. The court is cognisant of the fact that Hardiman J., at para. 4 of his judgment in *Comcast*, suggested that case was likely *sui generis.* Even so, the court considers that the observations of Clarke J. to which reference has just been made are both apposite in the context of the instant proceedings.

18. In *Silverdale and Hewett's Travel Agencies v. Italiatour* [2001] 1 I.L.R.M. 464, Finnegan J. held in effect that substantial commercial enterprises are expected to pursue litigation with reasonable expedition and a failure to do so is culpable. Per Finnegan J., at p.469:-

> *"In considering a party's personal blameworthiness one must look at the circumstances of the party ...[T]he plaintiff in the present case ...is a considerable commercial enterprise and must be expected to pursue litigation of a commercial nature with reasonable expedition and to that end take steps to ensure that its legal advisors act in an appropriately expeditious manner".*

19. While this may be so, the court considers that there are mitigating circumstances in this case that render excusable the inordinate delay arising, being those circumstances identified in the court's conclusions at paragraph 7 above.

20. In the relatively recent case of *O'Carroll & Another v. EBS Building Society & Another* [2013] IEHC 30, the plaintiff, as personal representative of a deceased investor, took proceedings arising out of the deposit of certain monies by the deceased with a Mr. Hall, the second-named defendant, who was licensed to accept deposits on behalf of EBS Building Society. Mr. Hall had taken the deposit but instead of placing it with EBS had invested or otherwise used it for his own benefit. The deceased died in 2000. Probate was granted in 2002. The plaintiff instituted proceedings in 2004.

Mr. Hall consented to judgment in 2008 but died in 2012, by which time attempts to enforce the judgment against him had been unsuccessful. In 2013, EBS brought an application to dismiss the plaintiffs' claim. O'Malley J. held that the delay arising was inordinate but not inexcusable, stating *inter alia*, at paras. 36ff, that:-

> *"While it may be unusual to pursue one defendant while letting matters lie in respect of another, this is a case where one defendant had, at a relatively early stage, admitted liability and consented to judgment. If the plaintiffs' claim could be satisfied by him it would clearly be in everyone's interest not to engage in superfluous litigation. EBS was fully aware of the course being taken by the plaintiffs and, while not formally acquiescing in it, did not seek to force the case on. The plaintiffs never abandoned their case against EBS, making it clear at all times that they would discontinue proceedings only when matters were fully resolved with Mr. Hall ...In my view, delay which is largely attributable to a*

course of action taken by the plaintiff, to the knowledge of the defendant, which would if successful be to the benefit of the defendant, is not inexcusable. It might be otherwise if the defendant has specifically taken objection to the course of action."

21. In this case, the pacing of the arbitration and the consequent impact on litigation were well known to each of O'Hare and McGovern and also Taggart. They were both aware that litigation had been commenced against them. They knew from the dates identified above that the litigation which had been commenced against them would effectively be put on stay until after the arbitration concluded, in the case of O'Hare and McGovern from at least the time of receiving the letter of 20th December, 2004, and in the case of Taggart from at least the time of receiving the letter of 4th July, 2007, and they made no, certainly no material objection to this proposed sequencing.

22. In *Desmond v. M.G.N Limited* [2009] 1 I.R. 737, Mr. Dermot Desmond, a prominent businessman, issued proceedings for libel in May 1998 concerning certain newspaper articles that alleged he had made various corrupt payments. However, a notice of intention to proceed was only issued in February 2005. The reason offered by Mr. Desmond for the significant delay in the proceedings was that he had acted on legal advice. The Supreme Court considered that the delay arising was both inordinate and inexcusable, though a majority were satisfied that the balance of justice required that Mr. Desmond's action should be allowed to proceed. Referring to Mr. Desmond's decision to *"park"* his defamation proceedings pending the determination of certain issues by an ongoing tribunal of inquiry into certain payments to politicians (the 'Moriarty Tribunal'), Kearns J., as he then was, observed at p.752, albeit in a dissenting judgment, that:-

"[T]he defendant was never informed of the plaintiff's decision to "park" the case nor was it invited to acquiesce in it. The lengthy delay almost certainly gave them reasonable grounds to believe that this litigation had simply "gone away" and would never be brought before any court."

23. This touches upon the issue of signalled delay to which reference was made by Clarke J. in his judgment in *Comcast,* which is referred to above and applied in this case. In the present case, of course, as referred at the court's conclusions at paragraph 7 above, there was knowledge on the part of O'Hare and McGovern and also Taggart as to the pacing of the arbitration and the consequent impact on the litigation that had been commenced against them.

24. In *O'Carroll,* O'Malley J. also refers in her judgment to the fact that the delay arising was attributable to a course of action, *viz*. the pursuit of Mr. Hall, which would, if successful, have been to the benefit of EBS Building Society. Equally, in this case, there was a benefit arising for O'Hare and McGovern and Taggart in that if Newbay was successful in the arbitration, then it was less likely, perhaps unlikely, that either O'Hare and McGovern or Taggart would be troubled further, at least by Newbay, in relation to the disputes that had arisen concerning the construction of the shopping centre.

25. For the reasons stated above, the court considers, consistent with the general trend of the applicable authorities, that the plaintiffs delay in these proceedings is excusable.

Where does the balance of justice lie?

26. It will be recalled that, under the *Primor* test, even if delay is found to be inordinate and inexcusable, the court is required to consider whether the balance of justice is in favour of or against a case proceeding. In this case the court has determined that the inordinate delay arising is excusable but it is useful in any event to consider where the balance of justice lies. Moreover, under the separate line of authorities commencing with *O'Domhnaill v. Merrick*, the balance of justice is the overriding and determinative factor, regardless of whether the delay was inordinate and/or inexcusable.

27. In *Primor*, Hamilton C.J., at p.475 *et seq*., indicated that the following criteria could be taken into account when determining where the balance of justice lies:-

"(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."

28. Further guidance to that given in *Primor* as to the criteria that might be considered by the court in determining where the balance of justice lies are to be found in the judgment of Finlay Geoghegan J. in *Manning v. Benson and Hedges Ltd* [2004] 3 I.R. 556 and that of Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510. In the *Anglo Irish Beef* case the Supreme Court decided that the balance of justice was in favour of striking out certain proceedings concerning an indemnification being sought under a particular share purchase agreement. In the course of his judgment, Fennelly J. observed as follows, at p.518, *et seq*:-

"[T]here may ...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 .... [T]he 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 ....[W]hen the court comes to strike that balance of justice in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J, it will need to find something weighty to cancel out the effects of the plaintiffs' behaviour. It will attach weight to the character of the claim and to the character of the plaintiffs. When considering any allegation of delay or acquiescence by the defendants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiffs' claim dismissed …. 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 '..."

29. The *Manning* case involved a claim by plaintiffs that, by reason of wrongful acts by the defendants, they had started and continued the deleterious habit of smoking tobacco and had incurred various personal injuries over the years as a result. The defendants brought applications seeking, amongst other matters, to dismiss the plaintiff's claims for want of prosecution on the grounds of inordinate and inexcusable delay. In granting the reliefs sought, Finlay Geoghegan J. identified, at p.569, the following non-exhaustive factors as relevant to the court's jurisdiction:-

"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.

Further, on the second question it will be relevant to consider any actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time."

30. In the present case the court has found the factors mentioned in paragraph 7 of this judgment to pertain and, having regard to the above jurisprudence, the court's findings in this regard direct it to the conclusion that, regardless of whether the court is correct as to the issues of inordinate delay and whether that delay is inexcusable, those factors have the effect that the balance of justice requires in any event that the instant proceedings be allowed to proceed. In reaching this conclusion the court has been heedful that the outcome of these proceedings may have a bearing on the professional reputation of one or more persons. As O'Hanlon J. observed in *Celtic Ceramics Limited v. IDA* [1993] I.L.R.M 248 at p.258 *et seq*:-

"It seems very unfair and unjust that persons whose professional standing and competence are under attack should be left with litigation hanging over their heads for years by reason of inordinate and inexcusable delay on the part of a plaintiff and I would respectfully echo the view expressed by Henchy J in Sheehan v. Amond that it should be possible to invoke 'implied constitutional principles of basic fairness of procedures ' to bring about the termination of such proceedings."

31. It seems to this Court that there may also be instances in which proceedings such as those referred to by O'Hanlon J. would not be "*very unfair and unjust*". An example of this would be a case in which a party decided to 'park' litigation pending the conclusion of related arbitration and conducted itself in a manner akin to that identified by Clarke J. in *Comcast* and considered above. It appears to the court that the instant proceedings are a classic example of just such a case.

Conclusion

32. The court declines to order that the plaintiffs' claim in these proceedings be struck out pursuant to the inherent jurisdiction of the court.