[2020] IEHC 246

THE HIGH COURT

[2009 No. 232S]

BETWEEN

MYRMIDON CMBS (PROPCO) LIMITED
AND BY ORDER OF THE COURT
BURLINGTON REAL ESTATE LIMITED

PLAINTIFFS

AND

JOY CLOTHING LIMITED, JOHN SUTTLE AND MARIANNE SUTTLE

DEFENDANTS

JUDGMENT OF Mr. Justice MacGrath delivered on the 23rd day of January, 2020.

1. This is an application brought by the second and third named defendants to dismiss these proceedings for want of prosecution and/or on the grounds of inordinate and inexcusable delay. In the alternative, an order is sought striking out the proceedings pursuant to O. 36, r. 12 of the Rules of the Superior Courts.

2. The proceedings were instituted on 21st January, 2009 by Myrmidon CMBS (Propco) Limited ("*Myrmidon*") by way of summary summons. The plaintiff claims the sum of €70,007.95 against the first named defendant, a limited liability company, in respect of arrears of rent and service charges allegedly due in respect of the period 25th June, 2008 to 31st March, 2009. The claim against the second and third named defendants arises on foot of alleged liability in respect of a guarantee executed by them, which guaranteed the liabilities of the first defendant. An appearance was entered on behalf of the defendants on 2nd February, 2009.

3. Application was made by the then sole plaintiff seeking liberty to enter final judgment on 28th October, 2009. This was grounded on the affidavit of Mr. Joe Mahon sworn on the 27th October, 2009. Correspondence exhibited to that affidavit include a letter sent by the first named defendant dated 3rd February, 2009 enclosing cheques in respect of certain arrears. The first defendant stated that it had paid service charges for the period January, 2009 to March, 2009 and it expressed disappointment at what it described as the aggressive manner in which it was being treated, particularly as it had been engaged in ongoing negotiations with the landlord to try to resolve its difficulties. This was also referred to in a letter of 6th February, 2009 from Mr. White, solicitor retained by the defendants, in which he outlined the attempts made to reduce the outstanding balance. The company also protested about the tenant mix and a failure in good estate management. Complaint was made about the landlord's refusal to grant consent to the assignment of the tenancy to a third party, Markamatt Limited ("*Markamatt*"). It was contended that another unit had been let directly to the same proposed assignee who thereafter became a tenant of the landlord in breach of the landlord's obligations under the lease. It is evident that matters subsequently pleaded in the defence and counterclaim were aired almost immediately after the institution of the proceedings when Mr. White also advised that proceedings would be resisted and in the event that they were continued, a defence would be delivered and a counterclaim pursued. These claims

were refuted by the solicitors acting on behalf of the plaintiff in subsequent correspondence.

4. It is also evident from correspondence that a number of payments were made during August and September, 2009. A complaint was also made on behalf of the defendants, by letter of 5th August, 2009, that the landlord was acting in an unreasonable manner with a view to obtaining vacant possession of units and without compensation.

5. By letter of 9th October, 2009, solicitors representing the plaintiff expressed their belief that the Master the High Court might remit the matter to plenary hearing in the event that a motion was issued seeking liberty to enter final judgment. It was proposed that to save costs, they would make an application on an *ex parte* basis to the Master to have the case remitted to plenary hearing. This was initially resisted by the solicitor for the defendant but ultimately, the matter was transferred to plenary hearing. A statement of claim was delivered on 24th November, 2009, by which time the claim had increased to €123,006.76, including a claim for rent and service charges arising since the institution of the proceedings. On 1st February, 2010 a motion for judgment in default of defence was issued. A defence and counterclaim was delivered on 8th February, 2010 in which the defendants claimed loss of business, salaries, rent, rates and loss on foot of the proposed assignment for an amount considerably in excess of the plaintiff's claim. It is pleaded that over the course of the previous ten years the plaintiff had permitted the centre to decline by failing and refusing to carry out necessary works of repair, maintenance and upkeep, in consequence of which the trade of the first named defendant diminished. In detailed pleadings, the second and third named defendants allege, *inter alia,* that the plaintiff had approached Markamatt and offered it an alternative unit in the centre. It is alleged that the plaintiff had been motivated to refuse its consent to the assignment by a desire to obtain additional rent by leasing a unit to Markamatt. Allegations are made of problems arising from the erection of planning notices in, and the quality of tenants who had been permitted into, the centre; it being centrally contended that the plaintiff failed to exercise good estate management. The defendants' pleadings are largely consistent with the contents of Mr. White's letter of 6th February, 2010.

6. Particulars of the plaintiff's claim were updated on the 26th July, 2010.

7. Joy Clothing Ltd, the first named defendant, went into creditor's liquidation and was dissolved on 9th November, 2011.

8. The plaintiff served a notice of change of solicitor and a notice of intention to proceed on 4th November, 2011. No further action was taken by any of the parties until 7th November, 2013 when once again a further notice of change of solicitor and notice of intention to proceed was served by the plaintiff. A reply and defence to the counterclaim was delivered on the 24th June, 2014.

9. On 18th September, 2014, the solicitor continuing to act for the second and third named defendants sought voluntary discovery of various categories of documents relating*, inter alia,* to the application to assign the lease to Markamatt, the refusal of consent thereto

and the letting of the unit in the shopping centre to Markamatt. Other documents sought included those pertaining to rent and service charges, memoranda of meetings relating to the repair, refurbishment and reinstatement of the shopping centre and those evidencing representations made by the plaintiff to the defendants and other tenants regarding redevelopment of the shopping centre. Discovery was also sought of documents relating to repairs carried out to the shopping centre between 2002 and 2009 and concerning the purported/proposed redevelopment of the centre.

10. Discovery appears to have been agreed. An affidavit of discovery was sworn by Mr. Niall Kavanagh on 1st May, 2015 and was received by the defendants 8th May, 2015. Mr. Kavanagh was a director of Burlington Real Estate Limited ("*Burlington*") and formerly a director of the plaintiff. The involvement of Burlington was unknown to the second and third named defendant prior to that time. It appears that a receiver had been appointed to the plaintiff company in November, 2013 and the debt the subject matter of these proceedings was assigned to Burlington. At the time of the swearing of the affidavit Burlington had not been joined to the proceedings.

11. On 8th May, 2015 the defendants wrote to the plaintiff's solicitors seeking clarification as to the entitlement and capacity of Mr. Kavanagh to swear the affidavit. A reply was received on the 13th November, 2015 in which the defendants were informed that the then sole plaintiff no longer had acting directors, but that Mr. Kavanagh had personally dealt with the matter in his previous capacity as director of that company. He was by now a director of Burlington. Further, it was explained that almost one year previously, on 13th November, 2014 the debt had been assigned to Burlington and consent was sought to the joinder of Burlington as co-plaintiff. By reply of 16th November, 2015 the solicitor for the defendants explained that they neither consented nor objected to the application and sought confirmation that papers would be served on them following its outcome.

12. On 29th July, 2016 the solicitor for the plaintiff served a further notice of intention to proceed and a notice of change of name of solicitor. Application was made to join Burlington as a co-plaintiff on 24th October, 2016 and a letter was sent to the solicitors for the defendants on 7th November, 2016 informing them of this and stating that the plaintiffs would now proceed to set the matter down for trial. By reply of 9th November, 2016 the defendants' solicitor repeated his contention that Mr. Kavanagh was not properly entitled to swear the affidavit of discovery and stated that this had to be rectified. Without prejudice to this contention, and to assist the process, he sought the documentation listed in the affidavit of discovery. In the penultimate paragraph of the letter, Mr. White advised that it was totally inappropriate to set the case down for trial at that time as the pleadings had not yet been concluded and the issue of discovery remained to be finalised. He sought confirmation that the case would not be set down for trial until the matters raised in the letter were attended to.

13. By further letter dated 14th November, 2016, Mr. White sought a copy of the deed of appointment of the receiver to Myrmidon, a copy of the court order joining the new plaintiff and once again raised issues concerning discovery and the manner in which the

affidavit had been prepared. He re-iterated that as Mr. Kavanagh was not a director of the plaintiff at the time of Burlington's joinder, it was not appropriate that he should swear the affidavit. He concluded by again stating that it was wholly inappropriate to set the case down for trial until issue relating to discovery were addressed.

14. Mr. White's letter of 9th November was replied to on the 26th April, 2017 by the solicitor for the plaintiff. An explanation was given as to Mr. Kavanagh's role and it was queried why it might be contended that he was not a proper person to swear the affidavit, particularly as he had personally dealt with the matter in his capacity as director of Myrmidon. Issues concerning discovery were also addressed. In the final paragraph of that letter, the solicitors for the plaintiff advised that they *"will now proceed to set the matter down for trial".* This provoked an immediate reply on 28th April, 2017 in which Mr. White sought a detailed response to his letter of 14th November, 2016, which he contended had been disregarded. Again, it was protested that it was *"totally inappropriate and out of order"* to state that the plaintiffs would now proceed to set the matter down for trial and confirmation was sought that they would not do so until all matters had been fully attended to. In the final paragraph of that letter, he reserved the right to *"…present this letter, if and so required, if you propose to ignore our letter of 14 November 2016, and this letter, and attempt to set the case down for trial."*

15. Mr. White wrote another letter on 18th May, 2017 once again requesting the plaintiff to address issues regarding discovery and the other matters referred to in his letter of 14th November, 2016, to which no response had been received. He addressed issues regarding discovery with particular reference to the matters raised in the defence and counterclaim. He sought production for inspection certain documents considered important to the defence and counterclaim and deemed necessary for the trial. He advised that in the event of continued refusal of, or non-production and non-compliance with discovery requirements, the defendants reserved their right to produce the letter to the court in the event of an application being made to compel compliance with discovery. No response was received to this letter.

16. Prior to the making of this application, the only other event which occurred was a without prejudice meeting in January, 2018, to which I shall refer below.

17. This motion is opposed by the plaintiff. In a replying affidavit sworn by Mr. Kavanagh on 1st March, 2019, he avers that the defendants had been selective in the presentation of the motion and have wrongly given the impression that the plaintiffs had demonstrated a desire not to proceed to hearing. He states that on a number of occasions the plaintiff wished to set the case down for hearing but the reason this had not been done was due to repeated insistence on behalf of the defendants in relation to the affidavit of discovery. He also avers that the parties had engaged in without prejudice discussions in January, 2018 and maintains that no prejudice is or was identified by the defendants in consequence of the alleged delays. An explanation as to how the January, 2018 meeting occurred is also provided. The solicitor for the plaintiffs were approached by a third party who had been involved in an unrelated matter. This third party informed him that he

knew the second and third named defendants and suggested that it might be possible to arrange a settlement meeting. A letter was written to Mr. White on 10th January, 2018 and a settlement meeting took place on 31st January, 2018.

18. Mr. Kavanagh also refers to without prejudice discussions which took place at a much earlier stage, in 2011. These involved a Mr. Crosbie. Mr. Kavanagh quite properly did not reveal the nature of those discussions.

19. Mr. Kavanagh refers to the necessity for the services of notices of change of solicitors. He avers that no allegation of prejudice was made prior to the issuing of this motion and points out that it is was not at that time suggested that any witness who might have given evidence is unavailable. He contends that the second and third named defendants took no steps to clarify any outstanding discovery issues and lays emphasis on Mr. White's letters requesting that service of the notice of trial be withheld until discovery issues had been resolved.

20. Mr. Suttle, the second named defendant, in a further affidavit sworn on the 3rd April, 2019 avers that while Mr. Crosbie was an acquaintance, neither of the defendants had instructed or permitted him to represent them at discussions in 2011. While a brief meeting took place on a without prejudice basis, he was not present at it and it had been arranged between the parties' solicitors. He contends that he has suffered prejudice because proceedings have been hanging over him and his wife for almost a decade and describes this as being oppressive and prejudicial. It is not accepted that the case is capable of being determined by reference to legal principles and analysis of documents. The defendants' defence centres on meetings, events and representations which took place between 2002 and 2008, most of which are not recorded in writing. He avers that it is almost certain that the recollections and memories of those involved will have faded. He makes the point that if the case was susceptible to disposal by reference to documents and legal principles then it might have been dealt with at summary judgment stage and that it had been accepted by the plaintiff that the matter should go to plenary hearing. In response to the contention of Mr. Kavanagh that the defendants did not appear to have made any attempts to ascertain the availability of a particular director from Markamatt, Mr. Suttle states that contact had been made with her by email. She confirmed that she had no recollection of the events, had disposed of all documents and expressed her reluctance to become involved. It is to be observed that contact with this witness occurred only in very recent times.

21. Finally, Mr. White denies that there was any delay on the part of the defendants either in the delivery of the defence and counterclaim or otherwise. He provides an explanation for any alleged delay in the delivery of the defence. He was required to take detailed instructions. His office work hours were disrupted due to bad weather in this period. He was unaware of the involvement of Mr. Crosbie who he states took no formal part in the proceedings. He expressed surprise at the reliance placed by Mr. Kavanagh on issues concerning discovery, particularly where there had been a failure to furnish and disclose the documents listed in the affidavit of discovery. On 8th May, 2015 he sought production

of the documents listed in the first schedule. Six months later the solicitor for the first plaintiff confirmed that copies of the documents would be provided and notwithstanding this there was, what he describes as a *"continuous and unexplained failure to provide these documents".* He also explains steps which he took in 2016 to seek copies of the discovered documents and which have not yet been made available. He repeats the defendants' concerns that Mr. Kavanagh swore the affidavit of discovery and as to the completeness of discovery.

22. Mr. White also denies that any blame can be attributed to the defendants in relation to the delay in the joinder of the additional plaintiff the proceedings. He avers that the case was not at any point in time ready to be set down for trial and the plaintiffs' attempts to rely on issues of discovery to explain their delay was entirely misconceived. With regard to the meeting in January, 2018, while he was unaware of the approach by a third party, as a matter of courtesy he attended a meeting in the office of the plaintiff's solicitor on 31st January, 2018. It was a brief meeting and his clients did not attend. As far as he is concerned, there was nothing to discuss and he does not accept that his attendance at this meeting could have any possible effect on the issues now before the court.

Principles applicable

23. No issues arise in relation to the principles applicable on this application. The test, albeit somewhat refined over the years is that which was enunciated in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. It involves a three-stage analysis. The applicant bears the onus of proving, on the balance of probabilities, that the delay on the part of the plaintiff is inordinate and inexcusable. If it is not established that the delay is inordinate, then the application must fail. If inordinate delay is established, then the onus of proof remains on the moving party to establish that such delay is inexcusable. If the delay is found to be excusable then the onus of proof will not have been discharged and the application must fail. Once inordinate and inexcusable delay is established, nevertheless, the court must not dismiss the proceedings unless it is also satisfied that the balance of justice would favour such an approach. In *Flynn v. Minister for Justice* [2017] IECA 178, Irvine J. observed that where the plaintiff is found guilty of inordinate and inexcusable delay there is a weighty obligation on the plaintiff to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim to proceed. It is clear from the authorities that in the determination of this issue the court may take into account a number of factors considered to be relevant including the conduct of both parties, delay or acquiescence, the number and complexity of the events and transactions required to be recalled, whether it is a so called documents case; and any other matter which may bear on the case, or its future conduct including prejudice, established, presumed or inferred. It is also evident that each case must be considered on its own facts. It is accepted by counsel for the plaintiff, that the delay in this case was inordinate.

24. Counsel for the defendants, Mr. Lyons B.L., relies on *dicta* of Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510 that when considering an allegation of delay or acquiescence, care must be taken to distinguish between culpable delay in taking

a step in the action and mere failure to apply to have a claim dismissed. Fennelly J. also observed that the defendant will not be lightly blamed for delay which is the fault of the plaintiff. None of the factors identified by Fennelly J. such as poverty, illness, ignorance or absence from the jurisdiction arise. He submits that the delay is inexcusable and that the balance of justice lies in favour of dismissing the proceedings. The plaintiffs have not shown circumstances which absolves them of fault, nor have they shown circumstances of disadvantage or disability which prevented the progression of the proceedings. Similarly, it is submitted, that the requirement to join a co-plaintiff cannot be advanced as an excuse. It is submitted that there was no culpable delay on the part of the defendants in delivering the statement of claim, nor could the stance which they took in relation to the application to join an additional plaintiff be considered to be culpable delay on their part. It is argued that any period of delay which may have arisen as a result of some action on the part of the defendants, falls a long way short of making the plaintiffs' delay excusable.

25. Insofar as the approach of the courts to the third leg of the *Primor* test is concerned, reliance is placed on dicta of Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206 that even marginal prejudice may justify the dismissal of the proceedings. She observed at para. 32:-

> *"That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The Court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. which are conveniently summarised in the head note of the Primor decision."*

26. It is submitted that prejudice has been established, and particular reference is made to the unavailability of the witness from Markamatt. It is further submitted that the onus which rests on the plaintiffs is not discharged simply by criticising the defendants for failing to demonstrate the existence of concrete prejudice.

27. Counsel also submits that there are aspects of the defence case which require consideration of numerous undocumented meetings between 2003 and 2006 and there is a risk of prejudice to the defendants because of the effluxion of time. He submits that this is not a case, as discussed by Clarke J. (as he then was) in *Rodenhuis & Verloop BV v. HDS Energy Ltd* [2011] 1 I.R. 611, which turns on the interpretation of a particular document. To suggest that the case might be dealt with simply on the basis of documents runs entirely contrary to the plaintiffs' early acceptance that the case be transferred to plenary hearing. Counsel also relies on *Murphy v. Magnet Networks* [2019] IEHC 461, and that the court is entitled as a matter of principle, to presume prejudice, particularly in relation to witness memories, where there is a considerable lapse of time. In this assessment the court is entitled to view the matter prospectively.

28. Counsel also places emphasis on dicta of Keane J. in *Maxwell v. Irish Life* [2018] IEHC 111 that the accuracy of recollection falls to be considered objectively, rather than subjectively. He observed:-

> *"Human experience and several past miscarriages of justice teach us that subjective assertions of clear recollection frequently fail to correlate with the objective facts, just as expressions of faint recollection are often found to be accurate. Shortly put, memory is fallible - whether a particular individual accepts that in relation to his or her personal recollection or not."*

29. Mr. Lyons B.L. also relies on *dicta* in *Havbell DAC v. O'Halloran* [2018] IEHC 557. Summary proceedings had been instituted in 2008 but had not been progressed when an application to dismiss was brought in September, 2017. It was held that when a new party takes over a loan from an existing party, and the litigation arising from such loan, it must assume any obligation which the existing party may have had, or failed to fulfil, including the requirement to progress the case with all due expedition.

30. Further, it is submitted that any criticism of the stance adopted by the defendants in taking issue with the affidavit of discovery as sworn, is misplaced. The issue was reasonably raised, almost immediately, and was not addressed satisfactorily, despite the issue being raised on a number of occasions. No affidavit has been sworn on behalf of Burlington, despite its joinder to the proceedings in 2016. Notwithstanding request, the plaintiffs have not provided documents and counsel argues that there was no basis upon which it could be said that the plaintiffs were in a position to certify the case as being ready for trial or that the defendants were responsible for preventing them from so doing. Reliance, is placed in this regard on dicta of Irvine J. in *Flynn v. Minister for Justice* [2017] IECA 178, that while the conduct of both parties to the proceedings has to be examined, the conduct of the litigation by the plaintiff (respondent to the motion) is the primary focus of attention. The defendant did not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant constituting acquiescence in the delay, silence or activity is not material. Mere silence or inactivity is insufficient to constitute acquiescence or delay because it does not communicate acceptance of a given situation to the plaintiff.

31. Finally, he submits that as a matter of policy, the without prejudice negotiations which took place in January, 2018 ought not to be taken into consideration as to do so would go against the policy of the courts to encourage settlements. Even if the plaintiffs were entitled to rely on that meeting, he submits that it was an event of no significance.

32. Counsel for the plaintiffs, Mr. Brady B.L., argues that the admitted inordinate delay is excusable. He contends that on a consideration of the correspondence and proceedings as a whole, the defendants have acquiesced in any delay. He submits that the proceedings were in a state of readiness for hearing in 2014 but queries raised by the solicitors for the defendants gave rise to an impasse. Other steps were taken since 2012 and he outlines such measures as have been discussed earlier . There is no evidence of the plaintiff abandoning its claim. Further, nothing in the letter of 7th November, 2016 suggests that any issue other than discovery impeded the case from proceeding in an orderly fashion or that the counterclaim could not be progressed at that time. Nothing has changed since

that time. The plaintiff is in a position to set the matter down immediately. Discovered documents can be hand-delivered. While the above constitutes an excuse to explain any inordinate delay, nevertheless, counsel contends that in the event that the court concludes that the delay is inexcusable, these are matters which ought to be taken into consideration in the analysis of the third leg of *Primor*.

33. Counsel submits that the balance of justice favours permitting the case to proceed. No prejudice has been shown by the defendants. The claim is one for rent due and the basis of the claim is a matter of contract. Liability arises from a breach of the terms of the lease itself and on a proper reading thereof, liability is clear. Any complexity that may be suggested to arise relates to the counterclaim. The criticism made by the defendants as to the plaintiff's behaviour in the litigation is equally applicable to the defendants' conduct in pursuing the counterclaim. Unlike in *Millerick*, there is no suggestion that the defendants were given the impression by the conduct of the plaintiff that the claim would be abandoned. The totality of the correspondence indicates the contrary.

34. Reliance is placed on *dicta* of Irvine J. in *Granahan T/A C G Roofing and General Builders v. Mercury Engineering* [2015] IECA 58, where she observed that one of the principal questions that the court is obliged to consider when dealing with the balance of justice is whether or not the defendant has been prejudiced as a consequence of the delay complained of. The claim concerned an alleged breach of contract which had been entered into in 2008. Proceedings were instituted in 2009. The defence was delivered on 23rd November, 2009. Particulars were raised by the defendant and replied to on 13th January, 2010. On 31st May, 2011 the proceedings were transferred to the High Court following a contested application and they were adopted in the High Court later that year. On the application to transfer the defendant, to its credit, offered its consent to unlimited jurisdiction. Particulars were raised on 6th December, 2012 in relation to matters arising out of the defence and these were replied to on 17th January, 2013. There was a change of solicitors in November, 2013. They served a notice of intention to proceed on 31st January, 2014. They sought voluntary discovery. The motion to dismiss was then issued. The High Court acceded to the application. The Court of Appeal took a different view. Irvine J. was satisfied that the delay, when viewed on a cumulative basis, was inordinate. While also inexcusable the balance of justice favoured permitting the case to proceed. In so deciding the court considered the conduct of the defendant and the extent to which it might have been guilty of delay which, as was stated by Fennelly J. in *Montgomery* must be culpable delay. The court did not accept that the defendant had been guilty of culpable delay. The primary responsibility for advancing the case was that of the plaintiff. On the question of prejudice as a consequence of the delay, the defendant contended that a number of named witnesses were no longer in its employment and their whereabouts unknown, the court was satisfied that any prejudice was more illusory than real. Irvine J. stated that a defendant faced with litigation should know the witnesses likely to be required to counter the allegations made. The defendant should have obtained their contact details before they left employment. There was no evidence as to what steps were taken to ensure the availability of those witnesses before they left. Even had the case been brought on for trial some years earlier, a number of those witnesses would

already have left the defendant's employment. One of them continued to work for the defendant but in another country. The court was not satisfied that the defendant would suffer even moderate prejudice due to unavailability of witnesses. Such prejudice could not be equated with the loss of a crucial witness as a result of delay, through death or illness. The court nevertheless accepted that at that point in time the balance of justice favoured permitting the claim to proceed but cautioned the plaintiff about further delays.

35. Counsel submits that any evidence that the witness who it is suggested was unavailable might give is not relevant, in any event. Her view as to what might be reasonable or unreasonable conduct on the part of the landlord in refusing consent was irrelevant as this is a matter of law.

36. Particular significance is placed on letters of the correspondence from 4th July, 2014, whereby the solicitor for the plaintiff confirmed that he intended to serve a notice of trial, within 7 days and the defendants' response to these letters. The defendants' replies show that there was significant continuing engagement between the parties at that time. This also remained the situation in November, 2016. The arguments outlined in the affidavit of Mr. Kavanagh were advanced by counsel in his submissions. Reliance is also placed on *Rooney v. Ryan* [2009] IEHC 154 where the application to dismiss was refused by Dunne J. in circumstances where, although the plaintiff conceded that it had been guilty of inordinate and inexcusable delay, the defendant nevertheless had lulled the plaintiff into a false sense of security such that the plaintiff was not impressed with any sense of urgency, and Dunne J. found that the balance of justice was in favour of permitting the case to proceed.

Decision

37. It is accepted that the delay in this case is inordinate. I am not satisfied, however, that such delay is excusable as a matter of law. I accept counsel for the defendant's submission that there is no evidence before the court suggesting that the plaintiffs were under a disability or disadvantage such as might exculpate inordinate delay. I do not believe that it can be said that the objections of the defendants to having the case set down amount to acquiescence or estoppel. On the facts, I am not satisfied that it can be said that the approach of the defendants lulled the plaintiffs into a false sense of security. The objection of the defendants was that the case was *not* ready for trial. (emphasis added) I could not reasonably construe such objections, in the circumstances of this case, as a request for forbearance or interpret the correspondence in a manner other than that the defendants were insisting on their legal rights in the litigation, as they perceived them to be. If the plaintiffs did not accept the objections of the defendants to the issues concerning discovery, or if they felt that such stance as adopted by the defendants impeded the progress of the case and the service of the notice of trial, it was open to them to serve a notice of trial and to deal with any consequential procedural objection or action which the defendants might take. In the circumstances, I am satisfied that the defendants have discharged the onus of proof of establishing that the plaintiffs have been guilty of inordinate and inexcusable delay. Nevertheless, even though I do not accept that the conduct of, or the stance adopted by, the defendants excuses the delay on the part of

the plaintiffs, nevertheless, it seems to me that it ought to form part of the court's consideration in its determination of the third leg of the *Primor* test to which I now turn.

38. As stated by the Court of Appeal in *Millerick* there is an obligation on the plaintiff to persuade the court that the balance of justice favours the case proceeding. In *Padden v. Ireland (ex tempore¸* 31st January, 2018, Irvine J., Court of Appeal) Irvine J. observed that when it comes to considering the third aspect of the *Primor* test and where the court has concluded that the plaintiff is guilty of inordinate and inexcusable delay it does not start its assessment with the scales of justice evenly balanced. Thus, it is up to the plaintiff to establish such circumstances to demonstrate that the interests of justice requires permitting the case to continue.

39. The court, in its assessment of the interest and balance of justice must consider the constitutional rights of the parties to litigate and to defend, and the requirement for a fair trial and reasonably expeditious conclusion of litigation. The matters upon which the plaintiff relies in support of its contention that the balance of justice lies in favour of the continuation of the proceedings include the opposition of the defendant to the service of the notice of trial on a number of occasions, despite the plaintiffs' willingness to do so, a matter which I have addressed above. It is argued that there is no evidence of specific prejudice and that attempts to introduce prejudice surrounding the non-availability of a witness in relation to the landlord's withholding of consent to the assignment of the lease and the alleged subsequent letting of another unit to the company of which she is a director, is not borne out by the evidence before the court and that in any event it is not relevant. Such evidence could have been obtained at an earlier stage. A degree of reliance is also placed on the meeting which took place in January, 2018.

40. With regard to the without prejudice January, 2018 meeting, I accept counsel for the defendants' submission that the fact of that meeting ought not to be taken into consideration by the court it its assessment of the question of delay (which in this case has been conceded) or in the consideration of the balance and interest of justice. Settlements of disputes are to be encouraged and in the absence of a relevant and operative representation, for example, as might amount to estoppel, or other circumstances where it would be unfair and unjust not to do so, it seems to me as a matter of general principle that it would be contrary to the policy of encouraging settlements if such without prejudice negotiations or meetings were to affect or alter the legal rights of the parties. This is particularly so in a case such as this where the meeting, such as it was, was not instigated by the defendants. In any event, it seems clear that nothing of significance occurred at this very brief meeting. The clients were not in attendance.

41. A further period of one year's inactivity elapsed before the bringing of this application. Following the meeting, no steps were taken by the plaintiffs to progress the proceedings.

42. It is clear from the authorities that each case must depend on its own facts. When one considers the facts and circumstances in the authorities on which the plaintiffs rely, it is clear that at least in some of those cases the periods of inactivity were considerably less

than in this case. Some cases involved pre-proceedings delay and others concerned applications brought in the context of recent activity, be it an exchange of correspondence, court applications, motions or in one case, a very recent engineering inspection of premises. In at least one decision, the court was satisfied that the plaintiff had been lulled into a false sense of security by the conduct of the defendant.

43. In Rooney, for example, much greater activity had taken place in the litigation than has occurred in his case, although unlike this case, pre-commencement delay existed. Nevertheless, the parties had engaged in the process of discovery, particulars and the arrangement of inspection facilities, some of which took place within a period of weeks prior to the bringing of the motion. In *Permanent TSB Finance Limited v. Orcona Limited and Others* [2014] IEHC 541, a claim arose in respect of alleged liability on foot of a guarantee executed in February, 2007. Proceedings were issued on 18th June, 2009. An appearance was entered shortly thereafter. The plaintiff changed solicitor on 17th September, 2010. Notices of intention to proceed were filed in September, 2010, October, 2011 and November, 2012. A motion was issued on 7th January, 2014, seeking liberty to enter final judgment. This was responded to by the motion to dismiss on the grounds of delay. It was accepted that the delay was inordinate and on the facts, Keane J. was satisfied that a portion of the period of delay between November, 2009 and November, 2012 was inexcusable. He was not satisfied that specific prejudice had been established or that any such prejudice had been caused by delay. With regard to general prejudice, he observed at para. 24:-

> *"I accept that some prejudice is likely to follow almost inexorably from any significant delay in proceedings. It certainly is a matter that I am required to take into account. However, each case must turn on its own particular facts."*

The learned judge noted that in response to the motion the defendant had not sought to set out the grounds on which he might have a *bona fide* defence. The court was therefore deprived of the opportunity to consider the scope or ambit of any defence which might be taken into account in the court's assessment of the degree of general prejudice that arose. From the summary nature of the claim and the documents exhibited it was not possible to assess the level of prejudice as being moderate or significant. There was also evidence of forbearance and acquiescence in the second period of delay between November, 2012 and January, 2014. The defendant's inaction during that period had to be given some weight, though less weight than the plaintiff's earlier delay. He was satisfied that the balance of justice was in favour of permitting the claim to proceed.

44. There was no delay on the part of the plaintiff in the commencement of the proceedings. Although I have come to the conclusion that taken in its entirety, the delay in this case is inexcusable, there are some factors which might be considered to explain certain limited periods of the inordinate delay. For example, a number of changes of solicitor took place and the proceedings required amendment by the joinder of a co-plaintiff. These might be considered factors to explain some of the delay but they must be considered in the overall context of the entire delay in progressing the litigation. That the defendants may have

taken a neutral stance in relation to the joinder of a new plaintiff on 16th November, 2015 is a factor which I should also take into account. It must be recognised, however, that following the making of that order on 7th November, 2016 the only action taken by the plaintiff in the proceedings, was to reply by letter of 26th April, 2017 dealing with queries which had been raised by the defendants on 9th November, 2016 and on 14th November, 2016 regarding discovery. Almost immediately, on 28th April, 2017 the defendants raised further issues about that response and again on 18th May, 2017. No progress was made in the proceedings thereafter by the plaintiff. In fact, although the plaintiff indicated by letter on the 30th November, 2015 that discovered documents would be provided, and despite the reminder letter of 9th November, 2016, these have not yet been produced.

45. Insofar as it contended that there was delay by the defendant in a number of respects matters ought to be considered. I do not believe that any delay between the statement of claim which was delivered on 24th November, 2009 and the delivery of the defence and counterclaim on the 8th February, 2010, if delay it be, ought to be taken into account. Given the circumstances outlined in the affidavit of Mr. Smith, the court could not conclude that there was any operative delay on the part of the defendant during this period.

46. The delay in pursuing the counterclaim, however, is a factor which I should take into consideration, given that many of the consequence of the delay as alleged by the defendants such as diminishing memories, witness availability and the ability to obtain evidence, are directed at issues which have been raised not only in the defence but also in the context of the counterclaim. In this regard, it appears to me to be somewhat late in the day for the defendant to claim that a potential witness is no longer available. I have seen nothing to suggest that the defendants could not at a much earlier stage and perhaps at the time that the defence and counterclaim were prepared or shortly thereafter, have engaged with them or any potential witness, and perhaps to have taken statements. It seems to me, therefore, that insofar as the defendant seeks to rely on the non-availability of the particular witness in question, it is not a matter upon which I ought to place significant weight in the determination of the overall balance of justice, and also in the consideration of whether evidence of concrete prejudice has been established. I am not satisfied that it has.

47. In the circumstances of this case, however, I believe that I should also take into account the concession by counsel for the defendant that a consequence of the stance which the defendants have taken, if successful on this application, will be their inability to proceed with the counterclaim which will also fall.

48. While I have found it difficult to accept that the defendants' letters seeking clarification of the affidavit and their objection to a notice of trial being served constitutes acquiescence or lulled the plaintiffs into a false sense of security, nevertheless, I believe they ought to take into consideration in the analysis of the third limb of the *Primor* test. Another factor, which seems to me to be relevant is the manner, timing and circumstances in which this

application is brought. On the one hand, there is no evidence that a warning letter issued, yet on the other hand, there is nothing to suggest that the plaintiff, had taken or would have taken action to progress the proceedings either at that time or within a reasonable period thereafter. The inactivity on the part of the plaintiffs since the joinder of co-plaintiff in excess of two years prior to the making of this application bears testimony to this.

49. An analysis of the pleadings shows that many of the issues raised in the defence and counterclaim were advanced in correspondence from the very outset of the case. Allegations were made of misrepresentations, failure to comply with covenants and implied terms in respect of good estate management and reference was made to meetings which had taken place. In my view, this suggests that this is not a simple documents case. I accept the submission of counsel for the defendants that if the plaintiffs were correct in their assessment that the claim was a simple and straightforward documents case, then it is unclear why it ought not to have been brought to trial much earlier. In *Montgomery*, Fennelly J. referred to the commercial nature of the claim which, on the plaintiff's own version was perfectly straightforward. In my view, in all of the circumstances, the plaintiffs cannot have been unaware of the nature of the issues raised by way of defence. Indeed, it seems to me that the plaintiffs themselves recognised the requirement for a more detailed hearing on a plenary basis, than disposal on the summary basis would involve.

50. Further, although I am not satisfied that concrete prejudice has been established, nevertheless bearing in mind the onus which lies on the plaintiff, I have come to the conclusion that, at minimum, and having regard to the authorities opened to the court, there is likely to be general prejudice to the defendants with regard to its ability to defend the claim in consequence of the delay of the plaintiff. Issues to be addressed at the hearing are likely to concern, *inter alia,* matters such as what occurred at meetings and about representations made over ten years ago. Looking at the matter prospectively, which I believe that the court is entitled to do, if this matter is to proceed it is likely to be some time more before the case comes on for hearing. At that stage, a further period will have expired from the time of the events pleaded. I also believe that, in the circumstances, I am also entitled to take into consideration the further general prejudice to the plaintiffs which it is submitted on their behalf arises from the oppressiveness of a claim hanging over them for such a period of time.

51. In truth, when considered in its entirety, although it might be that the plaintiffs have not abandoned their claim, it can also be said that they have shown little interest in it. The same might also be said about the defendants in respect of their counterclaim. However in my view, it ought to be borne in mind that the stance taken by the defendants from the outset was that if the proceedings were continued, a defence would be delivered and counterclaim maintained. The evidence suggests that had the claim not been pursued by the plaintiffs the counterclaim may not have been brought. This is also a factor which I ought to take into consideration. Indeed, when one analyses the activity of the plaintiffs since November, 2016 when the order was made joining the co-plaintiff, the only

evidence of involvement by the plaintiff in the proceedings is the letter of 26th April, 2017 and the without prejudice meeting in January, 2018.

52. In all the circumstances, including the concession of the defendants that a consequence of the striking out of the proceedings on the basis advanced by them, involves a similar fate for the counterclaim, I have come to the conclusion that the balance of justice lies against the continuation of these proceedings. I must therefore accede to the defendants' application and dismiss the proceedings. I will also make an order dismissing the counterclaim.