Neutral Citation: [2013] IEHC 470

THE HIGH COURT

[2004 No. 547P]

BETWEEN:

CAMPBELL-SHARP ASSOCIATES LIMITED

PLAINTIFFS

AND

MVMBNI JV LIMITED AND RAILWAY PROCUREMENT AGENCY

DEFENDANTS

[2004 No.3591P]

BETWEEN:

COMPREHEND LIMITED

PLAINTIFFS

AND

MVMBNI JV LIMITED AND RAILWAY PROCUREMENT AGENCY

DEFENDANTS

[2004 No.18771P]

BETWEEN:

IDARLS LIMITED

PLAINTIFFS

AND

MVMBNI JV LIMITED AND RAILWAY PROCUREMENT AGENCY

DEFENDANTS

JUDGMENT of Hanna J. delivered on the 31st day of July, 2013

This is an application by the defendants to dismiss proceedings pursuant to the inherent jurisdiction of the Court on grounds of inordinate and inexcusable delay or pursuant to Order 122, Rule 11 for want of prosecution. The plaintiffs' claim for damages arises out of the construction of the Luas Green Line between 6th July, 2001 and 27th June, 2004 which the plaintiffs allege gave rise to a nuisance (persistently high levels of noise, vibrations, dirt, dust and grime and the obstruction of access to the plaintiffs' premises). It is also alleged that the dirt, dust and grime resulting from the works encroached upon the plaintiffs' premises constituting a trespass. It is claimed that the works were carried out in a negligent manner for an excessive and unreasonable period of time.

By notice of motion dated 26th November, 2012 the defendants claim the following reliefs:

1. An order pursuant to the inherent jurisdiction of the Honourable Court dismissing the within proceedings on the ground of inordinate and unreasonable delay in the prosecution of the same;

2. An order pursuant to Order 122, Rule 11 of the Rules of the Superior Courts 1986 dismissing the plaintiffs claim for want of prosecution;

3. In the alternative, an order directing the plaintiff to take such steps as may be prescribed within such period as may be limited by the Honourable Court, in default whereof the proceedings herein shall stand dismissed without further order;

4. Such further and other order as this Honourable Court shall deem necessary or appropriate; and

5. An order for costs

Background Facts

The first named defendant, MVMBNI JV Limited, is the contractor appointed by the second named defendant, the Railway Procurement Agency (the "RPA"), to carry out the works in question. The RPA is a statutory body charged with the delivery of light rail infrastructure. The defendants have carried out works consisting of, *inter alia*, the laying of light railway tracks in the vicinity of, *inter alia*, Harcourt Street and Abbey Street. The plaintiffs' claim is that their businesses suffered considerable damage and financial loss due to the interruption, interference and obstruction of the premises and businesses by the contracted works. The plaintiffs' claim is for negligence, breach of duty, trespass, nuisance, and unlawful interference with Constitutional rights in relation to the use of certain premises. They allege that the deleterious effects of the works were exacerbated by delay in the defendants completing the work over a 26 month period- from February 2002 until April 2004. The alleged nuisance, trespass and damage occurred ten years ago and it is claimed by the defendants that there is an inordinate and inexcusable delay on the part of the plaintiffs in prosecuting the within proceeding. The defendants state that due to this delay they have suffered prejudice, and that in the circumstances it would not be fair for the case to proceed.

The plaintiffs are occupiers of premises on Harcourt Street and Abbey Street. There are twelve cases before the Court in which motions have been brought by the defendants to dismiss the proceedings on the grounds of inordinate and inexcusable delay. Three of these have been disposed of as the plaintiff has been dissolved; in the matter of Insight Options Limited there is no opposition and it was dissolved in 2010, there is no presumed opposition in Village Quarter Limited which was dissolved in January 2008 and Kestrel Fashions Limited t/a Donnelly's Leather Goods Shop was dissolved on 9th December 2011. The matter of Idarls Limited t/a Wynn's Hotel and Comprehend Limited t/a CTI Partners are dealt with together as there are no significant differences between them. Essentially they are based on the same evidence and the only difference is in the chronology. The remaining seven cases of Campbell-Sharp Associates Limited t/a The Origin Gallery, Dieter Bergmann t/a Primo Restaurant, Betty Ann Norton Theatres School Limited, Kivaway Limited t/a The Odeon Bar and Restaurant, Triglen Holdings Limited t/a The Russell Court Hotel, Fontis Catering t/a Saagar Indian Restaurant, and Stanley's Newsagents Limited were dealt with as one motion and run before the Court under Campbell-Sharp as the facts are somewhat similar in that no statement of claim was delivered until June 2012 (bar in the Triglen Holdings and Fontis Catering matters where such statements were delivered).

The Comprehend action essentially follows the same evidence as the Idarls action with some minor variations in the chronology. The Comprehend action was commenced by plenary summons on 24th March, 2004 and the statement of claim was delivered on 17th May, 2004. The Idarls action was commenced by plenary summons on 15th September, 2004 and the statement of claim was delivered on 14th October, 2004. The particulars were raised on 28th February, 2005 by the Railway Procurement Agency and a response to the particulars was given on 15th November, 2005. The defence of the first named plaintiff was delivered on 9th March, 2005 and the defence of the Railway Procurement Agency was delivered on 18th May, 2006. On 13th July, 2006 the defendants made a request for voluntary discovery. The plaintiffs agreed to make voluntary discovery on 15th February, 2007 but did not do so. As a result an application was made to compel them to do so in June 2008. In July 2008 Charleton J. made an order that unless discovery was made by 5th August, 2008 the application would stand dismissed for want of prosecution. An affidavit of discovery was produced on 30th July, 2008 but did not comply with the requirements of the rules so two further supplemental affidavits of discovery were made to correct the deficiencies- the first in June 2009 and the second in November 2011. A request for discovery was made by the plaintiffs on 5th May, 2011 and on 11th August they issued a 21 day warning letter in relation to the defendants' failure to make voluntary discovery. On 6th September 2011 the defendants indicated that they were taking instructions and requested the plaintiff not to issue a motion.

On 16th December, 2011, after consultation with an engineer and counsel, the plaintiffs requested the defendants to defer their affidavit of discovery as the request for discovery needed to be redrafted. It was not until 6th June, 2012 that the operative part of the discovery request was served. On 15th August, 2012 the notice of motion seeking dismissal of the proceedings was served and in October 2012 the plaintiff's notice of motion for discovery was served.

The Campbell-Sharp action was commenced by plenary summons on 16th January, 2004 and an appearance was entered by the defendants in February 2004 which was followed by proposals for the settlement of the proceedings by the Railway Procurement Agency in February 2007. On 10th September, 2010 there was notice of intention to proceed and on 12th October that year the defendants' solicitor threatened a motion to dismiss if further steps were not taken in the proceedings. The plaintiff's solicitor wrote to the defendant's solicitor on 2nd November, 2010 referring to the ten other sets of proceedings indicating that the Comprehend and Idarls cases would be prosecuted on the understanding that the remaining cases would be prosecuted thereafter. There is a dispute between the parties as to the existence of such an understanding. The statement of claim was delivered on 8th June, 2012 and on 15th August, 2012 the notice of motion seeking dismissal of the proceedings was served.

Decision

Primor plc v Stokes Kennedy Crowley [1996] 2 IR 465 is the authority for dismissal of proceedings for want of prosecution on the grounds of inordinate and inexcusable delay. The legal principles to be applied in this type of application have been summarised by Hamilton C.J. at 475 in this Supreme Court case, and subsequently confirmed in *Comcast International Holdings Inc v Minister for Public Enterprise* [2012] I.E.S.C. 50, as follows:

> "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 party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
>
> > (i) the implied constitutional principles of basic fairness of procedures,
> >
> > (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiffs 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 plaintiffs 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."

In essence the test in *Primor* is as follows:

1. Is there inordinate delay?

2. If so is it excusable or inexcusable?

3. If it is inexcusable where does the balance of justice lie?

Issue 1: Has there been inordinate delay in the prosecution of the proceedings?
It has been conceded that there has been delay on the part of the plaintiff in processing the proceedings but it is denied that it was inordinate and inexcusable. It is clear from the background facts that there has been significant delay on the part of the plaintiffs in the Comprehend and Idarls cases in both providing and seeking discovery but are these periods inordinate and inexcusable? The first period of delay is that of making discovery which runs from 2006 until 2008 and there is the second even longer period of delay on the part of the plaintiffs in failing to make a request for discovery and that runs from 2006 to 2011/12.

The proceedings in Comprehend and Idarls commenced on 24th March, 2004 and 15th September, 2004 respectively. On 13th July, 2006 there was a request for discovery by the defendants and the plaintiff agreed to make voluntary discovery in October of that year. As stated previously, following a motion compelling discovery, an order was made by Charleton J. directing the plaintiff to provide discovery. An affidavit of discovery was furnished on 31st July, 2008 by Neill Loftus in Idarls and by Thomas McCormack in Comprehend. This discovery was inadequate as regards the Comprehend matter and supplemental affidavits of discovery were being delivered up until November 2011. It was over two years before the plaintiff provided discovery in the Idarls case and over five years in the Comprehend case.

The second period of delay relates to the plaintiffs' request for discovery. When the defence was delivered in May 2006 the issues became clear and the clock began to run against the plaintiffs to make this request. The first request for discovery was made on 5th May, 2011 in Idarls and on 28th June, 2011 in Comprehend. The redrafted request for discovery was made on 6th June, 2012 in Idarls and 20th June, 2012 in Comprehend. The request for discovery came five years after the defence was delivered, seven years after the proceedings commenced, and nine years after the alleged nuisance commenced. The operative part of discovery was served six years after the defence has been delivered, eight years after the proceedings were commenced, and ten years after the alleged nuisance commenced.

From these dates it is clear that there was inordinate delay and so the first limb of the test is satisfied. Two years to comply with a discovery request and five/six years to raise a request for discovery is manifestly inordinate.

In the Campbell-Sharp matter no statement of claim was delivered until 8th June, 2012 which is over eight years after the commencement of proceedings (however, statements were delivered in both the Fontis Catering and Triglen Holdings Limited matters in October 2004). The plenary summons issued on 16th January, 2004 and the plaintiff responded on 18th February stating that they would be in a position to deliver a statement of claim within a month. No further steps were taken by the plaintiffs for quite some period in these matters since 11th February 2004 when an appearance was entered by the Railway Procurement Agency. It is plain that the delay in this matter was inordinate with a statement of claim being delivered eight years after proceedings were commenced.

Issue 2: Was the delay inexcusable?
The defendants claim that there has been no proper excuse for either of the two periods of delay. In relation to the delay regarding the two-year period in failing to make discovery the plaintiffs claim that the discovery sought was substantial and very detailed involving accounts and bank statements of another company, CTI Ltd. (in liquidation). This required an extensive search and also required the plaintiffs to obtain information from that company's accountants, liquidators and banks. They were eventually able to furnish some of the documents requested but were unable to obtain the banking documents of CTI Limited either from the accountants or the liquidators.

As regards the second period of delay, that of seeking discovery, it has been submitted by the plaintiffs that particular difficulties arose in obtaining appropriate experts to investigate the claim and assist in the formulation of the request. The first firm of engineers engaged was David L. Semple & Associates in 2004 which stated that it would not be able to continue in the case and withdrew from it as it was unable to furnish the plaintiffs with an expert report. The second firm of engineers, Watson and Associates Consulting Engineers, was contacted in 2008 and carried out preliminary investigations and site inspections. It advised that its engineers did not have the requisite knowledge or expertise for it to act as an expert or prepare a report in this particular case. A third firm of engineers, Beazley Sharp (Railwise) Limited was retained in July 2010 and carried out a site inspection in December 2011 and the firm is now fully committed to the case. Its engineers have carried out site inspections and it will be able to finalise its expert report when discovery is settled with the defendants. It is submitted by the plaintiffs that they had considerable difficulty over a number of years in engaging and retaining firms of civil engineers with the requisite experience involving the construction and development of a light rail system both inside and outside the jurisdiction. In response the defendants contend that it was the lawyers who would have the requisite knowledge to direct an application for discovery not the experts as put forward by the plaintiffs. According to the defendants it was the lawyers who should have been able to formulate a request for discovery in terms of a negligence and trespass action and submit that it is not apparent that expert evidence was required to formulate a request for discovery. The defendants state that no effort has been made to explain the difficulties in relation to obtaining an engineer with the relevant expertise or the efforts made to overcome this problem.

From the evidence Mr. Fox wrote to Mr. Semple, of the first engineering firm, on 27th November, 2007 complaining about the delay (as he had been involved since 2004), however, there is nothing in the letter to suggest that Mr. Semple was engaged regarding discovery or was assisting in the preparation of discovery. The letter also shows that there was no activity on the part of Mr. Semple over a number of years. In a second letter to Mr. Semple, dated 6th February, 2008, Mr Fox again enquires about the delay which was now at three years. Another similar letter was sent on 8th May, 2008 and again there is nothing to suggest that they were looking for input regarding discovery. As regards the second firm of engineers, Watson Associates, wrote to Mr. Fox on 13th January, 2009 saying that it does not possess the specific requirements to produce a report. This shows that a period of three years was allowed to elapse with Mr. Semple and the third firm did not get on board until a year and a half after Watson Associates informed Mr. Fox that it would not be able to assist. These correspondences highlight that engineers were engaged with at a very leisurely pace. Furthermore, Mr. Ring of Beazley Sharp was engaged in July 2010, but the first request for discovery is not made until June 2011.The defendants submit that when one looks at that request for discovery (letter dated 20th June, 2012) the documents that are sought are documents which a lawyer could identify without any input from an engineer. However, I am not satisfied that this would be so upon looking at the request itself which is comprehensive and extremely detailed. The request involved documentation relating to the tender and specification for the light railway works which involved, *inter alia*, a "Copy of all contracts and works schedules, directions, orders and notices issued in respect of enabling, ancillary and utility works carried out in support of the main contract works." At section B a request was made for "Copies of reports, designs, specifications and any undertakings and assurances provided in respect of mitigations for noise, vibration and other nuisance during construction of the contracted works". Further documentation concerning the erection, maintenance and dismantling of barriers which included "Copies of maps, plans, schedules to include pre-contract through to completion and operational stage updates, particularly with respect to ancillary and enabling works, utilities close to the premises" were requested. These examples highlight the level of specialised knowledge and expertise that was used in the request for discovery. From the evidence before the Court consultation took place with Mr. Ring in December 2011, and following that Mr. Ring played a necessary role in the request for discovery. However, despite being satisfied that the engineer was necessary to formulating the request for discovery one cannot excuse a delay of this magnitude by merely stating that difficulties were encountered in engaging the requisite experts. Therefore the delay was inexcusable.

Mutual Understanding/Implied Agreement
In relation to the Campbell-Sharp cases it is admitted that there was delay on the part of the plaintiffs in prosecuting these proceedings but that this is excusable on the basis of an understanding/implied agreement which existed between the parties. The alleged understanding was that the Comprehend and Idarls matters would be progressed and act as the two "lead cases" for the other proceedings. The plaintiffs maintain that this was done to avoid multiple sets of legal costs in parallel proceedings and to advance all the cases which involved identical claims arising out of the same set of circumstances would not have made sense; the position was understood by the defendants who acquiesced in this common sense approach. The plaintiffs submit that the understanding was acted upon by both parties and allowed the two "lead cases" to be advanced to a state of readiness for trial or a compromised settlement, following which the remaining cases could be proceeded with or resolved. Mr Walsh of McCann Fitzgerald disputes any agreement. The suggestion of an agreement or understanding first appears when Mr. Fox, solicitor for the plaintiffs writes to McCann Fitzgerald, solicitors for the defendants, on 2nd November, 2010 over 6 years into the proceedings stating "You will, we trust, agree that it makes sound financial sense for all parties concerned, in terms of both costs and outlays etc. to prosecute these two "lead" cases, first on the understanding, that the remainder of the cases will be dealt with thereafter." McCann Fitzgerald did not engage with the correspondence from Mr. Fox in relation to this matter. The defendants admit that they did not reply to this letter but claim that this does not point to a pre-existing understanding or give rise to an understanding while the plaintiffs claim this constitutes an acceptance and/or acquiescence rather than a denial of the understanding/implied agreement. Mr Fox's letter of 16th December, 2011 (asking the defendants to defer their affidavit of discovery as a redraft of discovery was required) again asks the defendants to confirm their "agreement to this proposed course of action" regarding the "lead" cases. Again the defendants say that this does not prove that there was already an agreement. The defendants submit that this means there was no agreement in place and this correspondence does not suggest an understanding.

In analysing this claim by the plaintiff's one must bear in mind the notice to proceed and the correspondence from Mr Walsh (of McCann Fitzgerald) to Mr Fox on 12th October, 2010 complaining about the delay of over six and a half years. Both of these appear to be inconsistent with an alleged understanding or agreement. Clare Carroll of McCann Fitzgerald, in her affidavit sworn 20th December, 2012, avers that it was never agreed that these would be test cases and Grahame Walsh, in his affidavit filed 3rd April, 2013, avers that no such agreement to park the proceedings existed and there was no consent on his part. The defendants assert that there would have been no need to serve a notice to proceed (10th September, 2010) if there was an agreement in place.

The law in relation to this issue is clearly stated in *Rodenhuis and Verloop B.V v HDS Energy Ltd.* [2010] IEHC 465, [2011] 1 IR 611 at p. 619 where Clarke J states at para. 17 that:

> "While there was undoubtedly a connection between the matters, it does not appear to me that the existence of those parallel proceedings provided any legitimate basis for the plaintiff in not progressing these proceedings or, at least at a minimum, in not raising the question of whether it might be appropriate to stay these proceedings pending a resolution of either or both of the parallel cases. It does not seem to me that it is open to a party to take the unilateral action of allowing one set of proceedings to go asleep because of the existence of another set of proceedings and then use the connection between the two sets of proceedings as an excuse for having allowed the proceedings concerned to go to sleep. If it is truly felt that it is inappropriate for some reason not to progress a set of proceedings because of the existence of other proceedings, then it is at a minimum incumbent on the party who holds that view to raise the issue in correspondence and seek to reach agreement. If agreement cannot be reached, then it is incumbent upon the party either to progress the proceedings or make some appropriate application to the court for directions. In those circumstances, I was not satisfied that the existence of the parallel proceedings provided any significant excuse for the delay."

The plaintiffs must prove that there was an agreement and that they genuinely believed in its existence. From the foregoing I am not satisfied that any mutual understanding or implied agreement existed between the parties and that Mr. Fox was mistaken in his belief that such an agreement or understanding existed. A non response cannot, in this situation, give rise to evidence of an agreement. This was a unilateral assertion on the part of Mr. Fox. However, the absence of a response or engagement on the part of the defendants might properly be described as lulling the plaintiffs' solicitor into a false sense of security in the belief that the defendants were "going along" with the test cases approach. Thus whereas I am not satisfied that any agreement along the lines asserted on behalf of the plaintiff existed nevertheless the lack of response, non-engagement and a muteness of the defendants can still be weighed in the overall balance at the end of these deliberations.

Issue 3 Where does the balance of justice lie?
Delaney and McGrath, in *Civil Procedure*, 2012, 3rd edition, set out what may be taken into consideration in analysing where the balance of justice lies in dismissing proceedings for want of prosecution as follows at para. 15-08:

> "As Kearns J has pointed out in the course of his judgment in *Desmond v MGN Ltd*[1], the considerations listed as relevant in assessing where the balance of justice lies are not intended to be exhaustive in nature and the court must take into account any particular matters which arise on the facts of an individual case.[2] In addition, as Fennelly J stressed in *Anglo Irish Beef Processors Ltd. v Montegomery*,[3] the court should balance all the considerations which emerge from the conduct of and interests of the parties to the litigation and the separate considerations listed by Hamilton C.J. in *Primor* "should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just."

In the present case the issues of delay and/or inactivity on the part of the defendants and prejudice fall be examined.

Delay on the Part of the Defendants
The defendants have conceded that there was an element of delay on their part but that this was justified in the normal course of litigation and that these periods are dwarfed by the delay on the part of the plaintiffs. It is clear from *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 465 that when looking at where the balance of justice lies the Court can have regard to delay on the part of the defendant. However, the Supreme Court said in *Primor* that any delay on the part of the defendant is not enough, it is not a bar in bringing an application to dismiss. Hamilton C.J. at 474, quoting the speech of Lord Browne-Wilkinson in the House of Lords in *Roebuck v. Mungovin* [1994] 2 A.C. 224 at pp. 236 and 237, states:

> "I therefore reach the conclusion that *Lyell's* case should be over ruled. Where a plaintiff has been guilty of inordinate and inexcusable delay which has prejudiced the defendant, subsequent 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. Such conduct of the defendant is, of course, 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. At one extreme, there will be cases like the present where the defendant's action are minor (as compared with the inordinate delay by the plaintiff) and cannot have lulled the plaintiff into any major additional expenditure: in such a case a judge exercising his discretion will be likely to attach only slight weight to the defendant's actions. At the other extreme one can conceive of a case where, the plaintiff having been guilty of inordinate delay, the defendant has for years thereafter continued with the action thereby leading the plaintiff to incur substantial legal costs: in such a case the judge may attach considerable weight to the defendant's activities. But it is for the judge in each case in exercising his discretion to decide what weight to attach in all the circumstances of the case to the defendant's actions and I trust that in the future there will be few occasions on which the Court of Appeal will be invited to review his decision on the point."

Hamilton C.J. at 492 continues:

> "While the learned trial judge erred in holding that the seeking of such order against the plaintiff constituted a bar or estoppel to their application to have the proceedings dismissed for want of prosecution, such conduct was, as stated by Lord Browne Wilkinson in *Roebuck v. Mungovin* [1994] 2 A.C. 224, 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 case.
>
> Though considerable expense was undoubtedly incurred by the plaintiff in the preparation of the affidavit of discovery, I do not consider that, in the light of the particular circumstances of this case, S.K.C.'s action in seeking a cross-order for discovery can be criticised."

This is so even if the defendants' actions lead to costs being incurred by the plaintiff. In *Primor* the Supreme Court overturned the approach taken by Johnson J. in the High Court and the proceedings were thrown out despite the fact that costs had been incurred. At p. 467 Hamilton C.J. refers to Ó Dalaigh C.J. in *Dowd v. Kerry County Council* stating as follows:

> "In considering the question of the extent of one party's delay, the court should not leave out of account the inactivity of the other party. As stated by Ó Dalaigh C.J. in *Dowd v. Kerry County Council* [1970] I.R. 27 at p. 41:-
>
> > "I wish to add two further general observations. First, 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."

Hamilton C.J. continues at pp. 467 and 468 quoting Finlay P., as he then was, in *Rainsford v Limerick Corporation* [1995] 2 ILRM 561:

> "From these decisions it is possible to elucidate certain broad principles which are material to the facts of this case and which would appear to constitute the legal principles applicable in this country at present to the problem of the dismissal of an action for want of prosecution or to its continuance by an extension of time for pleading.
>
> 1. Inquiry should be made as to whether the delay on the part of the person seeking to proceed has been firstly inordinate and, even if inordinate, whether it has been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable would appear to lie upon the party seeking a dismiss and opposing a continuance of the proceedings.
>
> 2. Where a delay has not been both inordinate and inexcusable, it would appear that there are no real grounds for dismissing the proceedings.
>
> 3. Even where the delay has been both inordinate and inexcusable the court must further proceed to exercise a judgment on whether in its discretion on the facts the balance of justice is in favour of, or against, the proceeding of the case. Delay on the part of a defendant seeking a dismiss of the action and to some extent a failure on his part to exercise his right to apply at any given time for the dismiss of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion.
>
> 4. Whilst the party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of his

> solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material to the exercise of the courts discretion."

In the present case Bryan Fox, in his affidavit sworn 29th November, 2012, avers that there was a delay on the part of the defendants regarding the delivery of the second named defendant's defence on 18th May, 2006 when the proceedings had been commenced on 24th March, 2004. Clare Carroll of McCann Fitzgerald avers (affidavit sworn 20th December, 2012) that the alleged delay on the part of the defendant was justified in the normal course of litigation and was in part due to the failure of the plaintiffs to provide replies to particulars necessary to prepare a defence. She continues that particulars were delivered on 14th November 2005 in Comprehend and on 15th November, 2005 in Idarls when they had been sought eight months previously on 28th February, 2005.

The plaintiffs also served a notice for particulars on the defendants on 13th November, 2007 and the defendants failed to respond which resulted in a 21 day warning letter being issued on 18th December, 2009. On 16th December, 2011 the plaintiffs issued a further notice for particulars which are still outstanding. The plaintiffs submit that these delays contributed to a considerable delay in the progression of the within proceedings. The defendant submits that in this instance they were asked questions of law and are therefore not required to respond as particulars should relate only to issues of fact.

There was also delay on the part of the defendants in replying to the plaintiffs' request for voluntary discovery. The initial requests were made in May and June 2011. These letters were ignored and a 21 day warning letter was sent on 11th August, 2011. On 6th September, 2011 the solicitors for the defendants wrote to the plaintiffs to say that they were taking instructions in relation thereto and requested that the plaintiffs refrain from issuing a motion. In response the plaintiffs agreed not to issue a motion and granted an extension of time, however, no further response was received from the defendants in relation to this issue and the plaintiffs repeated there request for voluntary discovery in June 2012.

Finally, there was a lack of engagement on the part of the defendants in replying to the plaintiffs correspondences regarding voluntary discovery sought by the defendants. Mr. Fox wrote to McCann Fitzgerald seeking confirmation that the defendants were satisfied with the matters to be discovered and which had been discovered on several occasions, beginning 19th December, 2008. On 18th December 2009 he also sought a response in relation to the discovery and on 17th June, 2009 a further letter was sent seeking confirmation in relation to the form of discovery the plaintiffs intended to make. This request was repeated on 16th February 2011. It was indicated that there was no response to these correspondences.

The evidence shows that the plaintiffs were not solely responsible for the delay in prosecuting the within proceedings. As is clear from the authorities, delay on the part of the defendant is not a bar to a motion to dismiss, but it certainly is a very material factor that falls to be taken into consideration in the exercise of the Court's discretion as to whether to dismiss claims of this nature. It is an ingredient that the Court may take into consideration in deciding whether or not to dismiss an action where there has been inordinate and inexcusable delay. I am of the view that the defendants' engagement in these proceedings goes beyond more than simple inaction. There was a failure to respond to a notice for particulars and a substantial period of delay relating to the failure to reply to the letters seeking voluntary discovery and when the plaintiffs indicated that they were going to motion for failure to respond to the letter for voluntary discovery they were asked to hold the motion pending the taking of instructions by letter dated 6th September, 2011. Regardless of whether the notice for particulars warranted a reply, the letter should have been responded to and shows a lack of engagement in the process. Due to the stance taken by the defendants the proceedings seem to move into a rather laconic state and a situation emerged where nothing much was happening over a long period of time and letters were not being replied to. This situation may be allied with other periods of non-engagement such as the issue of test cases. It is the view of the Court that the delay on the part of the defendant was a significant ingredient in this case.

Prejudice
The next matter to be considered in deciding where the balance of justice lies is that of prejudice. Hamilton C.J. states at 490 in *Primor*:

> "Delay on the part of a defendant seeking a dismiss of the action and to some extent a failure on his part to exercise his right to apply at any given time for the dismiss of an action for want of prosecution are ingredients in the exercise by the court of its discretion.
>
> But they are not the only such ingredients. The court is obliged to consider whether the total delay has been such that a fair trial between the parties cannot now be had and whether the defendants have been prejudiced by the continued delay.
>
> These matters must be considered separately in respect of each case."

At pp. 493 and 494 Hamilton C.J. sets out the prejudice the defendants suffered due to delay (not all of which is relevant to the present present proceedings) as follows:

> "1. Damage to the defendants' reputation as a leading Irish firm of auditors and accountants with significant international connections. Included in this is what the judge referred to as "widespread adverse publicity in newspapers and journals".
>
> 2. The continued possibility of having to pay a sum in damages "said to make the claim one of the highest of its kind ever brought, not only in this country but anywhere in the world".
>
> 3. The lengthy and considerable delay, at that stage 15 years from the time of completion of the original audit, with the possibility, should the action be allowed to continue, of an appeal to the Supreme Court "which could protract the matter considerably".
>
> 4. Factors inhibiting S.K.C.'s ability to mount a successful defence, including:
>
> > (i) most of the staff who worked on the audit have left the company, and a majority have left the jurisdiction also thus ensuring "an enormous expenditure of time and money would be involved in assembling witnesses from overseas";
> >
> > (ii) such witnesses as have left the jurisdiction, if unwilling to attend hearings voluntarily, could not be compelled to travel;

(iii) of the four partners involved in the work, one has since died, and the others have retired;

(iv) two of the three partners of Oliver Freaney & Co., who were involved in the joint audit of 1978, have also died, as has the then managing director of the plaintiff company.

5. Auditing standards have undergone considerable change in the intervening years, particularly owing to the exponential leaps made in computer power and technology generally. It would thus be "very difficult" to assess the quality of S.K.C.'s work by reference to standards applicable at the time.

6 It would be "entirely unreasonable" to expect the defendants' witnesses to be able to answer in detail questions relating to their daily business activities some 16 years ago."

In *Roderick Rogers v Michelin Tyre plc and Michelin Pensions Trust (No 2)* [2005] IEHC 294 Clarke J. identifies the kind of prejudice involved that does significantly weigh in the balance as follows:

"Insofar as the plaintiff makes a claim based on representations then it would appear, from the pleadings, that any such representations were made at the meeting on 15th September 1995. On the evidence it would appear that that meting was attended by a Mr. Pat Leonard and a Mr. Colm Baker on behalf of Michelin. It is not suggested that either of those two witnesses will not be available. However it is suggested that they are now both retired (for in excess of three and four years respectively) and will be required to give evidence concerning a meeting which, from their perspective, was relatively routine and which will have occurred at least ten years prior to any likely date of trial. In that context my attention is drawn to the comment of Finlay Geoghegan J. in *Manning v. Benson and Hedges Limited* [2005] 1 I.L.R.M. 190 to the effect that:

"Delays of four to five years as a matter of probability will reduce the potential of such persons to give meaningful assistance or act as a witness".

Obviously the extent to which a comment such as the above may be true will depend on the nature of the evidence which is likely to be given and other relevant circumstances. In this case the plaintiff has criticised the defendants for failing to put before the court any evidence as to the specific manner in which the relevant witnesses might find themselves impaired in giving evidence. I do not find that the absence of such evidence is a matter for which the defendants can properly be criticised. A defendant, in bringing an application such as the one now before the court, will be faced with a dilemma. The defendant is entitled to rely on what might reasonably be called general prejudice, that is to say the prejudice which could reasonably be expected to occur in any case of the type concerned and having regard to the delay involved. A defendant will also be entitled, if it wishes, to put before the court any special or additional prejudice. If it does so, it will necessarily have to draw the court's attention by means of evidence to a specific or additional prejudice which has occurred by reason of the absence of a witness, the difficulty of a witness in being able to give full evidence, the absence of documents or any other material fact. Clearly if a defendant does bring to the court's attention any such special prejudice the court must take that fact into account. However it would also be naive to ignore the fact that by so doing the defendant will draw the plaintiff's attention to the difficulty which the defendant would incur in properly defending the proceedings in the event that their application for a dismiss is unsuccessful. In those circumstances it seems to me that it is perfectly appropriate for a defendant (if it wishes) to rely simply on general prejudice."

The defendants in the present case seek to rely on specific prejudice in tracing the employees of the first defendant and of the Railway Procurement Agency. The defendants have sought to rely specifically on prejudice arising from the difficulty in tracing employees of the first named defendant. The defendants contend that it would be next to impossible to say what happened on particular days because of the difficulty in locating particular witnesses, i.e. the employees of the first named defendant who were working on the ground. However, this company had gone into voluntary liquidation in early 2008 and so the difficulty in tracing employees was an issue that had clearly arisen at this point irrespective of any delay on the part of the plaintiffs. So any prejudice which may have arisen in the normal course of events as a result of the economic difficulties of that particular company could have been negated by the defendant. The plenary summons was served on the first defendant in 2004 giving it more than sufficient notice to address problems in relation to tracing witnesses. In this regard I am satisfied that there is no prejudice to the defendants.

The defendants also state the employees of the fourth named defendant have since ceased their employment and others now live abroad so they may prove difficult to trace. What general issues of evidence are these employees going to address, given that the works are essentially being carried out in the main by the first named defendant? The claim came at a time when memories were very fresh, when the Railway Procurement Agency would have all of its documentation intact and would have all of its witnesses still present. It should have had no difficulty in maintaining the documentation records and in taking witness statements pertinent to this claim. The plaintiffs took action very quickly (insofar as the plenary summonses were issued in 2004 in all twelve matters) which meant that the defendants were in a position to maintain all of their documentation and take witness statements. The defendants maintain that various personnel that were involved in this project have dispersed and to try to get people now at this remove to deal with the allegations that are going to be made at the trial is a huge and real difficulty, and it is compounded very significantly by the duration of the delay on the part of the plaintiffs in this case. However, those employees were located in offices supervising the overall contract in terms of the administration of it whereas it is the contractors who are carrying out the works on the ground. Furthermore, the moment a claim is made one would expect certain steps to be taken e.g engagement of a claims investigator, people are interviewed, statements are taken. This could and should have been done in the present case. The plaintiffs further submit that to the extent that memories have been dimmed, they would have been dimmed in any event by the passing of four years since the construction finished.

Trill v Sacher [1993] 1 W.L.R. 1379, an English Court of Appeal case, refers specifically to the fact that the prejudice that is claimed by the defendant has to be attributable to a particular period of delay. In the present case it seems to me that the memories would have dimmed by the time the matter came on for hearing and it would be unjust and inequitable to strike out the plaintiffs proceedings where the defendants have not shown or proven that they are in any way prejudiced by the delay. In any event statements are available to refresh flagging memories.

One must consider the extent that the defendant is prejudiced in terms of a fair trial. I am of the opinion that the defendants have not suffered any prejudice as a consequence of the delay by the plaintiffs. The defendants have been in a position to ensure that all relevant documentation in relation to the construction of the light railway works have been maintained and witness statements obtained. The first defendant went into liquidation in 2008 and the defendants could not have been prejudiced by this fact because

at that time they could have taken any appropriate measures to obtain evidence, conduct interviews, or take statements from witnesses, within that company,_ The proceedings were issued in 2004 and the defendants have had years to muster their forces. The defendant has failed to show that the delay attributable to the plaintiff in prosecuting these proceedings has resulted in the likelihood that the defendants will not obtain a fair trial and therefore the balance of justice favours the refusal of the relief sought.

Documents case
Another issue in relation to prejudice is determining to what extent that this matters relies on documentary and oral evidence. In *Rodenhuis and Verloop B.V v HDS Energy Ltd*. [2010] IEHC 465, [2011] 1 IR 611 Clarke J at p.620 sets out what constitutes a documents case as follows:

> "[19] In applying those considerations to the facts of this case, it seems to me that the following conclusions can properly be reached. There has been some prejudice to the defendant because of the delay. While it is true to say that the meetings at which the contractual arrangements between the parties were entered into are documented in the sense that there are minutes of same, it seems likely that the dispute between the parties as to the precise contractual terms which are applicable will turn on narrow questions as to the precise discussions held between the parties. While the minutes may well be of assistance in establishing the broad nature of the discussions, there is every risk that the case will turn on precisely what was said by whom and when, and those matters will need to be assessed by reference to events which will have occurred thirteen or fourteen years before the trial. While the documents will undoubtedly be of assistance, it does not seem to me to be correct to regard that aspect of the case as being a "documents case" in the pure sense. There are cases which turn on the interpretation of documents themselves. There are also cases where parties will never have any recollection of the events other than by reference to contemporaneous records. However, there are cases, such as this, where the parties may be assisted in their recollection by documentation, but where issues which will need to be determined by the court may depend on precisely what was said. In such cases, while documents will make the task of the parties and the court easier, it will not necessarily be the case that the documents will be decisive."

Further insight into documentary evidence is given in *McBrearty v The North Western Health Board and Others* [2010] IESC 27 where Geoghegan J. states as follows:

> "...The court then went on to consider whether, as a matter of justice, the case should be allowed to proceed or should be struck out. In this connection Dalaigh C.J. made the following observation which is relevant to this case.
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> > "Nor can the court fail to take notice of the fact that, for their evidence of the treatment of their patients, surgeons and physicians do and must rely on their written records to refresh their memories; that is to say, medical evidence in modern conditions is largely a matter of written records. Here the records are available. It should also be said that in an action with regard to a surgical operation the patient rarely knows anything; what has happened is known only to the defendants."
>
> Every case is different. Factual resemblances are only of limited value. What is important in this case however and which was obviously held to be important in the Dowd case was that the written documentation was complete and available. It appears that that written documentation was sufficient for the plaintiff's expert, Mr. Clements, and the health board's expert, Mr. Lenihan, to form a definitive view. It appears not to be a case therefore where oral evidence is all important. If there is lack of memory on the part of Dr. Singh and/Or. Galvin, it is a factor that has to be taken into account but a balance of justice had to be considered having regard (inter alia) to the degree of its importance."

This approach allows the Court to use its discretion take into account the extent to which the defendants will be in a position to rebut the plaintiffs' claims by reference to documentary evidence and records concerning the manner in which the relevant works were actually carried out.

The defendants in the present case are in a position where they must defend actions which occurred 10 years ago and submit that much of the case will depend on what happened on particular days. They also state that there is a difference between a documents case and the present case, therefore the balance of justice favours dismissal of the case. They state that the claim will be heavily dependent on evidence comprising the recollection of witnesses with regard to the level of noise, vibrations, dust, etc. while the plaintiffs submit that the claim will primarily be established on documentary evidence such as the Environmental Impact Study (EIS), although oral evidence will assist the claim. The bulk of the evidence will come from contracts, schedules and minutes of site meetings. Such documents will establish the methodology deployed by the defendants, the time scales and the type of equipment and plant used including the drilling and excavation equipment, fencing and road closure barriers. Furthermore, the engineer will provide expert evidence regarding project management and be able to draw on comparative standards and best practices employed in other countries.

I am satisfied that this is principally a documents case although, no doubt oral evidence oral evidence will feature significantly. A fair trial is possible and on the balance of justice it cannot be dismissed. The argument that witnesses will be required and memories will have faded along with the claim that it will be impossible to trace employees do not hold as the case is not dependent on oral evidence. I am not satisfied that the defendants would be significantly reliant upon the memory of witnesses in the present case in circumstances where the proceedings concerned a large scale public project undertaken by an experienced state authority which requires detailed documentation both in the context of the implementation of the construction project and of compliance with statutory requirements in relation to health and safety and other matters. In that regard, the project was the subject of a detailed Environmental Impact Statement incorporating, *inter alia*, mitigation measures in relation to environmental/nuisance impacts, in respect of which it is submitted that there would necessarily have to be a considerable amount of documentation retained by the defendants particularly since they knew that the proceedings in this matter were pending. In the circumstances I am satisfied that the balance of justice requires that these proceedings be permitted to continue and I dismiss the defendants' application.

1. [2008] IESC 56, [2009] 1 IR 737.

2. Per Clarke J. in Kategrove Ltd v Anglo Irish Bank Corporation plc [2006] IEHC 210 at 11.

3. [2003] 3 IR 510.