[2020] IEHC 377

THE HIGH COURT

[No. 2010/938 S.]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

HARRY BOYLE AND MARGARET BOYLE

DEFENDANTS

AND

FINOLA K. CRONIN, DANIEL J. MORRISSY, EDEL MORRISSY, GERARD J. O'CONNOR PRACTISING UNDER THE STYLE AND TITLE OF DOBBYN AND MCCOY

THIRD PARTY

JUDGMENT of Mr. Justice Heslin delivered this the 28th day of July, 2020

Introduction

1. These proceedings come before the court in circumstances where the third party has brought a motion to dismiss, as against the defendants and the defendants have brought a similar motion as against the plaintiff. The Third Party's motion was issued on 5th February 2020, whereas the Defendant's motion was issued on 6th May 2020. Similar relief is sought in both motions, in particular, orders are sought to strike out the respective claims on the grounds of inordinate and inexcusable delay and on the grounds of want of prosecution.

2. It was agreed that the third party's motion would be opened first. The third party's motion, dated 5th February 2020 is grounded on an affidavit sworn by Mr. Seamus Tunney, solicitor for the third party, dated 4th February 2020.

Affidavit of Mr. Tunney, solicitor for the Third Party, sworn 4th February, 2020

3. In this affidavit, Mr. Tunney of Messrs. J.A. Shaw & Company, solicitors for the Third Party, avers, *inter alia*, that a guarantee dated 13th February 2008 was entered between the plaintiff and the defendants in respect of the liabilities of a company entitled Mint Properties Limited (hereinafter "MPL"), being a guarantee up to the sum of up to €1.5m. Helpfully, the court was furnished with a paginated book containing a copy of both motions as well as all affidavits and exhibits in respect of same. For ease of reference, I propose to quote page numbers from that book of motion papers (hereinafter the "book") when referring to extracts from relevant affidavits or exhibits and where they can be found.

The history of the Third Party Proceedings

4. The history of the third party proceedings is set out in para. 5 of Mr. Tunney's affidavit on page 5 of the book. In paras. 5 and 6 of Mr. Tunney's affidavit grounding the third party's motion, he makes the following averments: -

> *"5. I say that the relevant history of the third party proceedings is as follows:*
>
> - *Summary summons issued on the 26th of February, 2010.*
> - *Statement of claim delivered on the 31st of March, 2011.*

- *Order of the High Court granting the defendants liberty to issue and serve a Third Party Notice on the 9th day of July, 2012.*
- *Memorandum of appearance to the Third Party Notice dated 9th day of January, 2013.*
- *Third party statement of claim dated the 15th day of May, 2013.*
- *Notice for particulars arising from the statement of claim dated 8th of January, 2016.*
- *Third Party Defence dated the 8th day of January, 2016.*
- *Reply to particulars served by letter dated 24th day of August, 2016.*
- *Third party affidavit of discovery sworn on the 10th day of July, 2017.*
- *Notice of Intention to Proceed by defendants dated the 6th day of June, 2019.*

6. I say that since the 10th day of July, 2017 the defendants has [sic] taken no step in the third party proceedings (other than file a Notice of Intention to Proceed on the 6th day of June, 2019) nor have they made no [sic] attempt to bring the claim herein to finality or prosecute that third party issue and in these circumstances the defendants are guilty of inordinate and inexcusable delay."

5. As can be seen from the foregoing, the Defendants' claim against the Third party commenced in July 2012 when the court granted liberty to issue a Third Party Notice, by Order of 9th July 2012, and it is not in dispute that a Third Party Notice issued immediately thereafter, dated 12th July 2012. It is also a matter of fact that, apart from the Defendant's Notice of Intention to Proceed, the last pleading in relation to the Defendants' claim against the Third Party comprises the Third Party's Affidavit of Discovery sworn on 10th July 2017. Thus, the period of time, during which the Defendants' claim against the Third Party was pleaded, is one of precisely 5 years, bookended by the dates July 2012 and July 2017. This was followed by a period of delay on the part of the Defendants which at the heart of this application. Later in this judgment, I will look at the question of delays which occurred during the aforesaid 5 year period which ended with the delivery by the Third Party of their affidavit of discovery.

6. Returning to Mr. Tunney's affidavit, in paragraphs 6 to 8 he avers, inter alia, that *"…no serious attempt has been made by either the plaintiff or the defendants to bring these proceedings to finality"* since the proceedings were initiated in 2010 in respect of the 2008 guarantee. Mr. Tunney avers that no step has been taken by the defendants, in respect of the third party proceedings, since 10th July 2017, when discovery was finalised, other than to serve a notice of intention to proceed which was issued by the defendants on 6th June 2019. Mr. Tunney goes on to aver that the defendants are guilty of inordinate and inexcusable delay and want of prosecution. He avers, *inter alia*, that

the delay *"…is prejudicial to the defence of the third party issue and with the passage of time there are concerns about the availability of witnesses and what they remember of a guarantee executed in 2008"*, being an averment in para. 9. At para. 10 it is averred that the ongoing third party proceedings and allegations contained therein have created difficulties for the Defendant in obtaining professional indemnity insurance and at para. 11 Mr. Tunney prays for the relief sought in the motion.

Replying affidavit of Mr. Patrick Kelly sworn 29th April, 2020.

7. The Defendants' solicitor Mr. Patrick Kelly, of Messrs. McKeever Rowan, swore a replying affidavit on 29th April 2020. A copy of same appears in the Book from p.8 onwards. In para. 4, reference is made to the Defendants being elderly and suffering from medical issues. It is appropriate to quote para. 4 verbatim which I do as follows:

> *"4. I say that the defendants in the within proceedings are both elderly, the first named defendant being in his 80's and the second named defendant being in her 80th year and I say and believe that they both suffer from respective medical issues. In particular, in this regard, I say and believe that the first named defendant attends a cardiologist and that he suffers from high blood pressure and from arthritis. Additionally, I say and believe that the second named defendant suffers from anxiety arising as a result of the within proceedings and the possible consequences of same and also as a result of the recent and untimely of the defendants' daughter. Furthermore, I say and believe that the second named defendant also suffers from cardiovascular problems."*

8. The foregoing facts are not in dispute. In para. 5, reference is made by Mr. Kelly to the fact that the Plaintiff's proceedings were commenced by way of a summary summons dated 26th February 2010 and it is averred that the plaintiff bank is claiming €1.5m as against the defendants, which claim is based on a guarantee dated 13th February 2008 *"allegedly"* signed by the defendants. During submissions, counsel for the Defendants clarified that it is accepted that the defendants did, in fact, sign the guarantee in question although it is emphasised that the Defendants deny any liability under the guarantee, in the manner pleaded in the proceedings.

9. Reference is made, in para. 6, to a notice of change of solicitors which was entered by Mr. Kelly's office on 4th June 2010, the Defendants having been previously represented by another solicitor. Mr. Kelly also makes averments in relation to the pleadings exchanged thereafter including the Plaintiff's statement of claim of 31st March 2011 and a Defence and Counterclaim which was delivered on 23rd April 2012 on behalf of the defendants.

10. In para. 7 on p. 9 of the book, Mr. Kelly refers to a chronology in respect of the timeline of the proceedings as between the defendants and the third party. This is consistent with that referred to by Mr Tunney but, in circumstances where it is somewhat more detailed, its contents can be summarised as follows:

- 12th July 2012 - Third Party Notice;

- 9th January 2013 – Appearance by Third Party;
- 15th May 2013 – Third Party Statement of Claim;
- 9th July 2015 – Defendants' Notice of Intention to Proceed;
- 24th November 2015 – Defendants' Motion for Judgment in Default of Defence;
- 14th December 2015 – Order extending time for delivery of Defence;
- 8th January 2016 – Third Party Defence;
- 8th January 2016 – Third Party Notice for Particulars;
- 24th August 2016 – Reply by Defendants to Third Party Notice for Particulars;
- 20th March 2017 – Defendants' request for voluntary discovery by Third Party;
- 25th July 2017 – Third Party Affidavit of Discovery furnished;
- 6th June 2019 – Notice of Intention to Proceed issued by Defendants.

Delay by the Defendants in the conduct of the proceedings prior to July 2017

11. Even though the Third Party's motion is brought in light of the Defendants' delay from July 2017 onwards, I am satisfied that it is appropriate for this court to also look at the manner the claim was progressed from its inception. It is clear from the evidence before this Court that there was very considerable delay in relation to the progress of the Defendants' claim against the Third Party, even before July 2017. By way of example, the Defendants delivered a Statement of Claim dated 15th May 2013, following which the Defendants took no further step for almost two years and two months, the next step taken being to serve a Notice of Intention to Proceed dated 9th July 2015. The Third Party plainly did not deliver a Defence with anything like sufficient speed and the "ball" was certainly in the Third Party's "court", insofar as an obligation to deliver a Defence to the Statement of Claim was concerned. That is not, however the end of the analysis. Even taking into account the Third Party's delay, it has to be noted that the case against the Third Party is one brought by the Defendants. As such, it is for them to progress it with sufficient expedition. Had the Third Party brought, in June 2015, a motion of the type which is currently before the Court, one could well imagine an accusation of delay or acquiescence being levelled at the Third Party by the Defendants, and with some justification given that it was the Third Party's obligation, and failure, to deliver a Defence. That, however, does not explain the delay of over two years on the part of the Defendants which plainly represented a major hiatus in the progress of the pleading of the case and is all the more significant, given the fact that the issues in dispute went back to 2008. Even allowing for the fact that the time limits in the Rules of the Superior Courts are often departed from, delay of over two years is not what might be considered commonplace or ordinary. The Defendants were plainly correct to bring a motion to compel the delivery of a Defence but it is noteworthy, and not at all to the Defendants' credit, that this was not done until over two years after the service of the Defendants'

Statement of Claim on the Third Party, with the Defendants' motion for Judgment in default of defence against the Third Party coming four months later, on 24th November 2015, resulting in a 14th December 2015 Order extending time insofar as the delivery of Defence by the Third Party.

12. This, however is not where the Defendants' delay ends insofar as progressing the case against the Third Party is concerned. One would expect that, in light of a period of delay of over two years delay which necessitated a Notice of Intention to proceed being served by the Defendants' in respect of their claim against the Third Party, no significant delay would arise subsequently. Against that background, it is difficult to understand why the Third Party's Notice for Particulars, dated 8th January 2016, was not replied to for almost 8 months, the Defendants' replies to particulars being dated 24th August 2016. Based on the evidence before the Court, I am entitled to conclude that this delay cannot be explained with reference to the contents of the Replies to Particulars which were in fact served. I have examined the Reply to Particulars furnished by the Defendants, dated 24th August 2016, and it is a document running to less than 4 pages. Among the replies given by the Defendants to the 18 particulars which were raised by the Third Party, replies 3, 4, 5, 6 and 7 simply state: *"See response No. 2 above"*, whereas reply 18 states: *"This is not a proper matter for particulars of the clam being made by the Defendants against the Third Party"*. Of itself, such a delay in responding to a pleading may not be of major significance, in the context of a claim which was otherwise progressed with reasonable expedition and it is understandable that, from time to time, certain lapses occur for a variety of reasons. However, against the background of a dispute relating to events of 2008 and coming after a long period of delay on the part of the Defendants, it is not unfair to make reference to the foregoing, particularly as no other pleading or action is said to have taken place during the said period of 8 months, as Mr Kelly's chronology of events illustrates. It is also difficult to understand why, having received the Third Party defence of 8th January 2016, it was not until over fourteen months later that the Defendants sought voluntary discovery from the Third Party, by letter dated 20th March 2017. Having been requested in March 2017 to make Discovery, the evidence confirms that it was made promptly by the Third Party in the manner discussed in more detail elsewhere in this judgment. The Third Party's 10th July 2017 Affidavit was furnished to the Defendants on 25th July 2017, following which there is a period of further and significant delay leading up to the present application. In light of the foregoing, I am satisfied that it is not unfair to the Defendants to say that, at the very least, there was a period of delay of 2 years (out of the total period of 5 years to which I have referred earlier) which represented avoidable and unnecessary delay as regards the progress of the Defendant's claim against the Third Party is concerned, which occurred *prior* to July 2017 when, as we know, a further period of delay of approaching 2 years ensued. In short, the evidence demonstrates that, as a matter of fact, that, but for delay, the Defendants' case against the Third Party could have been heard at least 4 years earlier.

The nature of the Defendants' allegations against the Third Party

13. In para.7 of his Mr. Kelly makes, *inter alia*, the following averment with regard to instructions that he received from the defendants and it is plain that these assertions by

the defendants (vigorously contested by the Third Party) are fundamental issues insofar as the nature of the dispute between the Defendants and the Third Party are concerned:

> *"…your Deponent was instructed by the Defendants that they had never met with solicitors from Dobbyn McCoy Solicitors ('hereinafter referred to as the Third Party') who had purported to act for them and that furthermore they had never received any advice from the Third Party, its servants or agents."*

14. It is clear that the foregoing instructions by the Defendants to Mr. Kelly gave rise to the application to court which was made by the Defendants for liberty to issue a Third Party Notice and this application is referred to in para. 8 of Mr. Kelly's affidavit. The application for liberty was issued on 1st May, 2012 and was returnable for 9th July, 2012 at which point the court granted the defendants liberty to issue and serve the Third Party Notice.

15. It is clear from the contents of para.5 of Mr. Tunney's affidavit and para.9 of Mr. Kelly's that the third party and the defendants are in agreement that the last two items in the relevant history of the third party proceedings comprise a third party affidavit of discovery which was sworn on 10th July, 2017, the next item being a notice of intention to proceed which was issued by the defendants on 6th June, 2019 almost two years later.

16. Among other things, Mr. Kelly's affidavit goes on to set out the exchange of correspondence, in 2015, 2016 and 2017, regarding issues in the proceedings including the delivery of the Third Party Defence, the raising of and response to Particulars and the question of Discovery and Mr. Kelly exhibits relevant correspondence in respect of the foregoing. Paragraph 12 of Mr Kelly's affidavit details the sequence of events in relation to the making of Discovery by the Third Party. Mr. Kelly avers that by letter dated 20th March, 2017, he sought voluntary discovery, on behalf of the defendants, from the Third Party.

Discovery by the Third Party of "Any documentation furnished to the Plaintiff from the Third Party on behalf of the Defendants"

17. For reasons which will be apparent when it comes to looking at the issue of discovery as sought by the Defendants from the Plaintiff, I note the third of the 3 numbered categories which the Defendants wanted the Third Party to discovery was stated to be: *"Any documentation furnished to the Plaintiff from the Third Party on behalf of the Defendants"*, as is clear from Mr. Kelly's 20 March 2017 letter. Not having received discovery, he wrote again to the third party's solicitors on 8th May 2017, warning of a motion. He then refers to a reply by the solicitors for the third party of 19th May 2017, apologising for the delay and confirming the third party's agreement to providing the discovery sought, within a four-week period. Mr. Kelly then refers to his 24th May, 2017 letter confirming agreement to the foregoing proposal. Finally, he refers to the affidavit of discovery which was sworn on behalf of the third party on 10 July 2017 and was furnished to Mr. Kelly on 25th July, 2017. The relevant correspondence comprises Mr Kelly's exhibit "PK3" (pages 23 to 29 of the book). The Third Party's Affidavit of Discover, together with copies of all documents scheduled therein, is exhibited at "PK4" (pages 31 to 83 of the book).

Discovery by the Third Party within 4 months of the initial request for same

18. At this juncture I would observe that the foregoing is an example of discovery being dealt with in a timely and efficient manner by the Third Party. The Third Party was certainly in very serious delay in relation to delivering a defence in response to the Statement of Claim delivered by the Defendants but, having been granted an extension of time to deliver a defence, same was served promptly and discovery was clearly dealt with by the Third Party in a timely manner. It is a matter of fact that the entire process took less than four months from the initial letter sent by the defendants' solicitor on 20th March 2017, seeking voluntary discovery from the third party, to the swearing by the defendants' solicitor of an affidavit of discovery on 10th July 2017, furnished to the Defendants on 25th July, 2017. I emphasise the foregoing because, as will be seen later in this judgment, it contrasts sharply with the manner in which discovery was dealt with as between the plaintiff and the defendants and the delay which arose, of over four years, from the Defendants' initial request to the swearing by the Plaintiff of an affidavit of discovery.

19. The following is averred by Mr. Kelly in para.14 of his affidavit which can be found on p. 11 of the Book:

> *"14. Furthermore, I say that your deponent wrote to the third party's solicitors on the 18th day of August, 2017, setting out the defendants' position as against the third party and stating that 'from the documentation furnished there is little evidence of a solicitor client relations [sic] between the defendants and the third party.' Additionally, I say that, under cover of the said letter, your deponent informed the third party's solicitors that the action between the plaintiff and the defendants had been adjourned generally with liberty to re-enter to enable the plaintiff comply with a request for voluntary discovery made by the defendants."*

No suggestion that the Third Party failed to make proper discovery

20. It might usefully be noted that at no stage do the Defendants claim that the discovery, as furnished by the Third Party on 25th July 2017, was in any way deficient. No such complaint is made and, on the evidence, I am entitled to conclude that, as of July 2017, the Defendants were in possession of all *"documentation furnished to the Plaintiff from the Third Party on behalf of the Defendants"* (being the 3rd of the three categories which the Third Party had agreed to furnish to the Defendants by way of voluntary discovery and did furnish in July 2017). In light of the foregoing, even though the Defendants sought the same category from Plaintiff by way of discovery (by way of the Defendants' request in March 2017 for an additional category of discovery), I am entitled to conclude on the evidence that, although the Defendants may have *wanted* the Plaintiff (as the recipient of the documents in question) to make discovery of the identical category which the Third Party (as the sender of same) had already made to the Defendants, on 25th July 2017, the Defendants no longer *needed*, as opposed to *wanted*), that same category of discovery from the Plaintiff, from July 2017 onwards, insofar as the question of progressing the Defendants' claim against the Third Party was concerned. If the correspondence, subsequent to July 2017, revealed that the Defendants believed that the Third Party's discovery was incomplete or unsatisfactory in any way, the position might be

otherwise. However, it is a matter of fact that no request for further and better discovery was made by the Defendants to the Third Party, nor was any such motion issued. The correspondence is consistent with prompt discovery having been made by the Third Party in July 2017, the adequacy of which the Defendants were satisfied with. Based on the evidence I am satisfied that there was no bar to the Defendants proceeding with their case against the Third Party as of July 2017.

Discovery sought by the Defendants from the Plaintiff

21. In para.15 of his 29th April, 2020 affidavit Mr. Kelly avers that, by letter dated 21st August 2015, voluntary discovery was sought from the plaintiff. That letter comprises part of exhibit *"PK6"* to Mr. Kelly's affidavit and a copy of the letter can be seen at pp. 87 and 88 of the Book. In para. 15, Mr. Kelly goes on to refer to what he describes as an additional request for voluntary discovery made to the plaintiff's solicitors by means of a letter dated 20th March, 2017. A copy of that letter can be seen at pp. 89 and 90 of the Book. The letter, which was sent by the Defendants' solicitor to Barry C. Gavin & Son, solicitors for the plaintiff, begins with the words *"Dear Sirs, we refer to the above proceedings and to our letter dated 21st August, 2015 requesting that you provide us with discovery of certain documentation. Please note that in addition to those categories of documentation, we hereby require…"*. The letter goes on to specify a single category of documentation required, namely:

> "1. All documentation furnished to the plaintiff by the Third Party on of the defendants herein." (emphasis added)

Similar request for discovery made by the Defendants' to both the Third Party and to the Plaintiff on 20 March 2017

22. It is noteworthy that the additional category of discovery which the Defendants asked the Plaintiff to furnish, by letter dated 20 March 2017, namely all " *documentation furnished to the plaintiff by the Third Party on of the defendants"* was the very same as the third category of documentation which the Defendants asked the Third Party to furnish in a letter of the same date. In para.16 of his affidavit Mr. Kelly avers that he was required to write on numerous occasions to the plaintiff's solicitors requesting the aforesaid discovery and he avers that, notwithstanding such efforts, the plaintiff continued to delay in providing the affidavit of discovery sought. It is a matter of fact that the Defendants did not issue any Motion, pursuant to Order 31 of the Rules of the Superior Courts, seeking to compel the Plaintiff to make the discovery sought by the Defendants as per the initial request in 2015 or the additional request of 2017. In para.16, Mr. Kelly goes on to refer to his firm's letter dated 7th June, 2019 which, he avers, was sent due to the considerable delay on the part of the plaintiff in making discovery. He exhibits that letter at *"PK7"* and a copy can be seen on p. 92 of the Book. That letter to Messrs Barry C. Galvin & Son, solicitors for the plaintiff is relatively short and states the following:

> *"Dear Sirs,*
>
> *We refer to the above matter and enclose herewith Notice of Intention to Proceed.*

Please note that if we do not hear from you within twenty-eight days from the date hereof with your intention to progress this case we will have no option but to issue the appropriate motion to strike out your client's claim for want of prosecution."

Discovery by the Plainitff in September 2019

23. At para.17 of his affidavit Mr. Kelly confirms that the plaintiff's affidavit of discovery was ultimately furnished to him on 17th September, 2019 and at para. 18 Mr. Kelly asserts that the defendants have not been guilty of inordinate and inexcusable delay and want of prosecution. At para.19 he prays that the relief sought in the third party's motion be refused.

24. Other than an affidavit of service, no other affidavits were sworn in respect of the Third Party's motion to dismiss the Defendants' claim, prior to the hearing commencing. By agreement of all parties, immediately after the Third Party's application against the Defendants had been opened, counsel proceeded to open the motion papers in respect of the Defendants' motion against the Plaintiff.

Supplemental Affidavit of Seamus Tunney – 6th July 2020

25. On day 2 of the hearing (Thursday 9th July), Counsel for the Third Party furnished the Court with a Supplemental Affidavit of Seamus Tunney, sworn on 6th July 2019. No objection was made in relation to the delivery of same. This affidavit simply exhibited certain correspondence which passed between Messrs J.A. Shaw & Co., solicitors for the Third Party and Messrs McKeever, solicitors for the Defendants, in 2017, 2019 and 2020. This includes a 19th May 2017 letter from the Third Party's solicitors confirming that the Third Party would make voluntary discovery of all categories sought in the letter from the Defendants' solicitors dated 20th March 2017. Mr Tunney's affidavit also exhibits, inter alia, a copy of the letter dated 25th July 2017, which he sent to the Defendants' solicitors, and which enclosed the Third Party's Affidavit of Discovery. That letter went on to state that *"In the event that any steps are taken in due course to strike out the Plaintiff's action we would be obliged to be put on notice so that we could join in a similar application (should it prove necessary)."* Thus, as a matter of fact, the Third Party flagged the possibility of a strike out motion and did so in July 2017, when furnishing discovery to the Defendants with 4 months of the initial request for same.

The Defendants' motion as against the plaintiff

26. The Defendants issued a motion, dated 6th May 2020, a copy of which appears at p.93 of the book. It is grounded on an affidavit sworn by Mr. Kelly on 29th April, 2020. That affidavit comprises pp. 95 to 98, inclusive, of the motion book. At para. 3, Mr. Kelly refers to the defendant's being elderly, to their medical issues and to the recent and untimely death of the defendants' daughter. In para. 4, averments are made in relation to the plaintiff's proceedings which, it is not in dispute, commenced by way of summary summons dated 26 February, 2010. In para. 5, reference is made to the notice of change of solicitors in June 2010, to the statement of claim delivered by the plaintiff on 31st March 2011, to Particulars raised and replied to thereafter and to the delivery of a Defence to the plaintiff's claim and counterclaim, which was furnished by the defendants on 23rd April, 2012. It is not in dispute that further and better particulars were raised

and replied to by the respective parties as averred in para. 6 and Mr. Kelly goes on to refer to the plaintiff furnishing a Reply to the defendants' defence and counterclaim on 3rd September, 2014. Reference is then made to a notice of trial served by the plaintiff dated 1st December, 2014.

27. In para. 7 of his Affidavit, Mr Kelly avers that, as no further steps were taken in the case, his office served a notice of intention to proceed on 9th July, 2015. He goes on to aver that, by letter dated 21st August, 2015, the defendants sought discovery of certain documents from the plaintiff and he exhibits a copy of that letter. I have already referred to the 21st August, 2015 letter in which the defendants sought voluntary discovery from the plaintiff.

September 2014 Certificate of Readiness and December 2014 Notice of Trial in relation to Plaintiff's case

28. I will examine the foregoing period from February 2010 to December 2014 in more detail later in this judgment but, at this juncture, I would observe that the foregoing evidences the fact that, insofar as the Plaintiff was concerned, the case against the Defendants was ready to proceed towards the end of 2014, having been initiated almost 5 years earlier, in late February 2010. It is not in dispute that the Plaintiff's Senior Counsel issued a Certificate of Readiness on 15th September 2014, which was followed by the Plaintiff's Notice of Trial, dated 1st December 2014.

21st August 2015 – Discovery sought from Plaintiff by the Defendants

29. At this juncture it may be useful to quote the following extract from the 21st August 2015 letter which makes clear what categories of documentation were required by the defendants and the reasons for same:

> *"1. All documentation relating to or concerning the guarantees dated the 12th December, 2007 and the 13th February, 2008 to include documentation concerning any arrangements made for the execution and delivery of the said guarantees.*
>
> *2. All documentation evidencing or concerning the plaintiff's knowledge of the personal circumstances of the defendants.*
>
> *Reason for categories 1 & 2:*
>
> *The defendants claim in their defence that they are an elderly couple whose only liable asset is the property at Passage Cross, Waterford. By entering into any guarantee of the debts of Mint Properties Ltd, the plaintiffs put in jeopardy the defendants' home and well-being. The principal shareholder and director of Mint Properties Ltd was their son, Mark Boyle, who requested the defendants to execute a guarantee in its favour to enable him to pursue a commercial venture for the benefit of his company. In the premises, if, which is denied, the defendants executed the guarantee the same constituted an unconscionable transaction."*

30. In para. 8 of his 29th April, 2020 affidavit Mr. Kelly avers that, as no discovery was forthcoming, he wrote again to the plaintiff's solicitors on 14th October, 2015 seeking discovery as previously requested and indicating that the relevant application would issue in default of same. He goes on to aver that further requests for the said discovery were made by means of letters dated 18th February 2016, 30th June 2016 and 19th January 2017. Copies of all the foregone correspondence comprises exhibit "PK2" to his affidavit. Copies of the correspondence can be seen from pages 103 to 106 inclusive, of the booklet.

Plaintiff's 23rd January 2017 letter apologising for delay regarding discovery

31. In para. 9 Mr. Kelly avers that the plaintiff's solicitors wrote to him on 23rd January 2017 confirming that the plaintiff had agreed to make voluntary discovery of the documents as originally sought, apologising for the delay and indicating that it was hoped that the relevant affidavit of discovery would be provided in early course. Mr. Kelly exhibits a copy of that letter which comprises exhibit "PK3" and a copy of same can be seen at p.108 of the book. That letter from Barry C. Gavin & Sons to McKeever Rowan states the following:

> *"Dear Sirs,*
>
> *We refer to the above matter and to your letter of 19th January, 2017.*
>
> *As you are aware, there is no Order for Discovery in this matter, but our clients have agreed to make voluntary discovery some time ago and we regret the delay in reverting in this regard. We hope to be in a position to revert with our affidavit of discovery in early course.*
>
> *We note that the third party pleadings may now have substantially closed and we would be obliged if you could kindly let us have a copy of any further pleadings exchanged since the delivery of the third party defence on the 8th January, 2016.*
>
> *We look forward to hearing from you in this regard."*

32. It is a matter of fact that in the aforesaid letter dated 23rd January, 2017, the plaintiff acknowledges *"delay"*, specifically delay in reverting with regard to the issue of discovery. It is also a matter of fact that the first letter seeking voluntary discovery from the plaintiff was sent on 21st August 2015, being some seventeen months before the 23rd January 2017 letter from the plaintiff's solicitors. It is also a matter of fact that no explanation for the delay which the plaintiff is said to *"regret"* is proffered in the 23rd January 2017 letter.

33. In light of the foregoing, the evidence demonstrates, that prior to the specific period of delay which prompted the motion by the Defendants which is before this Court, there was significant delay on the part of the plaintiff in terms of progressing its case against the defendant.

Defendants' 20 March 2017 request for an additional category of discovery

34. In para. 10 of his affidavit sworn 29 April 2020, Mr. Kelly goes on to refer to the 20th March 2017 letter which was sent to the plaintiff's solicitors, requesting an additional category of documentation by way of voluntary discovery. That letter has been referred to earlier in this judgment in the context of the Third Party's application. It will be recalled that the additional category of discovery sought by way of the defendants' letter dated 20th March, 2017 was *"all documentation furnished to the plaintiff by the Third Party on behalf of the defendants herein"*. Mr. Kelly also refers to having sent a second letter to the plaintiff's solicitor, dated 20th March, 2017 and both of the 20th March, 2017 letters are exhibited at "PK4". Copies appear between pp. 110 and 112 of the book. The second of the 20th March 2017 letters (a copy of which is at p. 112 of the motion book) states the following:

> *"Dear Sirs,*
>
> *We refer to your letter of the 23rd January.*
>
> *We await receipt of the plaintiff's affidavit of discovery. The original request for discovery was made on the 21st August, 2015.*
>
> *Please note that any failure on your part to honour your agreement to make discovery will result in an application being made in the High Court pursuant to Order 31, Rule 21 of the Rules of the Superior Courts and this letter will be used in that application to fix you with the costs of same.*
>
> *We have requested the Third Party to make voluntary discovery and a copy of the letter of even date to Messrs. J.A. Shaw & Co. Solicitors is enclosed.*
>
> *We look forward to hearing from you in this regard."*

35. It will be recalled that the letter to the Third Party, dated 20th March 2017, to which the Defendants' solicitors referred in the above correspondence, was the letter asking the Third Party to make discovery of, inter alia, the very same category of documentation which the Defendants asked the Plaintiff to furnish in the letter sent to the Plaintiff on the same date (namely, all *"documentation furnished to the plaintiff by the Third Party on behalf of the defendants"*). Thus, on 20th March 2017, the Defendants were asking for discovery of the same category of documentation from both the sender and the recipient of the documentation in question.

36. In para. 11 Mr. Kelly avers that, notwithstanding the contents of the letter from the plaintiff's solicitors dated 23rd January, 2017, no affidavit of discovery was furnished. He then refers to a letter which he sent on 7th June, 2019, to the plaintiff's solicitors, enclosing a notice of intention to proceed, dated 6th June, 2019. Mr. Kelly exhibits the 7th June, 2019 letter which produced a reply from the plaintiff's solicitors dated 10th June, 2019, indicating that they were seeking the plaintiff's urgent instructions. This was followed by a letter dated 16th July, 2019 from the plaintiff's solicitors which stated, *inter alia*, that the plaintiff was *"… in the process of putting together the necessary paperwork*

to finalise the discovery herein." In para. 12 Mr. Kelly also refers to a letter from the plaintiff's solicitors, sent on 17th September, 2019, which furnished the relevant affidavit of discovery. The foregoing correspondence is exhibited at "PK6" and copies can be seen from pp. 116 to 118 of the book.

Prejudice as alleged by the Defendants

37. In para. 13, Mr. Kelly avers that the defendants are of advanced age and are suffering from various health issues. He goes on to make the following averment:

> *"I say and believe that the said delays caused by the plaintiff in progressing the case are likely to cause a serious risk of prejudice to the defendants. Specifically, I say and believe that, because of the matters averred to previously, the first named defendant will not be in a position to give evidence at the trial of the within action and I say and believe that similarly the second named defendant may also have a difficulty in this regard."*

38. In para. 14 Mr. Kelly asserts that the plaintiff has been guilty of inordinate and inexcusable delay and want of prosecution and that the balance of justice lies in the within case not proceeding and at para. 15 he prays for the relief sought in the defendants' motion.

Replying Affidavit of Mr. John O'Brien sworn 3 June, 2020

39. A replying affidavit was sworn by Mr. John O'Brien of Barry C. Gavin & Son, solicitors on record for the plaintiff. In para. 3, it is denied that the plaintiff has been guilty of inordinate and inexcusable delay. Averments are then made in subsequent paragraphs, under the heading *"The Nature of the Case"*. Reference is made in para. 4 to the 13th February, 2008 guarantee. Among other things, it is averred that MPL, for which the said guarantee was provided as security, was involved in the acquisition of a commercial site near Waterford Airport with the intention of developing an industrial park. In para. 5, it is averred that the initial security envisaged a first charge over the commercial site itself and a guarantee from the defendants in the sum of €1.35 million, to be supported by a charge over property owned by the defendants at 6 Shorewood, Ballinakill Downs, Waterford. It is averred that the defendants executed a guarantee in the sum of €1.35 million on 12th December, 2007 and that MPL drew down a loan, commencing on 14 December, 2007. Paragraph 6 refers to a sub-sale, by MPL of the commercial site, prior to MPL becoming registered owner, a consequence of which meant that security over the site itself could not be granted. Mr. O'Brien avers, *inter alia*, that *"an alternative structure was accordingly agreed which involved the defendants executing an enhanced guarantee in the sum of €1.5 million and providing their lands at Blenheim, County Waterford, in support of that guarantee".*

40. At para. 7, Mr. O'Brien avers that the defendants executed the 8th February 2008 guarantee as well as a charge over their Blenheim property and reference is made to a revised letter of sanction which issued to MPL at this time, although the date on the revised letter of sanction remained 23rd November, 2007. In para. 8, it is averred that MPL defaulted on its repayment obligations under the loan agreement and reference is

made to a demand made of the company on 3rd September, 2009 and a demand made of the defendants for payment of €1.5 million on foot of the guarantee on 1st December, 2009, following which the summary summons was issued on 26th February, 2010.

41. From para. 9 onwards, averments are made under the heading *"The Progression of the Proceedings"*. Paragraph 9 refers, *inter alia*, to the defendants' appearance which was entered in March, 2010 by their former solicitors. Reference is also made to a motion seeking liberty to enter final judgment, which issued on 15th April 2010, and to the coming on record, on 3rd June 2010, of the Defendants' current solicitors who, having had some time to consider the case and advise the defendants, delivered a replying affidavit sworn by the second named defendant on 19th October, 2010. It is averred that, having reviewed that affidavit, the Plaintiff decided that the matter could not proceed by way of a summary application and a consent order directing the matter to proceed by way of a plenary hearing was made on 21st February, 2011.

42. In paras. 10 and 11, reference is made to an original letter of sanction dated 23rd November, 2007, to a revised letter of sanction which issued in February, 2008 but which was erroneously dated 23rd November 2007 and to a copy of the letter of sanction dated 23rd November, 2007 as exhibited by the second named defendant on 19th October, 2010. These comprise exhibit "JOB1" to Mr. O'Brien's affidavit and "JOB1" comprises pp. 133 to 148 of the motion book.

43. Page 136 of the book comprises the third page of the 23rd November, 2007 letter of sanction and 3 items of "security" are listed at the top of the page, item 3 being *"letter of guarantee in the amount of €1,350,000 from Harry & Margaret Boyle (supported)"*. Page 140 of the book comprises the second page of a letter of sanction which is also dated 23rd November, 2007, but it is accepted by the parties that this letter of sanction issued to MPL in early 2008. At the bottom of the second page of this letter of sanction, one can see 3 items of "security", the third of which is stated to be *"letter of guarantee in the amount of €1,500,000 from Harry & Margaret Boyle, supported"*. Pages 144 to 148 of the book comprise the copy of the 23rd November, 2007 letter of sanction as exhibited by Mrs. Boyle, the second named defendant. Page 146 of the motion book comprises the third page of the letter of sanction and it is true to say that the does not contain any reference to "security". On day 2 of the hearing, I was furnished with a better copy of the same Affidavit, with exhibits, sworn on 19th October 2010 by the second named Defendant, Mrs Boyle. While stressing that this court cannot make findings of fact in relation to the issues in dispute in the proceedings themselves, I do note that the letter of sanction which Mrs Boyle exhibited on 19th October 2010 appears to be a faxed copy of that letter of sanction and I also note that, at the foot of each page, is information which appears to relate to when and who sent the faxed document. That information reads as follows: " 29/11/2007 FAX 051857211 MARK BOYLE". Mr. Mark Boyle is the son of the Defendants. It is not controversial to say that one reading of the documentation exhibited by Mrs Boyle in 2010 is that it comprises a faxed copy letter of sanction furnished to her by her son. Plainly such issues are not for this court to resolve but the foregoing suggests the nature of certain issues in dispute, for which sworn oral testimony from

relevant witnesses would be vital to their resolution. It is not in dispute, however, that the Defendants derived no personal benefit from any monies advanced by the Plaintiff for which the relevant guarantee is said to be security.

Claim that the 2nd Defendant exhibited a "doctored" version of a letter of security in October 2010

44. In para. 11, Mr. O'Brien avers that it was and remains the plaintiff's position that the document exhibited by the second named defendant is a *"doctored"* version of the letter of sanction and that it is not genuine or reliable. Mr. O'Brien goes on to aver that the plaintiff considered that it would not be possible to establish this to be the case in the summary application and it was accordingly agreed that the case be adjourned to plenary hearing on 21st February, 2011. In para. 12, reference is made to the plaintiff's motion for judgment in default of a defence, which issued on 2nd February, 2012 resulting in an order made, on 26th March, 2012, extending time for the delivery of a defence. In para. 13, it is averred that the defendants brought an application seeking to join the third party on 1st May, 2012, which application was heard on 9th July, 2012, resulting in an order made on that date. Mr. O'Brien also avers in para. 13 that, while the order was made joining the third party, no order was made directing that the third party proceedings be heard at the same time as the plaintiff's claim against the defendants.

5 month delay by the Plaintiff in providing Replies to Particulars

45. It is a matter of fact that the Plaintiff delivered a Statement of Claim, dated 31st March 2011 and it is also the case that, soon afterwards, the Defendants served a Notice for Particulars, dated 14th April 2011. I have examined the Defendants' Notice for Particulars, which appears at page 42 of the pleadings book. It could not fairly be called a complex document. It is a single page, comprising just 5 numbered queries, including requests for copy documentation. No explanation is offered on Affidavit as to why it took almost 5 months for the Plaintiff to respond. The Plaintiff's Replies appear at page 45 of the pleadings book and comprise 3 pages. Nothing in the documents themselves provide an explanation as to why it was not until almost 5 months later that the Plaintiff furnished Replies to Particulars, dated 26th September 2011. On the evidence, I am satisfied that the foregoing constituted delay on the part of the Plaintiff in progressing its claim against the Defendants. Thereafter, on 15th December 2011, the Defendants raised what was described as a Notice for Further and Better Particulars. It is not in dispute that this was not responded to. It would not, however, be fair to the Plaintiff to criticise it for this. An analysis of this 1-page document shows that it is actually a request that two categories of documents be furnished by the Plaintiff to the Defendants. Such a request was more properly a matter for discovery. In the manner explained elsewhere in this judgment, it is a matter of fact that the Defendants did subsequently make a discovery request in the proper form and it cannot be doubted that the Plaintiff delayed very significantly in dealing with same. For present purposes, it is worth observing that this so called Notice for Further and Better Particulars was served by the Defendants in mid- December 2011 and it is not in dispute that the next "step" in the progress of the case was the Plaintiff's 2nd February 2012 Motion for Judgment in default of Defence as against the Defendants. In coming to a decision in the manner set out in this judgment, I have given due weight to all delays on the part of the Defendants, including with regard to the late delivery of

their Defence. It is accepted by all parties that, on 26th March 2012, an Order was made extending time for the delivery of a Defence and that, on 23rd April 2012, a Defence was furnished.

Plaintiff's 9 month delay in seeking particulars regarding the Defence

46. In para. 14 of Mr. O'Brien's Affidavit, reference is made to the Notice for Particulars raised by the plaintiff on 25th January 2013, which sought particulars in relation to the Defendants' Defence. It is not in dispute that the Defendants delivered their defence 9 months earlier, on 23rd April 2012. No explanation is offered by Mr. O'Brien as to why it took 9 months for the plaintiff to raise particulars in relation to the defence. Helpfully, the court was furnished with a paginated book of pleadings. A copy of the defence comprises pp. 115 and 116 of the pleadings book. The defence is not a lengthy document, running to just nine paragraphs, followed by a counterclaim which is a single paragraph. The plaintiff's notice for particulars, to which Mr. O'Brien refers in para. 14 of his affidavit, sworn 3rd June 2020, can be seen at p. 143 of the book of pleadings. It is not an extensive document, comprising just two pages with particulars sought by way of six numbered paragraphs. I deliberately examined the contents of the defence and the notice seeking particulars in respect of the Defence, in case it could be said that the extensive or complex nature of same could in some manner explain the nine-month delay. I do not think that could reasonably be said. In short, the evidence establishes two matters of facts. Firstly, the fact of nine-months delay by the plaintiff with regard to seeking particulars and, secondly, that it could not reasonably be said to have required nine months to draft what was a relatively short notice for particulars in respect of a relatively short defence and counterclaim. For the avoidance of doubt, it was not suggested on behalf of the Plaintiff that it took any other step in its case during that 9 month period.

Defendants' delay in replying to the Plaintiff's notice for particulars

47. It is clear that the Defendants delayed in replying to the plaintiff's notice for particulars, dated 25th January 2013, and paragraph 14 of Mr. O'Brien's affidavit concludes by referring to the plaintiff's motion, heard on 14th October 2013, to compel the defendants to reply to particulars, which replies were ultimately delivered on 24th January 2014, just one day short of a year after being raised.

Plaintiff's delay in replying to the Defendants' notice for particulars

48. Mr. O'Brien also refers, in paragraph 14, to the notice for particulars raised by the Defendants, in May 2013, and to the Plaintiff's replies delivered on 4th July 2014. Mr. O'Brien also refers to the plaintiff's delivery of a Reply to the Defendants' Defence on 3 September, 2014. The notice for particulars raised by the Defendants, dated 15th May 2013, can be seen at p. 147 of the book of pleadings. It is a very short document comprising a single page seeking particulars in two numbered paragraphs. In light of the evidence, it is a matter of fact that the plaintiff did not furnish replies to those particulars until over thirteen months later, on 4 July 2014. A copy of the plaintiff's replies to particulars also appears in the book of pleadings. It is a single page comprising two short paragraphs. On the evidence, I am satisfied that the fact of the delay of thirteen months on the part of the plaintiff between the raising, by the defendants, of a notice or particulars ,dated 15 May 2013 and the replies furnished by the plaintiff on 4 July 2014,

cannot be explained with reference to the contents of either the notice for particulars or the replies. The former was brief and straightforward and this is very clear from the contents of the replies which comprise a mere four sentences, enclosing two documents.

7 out of 13 months being delay on the Plaintiff's part

49. I do note that, during part of the foregoing period of over 13 months (i.e. from May 2013 to July 2014) there was certainly some other activity on the part of the Plaintiff, in that the Plaintiff's motion to compel the Defendants to furnish replies to particulars (raised by the Plaintiff in January 2013) was issued on 22nd July 2013, resulting in an Order to compel replies by the Defendants, dated 14th October 2013, and Replies to particulars by the Defendants, dated 28th January 2014. It is still plain from the evidence that at least 7 months of the 13- month period it took the Plaintiff to reply to particulars, was a period in which the Plaintiff took no step to progress its case whatsoever. For example, it is a fact that over two months elapsed between the Defendants' Notice for Particulars dated 15th May 2013 and the Plaintiff's 22nd July 2013 Motion. Furthermore, it is a fact that on 14th October 2103 the Court ordered that *both* parties respond to their respective Notices for Particulars which were both outstanding at the time. It is not in dispute that the Defendants did so just over 3 months later, on 28th January 2014. However, the Plaintiff did not do so until nearly 9 months after the Court's 14th October 2014 Order (which was over 5 months after the Defendants delivered their Replies). The Plaintiff's Replies to Particulars were dated 4th July 2014 and I have already discussed the nature of same. In light of the evidence it could not be said that, although the Plaintiff was in delay in terms of delivering replies to particulars to the Defendants, it was busy progressing the case in other ways. At most, that was true for half the time. I am satisfied that at least 7 months of the aforesaid 13, represented inaction on the Plaintiff's part for which no explanation has been offered on Affidavit and for which no explanation is apparent from the pleadings themselves.

Plaintiff's Case ready to proceed in 2014

50. During the course of the hearing, it was accepted by all parties that, on 15 September 2014, a Certificate of Readiness was issued by Senior Counsel in respect of the Plaintiff's case. In paragraph 15 of Mr. O'Brien's affidavit he avers, inter alia, that a Notice of Trial was delivered dated 1st December 2014. No reference is made to the period of 2 ½ months between the Certificate of Readiness and the Notice of Trial. A copy of the notice of trial appears in the book of pleadings. Having regard to the foregoing evidence, I am entitled to conclude that the plaintiff's case was ready to proceed over five and a half years ago, in early December 2014, having been certified as ready to go on, by the Plaintiff's counsel.

51. In para. 15, Mr. O'Brien refer to a letter sent by the plaintiff's solicitors on 27th January, 2015 to advise the defendants that an application would be made to transfer the case into the court non-jury list. Even allowing for the Christmas vacation, it is not explained why a further 2 months elapsed before the said letter was sent. It is not in dispute that the Defendants replied by letter of 30th January 2015 stating that such an application would cause serious inconvenience. Mr. O'Brien avers that the plaintiff did not proceed with its application in the circumstances and he exhibits the relevant correspondence. In para. 16,

he refers to a letter sent to the defendants' solicitors on 24th March, 2015 advising them that an application would be made for a trial date in the Dublin non-jury list and Mr. O'Brien avers that the solicitors for the third party were also so advised.

Plaintiff's case listed for hearing on 13th October 2015 – 2 December 2015 application to vacate trial date

52. It is not in dispute that, on 25th March 2015, the Plaintiff's case was listed for hearing on 13th October 2015 and, from paras. 17 to 20, Mr. O'Brien refers to same. He also refers to the 21st August 2015 request for discovery made by the defendants and to the letter from the plaintiff's solicitors, dated 16th October 2015, agreeing to make discovery. He goes on to aver that the plaintiff accepted the defendants' representations that it would be more suitable for the Third Party proceedings to be heard at the same time as the plaintiff's primary claim. This gave rise to an application made on 2nd December 2015 to vacate the trial date and adjourn the proceedings generally with liberty to re-enter. It is appropriate to point out that there is no evidence that the Third Party was involved in coming to this agreement.

53. From para. 21, Mr. O'Brien makes reference to pleadings exchanged between the defendants and the third party and, in para. 22, he refers to the additional request for discovery made by the plaintiff by letter dated 20th March 2017. Earlier in this judgment, I made reference to both the 27th January 2015 request by the Defendants for voluntary discovery and to the 20th March 2017 request for an additional category of discovery documentation. It is not in dispute that the Plaintiff had failed to furnish any affidavit of discovery by the time the request was made in March 2017 for an additional category.

Correspondence sent by the Defendants' solicitors pressing for discovery

54. Nowhere in Mr. O'Brien's affidavit does he take issue with the fact that, after making a request for voluntary discovery on 21st August, 2015, the Defendants' solicitors wrote to the plaintiff's solicitors on no less than four occasions, in circumstances where the plaintiff had not provided the discovery sought. Those letters were sent by the Defendants' solicitors on 14th October, 2015, 18th February, 2016, 30th June, 2016 and 19th January, 2017. It is a fact that the Plaintiff delayed in making the discovery requested. Nowhere in Mr. O'Brien's affidavit is there any explanation for the plaintiff's delay in making the discovery sought. It will be recalled that on 23rd January, 2017, the plaintiff's solicitors replied to the letter from the defendants' solicitors of 19th January, 2017. It will be recalled that in their 23rd January, 2017 letter, the plaintiff's solicitors stated, *inter alia*, the following:-

> *"As you are aware, there is no order for discovery in this matter, but our clients have agreed to make voluntary discovery some time ago and we regret the delay in reverting in this regard. We hope to be in a position to revert with our affidavit of discovery in early course."*

20th March 2017 request for an additional category of discovery

55. It was relatively soon after this, namely by letter dated 20th March, 2017, that the solicitors for the defendants sought an additional category of documents. I am satisfied on the evidence that they did so against the following background. Firstly, voluntary

discovery was initially sought on 21st August, 2015. Secondly, no less than four further letters had been sent by the Defendants following up on the issue and requesting that discovery be forthcoming, in addition to telephone calls made by the Defendants' solicitors to the Plaintiff's. The 19th January, 2017 letter from the defendants' solicitors contains, *inter alia*, the following statement: *"despite repeated requests and telephone calls to your office, we are still awaiting receipt of the plaintiff's affidavit of discovery"*. It is clear from a reading of the letters sent by the defendants' solicitors that they understood that discovery would be made on a voluntary basis by the plaintiff and, read alongside the contents of the 20th January 2017 letter, which confirms that the plaintiff agreed to make voluntary discovery *"some time ago"*, and apologised for the delay, in my view the defendants could not fairly be criticised for the ongoing delay which was the plaintiff's responsibility. It is true that the defendants did not issue a motion which sought to compel the delivery of discovery, but it is equally clear that the defendants were operating on the basis that the plaintiff was willing to furnish discovery on a voluntary basis and would do so. That was a reasonable belief in light of the correspondence. Weighing up all the evidence, I am satisfied that the responsibility for the delay in making discovery to the defendants can fairly be said to be the plaintiff's. I believe that, on the basis of the evidence before the court, it would be unfair to say that the Defendants acquiesced in relation to the Plaintiff's ongoing failure to make discovery. The Defendants did not remain silent. On the contrary, there is evidence of several letters and phone calls and an evidential basis for a reasonable belief on the part of the Defendants that the discovery would be furnished on a voluntary basis. I say the foregoing specifically with regard to the claim which was the Plaintiff's obligation to progress against the Defendants. Later in this judgment I will examine the position insofar as the claim which the Defendants had an obligation to progress was concerned, namely the Defendants claim against the Third Party.

The position as of January 2017

56. As of 23rd January 2017, the Plaintiff's solicitors had stated in the clearest of terms that the plaintiff was willing to make voluntary discovery, that this had been agreed some time ago, that the delay in making voluntary discovery was regretted and that they hoped to furnish the relevant affidavit of discovery in early course. It is also a matter of fact that, having delayed from 21st August, 2015 (when the defendants made the initial request for voluntary discovery) to 23rd January, 2017 (when the plaintiff apologised for the delay in making discovery and agreed to furnish an affidavit in early course), there was further delay of some two years and eight months by the Plaintiff, before the relevant affidavit of discovery was furnished to the Defendants' solicitor on 17th September, 2019. It is also a matter of fact that the plaintiff's affidavit of discovery was furnished in the wake of correspondence from the Defendants' solicitors of 7th June, 2019 enclosing a notice of intention to proceed. In the manner examined above, I am satisfied that the evidence discloses very substantial delay on the part of the plaintiff with regard to the making of discovery, from the point at which it was initially requested, in August 2015, up to the point at which discovery was made by the plaintiff, over 4 years later, in September 2019. Of the foregoing period, over 2 years delay arose between the letter sent by the Defendants' solicitors, dated 20th March 2017 (seeking one additional category of

discovery), until the Defendants' Notice of Intention to Proceed, on 7th June 2019, with a further 3 months delay by the Plaintiff before eventually delivering the Affidavit of discovery in question, on 17th September.

The Plaintiff's statement that "the matter went quiet"

57. After referring, in para. 22, to the Defendants' 20th March, 2017 letter regarding the additional category of discovery, Mr. O'Brien goes on to make the following averment:-

> *"It is the case that the matter went quiet at that stage…"*

This is undoubtedly factually correct. Mr. O'Brien goes on to aver that no further communication was received from the defendants' solicitors until 7th June, 2019 when a notice of intention to proceed was served. In my view, however, it is important to note that, as a matter of fact, the "ball" was very much in the plaintiff's "court" throughout the entire period when the matter "went quiet". I have already referred to the fact of a series of letters sent by the Defendants' solicitors in relation to discovery and, indeed, there is evidence of a number of phone calls on the same issue. That ultimately resulted in what can fairly be described as a letter in which the plaintiff "put their hands up", acknowledging delay, apologising for it and indicating that they would rectify matters by delivering an affidavit of discovery in early course, being the letter from the plaintiff's solicitors dated 23rd January 2017. Against that factual position, it is in my view unfair to lay at the door of the defendants the blame for the plaintiff's delay in making discovery up to and beyond 23rd January 2017. It was the plaintiff who promised to do something, namely, to deliver the long-awaited affidavit of discovery. Furthermore, this is the plaintiff's case and, as such, the plaintiff has the primary responsibility for pressing it forward. Moreover, it is a case which the plaintiff's senior counsel certified as ready to proceed towards the end of 2014.

Plaintiff's delay from 23rd January 2017

58. In light of the evidence, I am satisfied as to the fact of further delay on the part of the plaintiff with regard to the discovery issue, being the delay from 23rd January 2017 (when the Plaintiff's solicitors wrote to the Defendants' solicitors) to 17th September 2019 (when the Plaintiff's affidavit of discovery was delivered) compounding the plaintiff's delay with respect to discovery, which commenced as of the Defendants' initial request for same, by letter dated 21st August 2015. In total, the delay between the initial request for voluntary discovery, on 21st August, 2015, and the delivery by the Plaintiff of an affidavit of discovery, on 17th September, 2019, is in excess of four years. The delay of particular relevance to the Defendants' present application is the delay commencing with the Defendants' solicitors letter dated 20th March 2017 (containing a request for an additional category of discovery) and events of 2019, in particular the Defendants' 6th June 2019 Notice of Intention to Proceed and the delivery, on 17th September 2019, of the Plaintiff's affidavit of discovery.

The nature of the discovery sought from the Plaintiff

59. Two matters of fact arise in respect of the issue of discovery. Firstly, the discovery sought by the Defendants cannot fairly be said to have been unusually large or particularly complex. That is wholly apparent from the Defendant's letters seeking voluntary

discovery. In total, just 3 categories are sought and I have referred to those earlier in this judgment. I emphasise the foregoing because it can happen in proceedings, including claims involving banking facilities, that discovery is extensive and is said by the party making it to require a significant period of time to conduct extensive searches. On the evidence before me, I am satisfied that this does not arise in the present case. The nature of the discovery sought and furnished cannot be said to explain the Plaintiff's delay. Furthermore, the Plaintiff does not even suggest that there was any particular difficulty with conducting the relevant searches and producing the affidavit of discovery in question. Nor is it suggested, in the affidavits on behalf of the Plaintiff, that *any* difficulties were encountered by the Plaintiff during the process which caused or contributed to the delay in making discovery. No reason for the delay with regard to discovery is proffered by the Plaintiff. That is true in relation to the *entire* period of the Plaintiff's delay in making discovery, the Plaintiff having been initially asked for two categories in August 2017 and having failed to produce any discovery by March 2017, when the Defendants asked the Plaintiff to make discovery of one additional category of documentation.

Defendants' Notice of Intention to Proceed – served 7 June 2019

60. From paras. 23 to 25 of Mr. O'Brien's affidavit, reference is made to the correspondence which was exchanged between the parties between June and December, 2019, following the service by the Defendants of a notice of intention to proceed on 7th June 2019 and that correspondence is exhibited. In para. 26, reference is made to the fact that, on 19th December 2019, the case was listed for case management to take place on 5th February, 2020 and that on 5th February 2020, the third party advised the court that it intended to apply to dismiss the Defendant's claim against it and the Defendants indicated, at the same time, that they were contemplating a similar motion in respect of the plaintiff's claim.

The plaintiff's assertion that the proceedings were prosecuted "expeditiously" up to 2 December 2015

61. In para. 28 of his 3rd June 2020 Affidavit, Mr. O'Brien avers that the proceedings were prosecuted expeditiously by the plaintiff, from inception up and until 2nd December, 2015, when the plaintiff accepted that the primary claim and the third party proceedings should be heard at the same time. In light of my analysis of the facts in this case, I do not accept that that averment is accurate. The Summary summons in these proceedings was issued on 26th February 2010. December 2015 is almost five years later. In the manner identified earlier in this judgment, I am satisfied that there were periods of delay, some very significant, on the part of the plaintiff even before December 2015, none of which periods of delay have been explained. In particular, it took the Plaintiff almost 5 months to reply to particulars in 2011, it took the Plaintiff 9 months to seek particulars in relation to the defence delivered and a period of 13 months elapsed between the raising of particulars by the Defendants, in May 2013, and the replies to same delivered by the Plaintiff in July 2014, of which period at least 7 months represents delay for which the Plaintiff alone was responsible. There were other periods where it can fairly be said that time was lost unnecessarily e.g. 2 ½ months between a certificate of readiness and the Plaintiff issuing a Notice of Trial and a further 2 months before the question of having a

trial in Cork was made. Lest this type of granular analysis be thought to be unfair to the Plaintiff, I would emphasise that certain of the periods of delay to which I have referred would not normally, of themselves, appear to be of much if any significance. However, in circumstances where the Plaintiff denies that there has been any delay and positively avers that *"The proceedings were prosecuted expeditiously by the Plaintiff from inception up to and until the 2nd December 2015"*, it is appropriate to look closely at the evidence. Having done so, I am satisfied that, as a matter of fact, the plaintiff's proceedings were not proceeded expeditiously by the plaintiff from inception up to 2 December, 2015 in the manner claimed in paragraph 28(a) of Mr. O'Brien's 3rd June 2019 Affidavit.

Analysis of delay- certain findings of fact

62. Having carefully reviewed the evidence, I am satisfied of the following facts regarding delay, namely, between 26th February 2010 (when the Summary Summons was issued) and 2nd December 2015 (when the case was adjourned) it can fairly be said that (a) both parties were simultaneously in delay for a period totalling some 8 months; (b) the Defendants were responsible for delay totalling a further 11 months; and (c) the Plaintiff was exclusively responsible for delay of at least 22 months. It will be recalled that almost 5 years elapsed between the commencement of the case in February 2010 and the Notice of Trial in December 2014 and I am satisfied that, but for delays which can fairly be said to be the sole responsibility of the Plaintiff, the case would have been ready for trial almost 2 years earlier.

Plaintiffs' delay was nothing to do with the Third Party

63. It should also be emphasised that the delays which I have examined have nothing to do with and cannot be said to be in any way attributed to the Third Party action. It will be recalled that, as Mr. O'Brien avers, no Order was made at any stage prior to the delivery of the December 2014 Notice of Trial that the Plaintiff's claim must be heard alongside the Defendants' case against the Third Party. The linking of the two claims, by agreement between the Plaintiff and Defendants, came later, as is explained elsewhere in this judgment.

The period from 2 December 2015 to 10 July 2017

64. In para. 28(b), Mr. O'Brien avers that *"the subsequent period up until the 10th July, 2017 involved the defendants and the third party finalising the proceedings in the third party claim and in addressing the issues of discovery."* A number of comments can be made in relation to the foregoing averment. Firstly, it is an averment which says nothing about the undoubted delay on the part of the Plaintiff with regard to the question of discovery, which delay began with the receipt, by the Plaintiff's solicitors, of the defendants' letter dated 21st August 2015 seeking discovery, and continued throughout the entire period referred to by Mr. O'Brien in para.28(b). Secondly, it was the plaintiff's decision to agree that its proceedings and the defendants' claim against the third party would be heard together. As Mr. O'Brien averred, in para.13 of his affidavit, and as his firm stated in a letter to the solicitor for the defendants, dated 24 March, 2015 (being exhibit "JOB3", a copy of which appears on p.154 of the Book), the court's 9th July, 2012 order did not provide that the third party matter be heard with the plaintiff's claim. It might also be pointed out at this juncture that there is no evidence that the Third Party was asked to

agree to the arrangement that the Plaintiff and Defendants came to, namely that both claims would be heard together.

65. In my view, having agreed that both matters would be heard together, despite the said court order not requiring same, it was incumbent on the Plaintiff to take at least some steps to ensure that delay in the progress of the Third Party matter did not have the knock-on consequence of delaying the Plaintiff's claim unduly. I am not satisfied, on the evidence, that any or any reasonable efforts were made on the part of the Plaintiff in this regard until after the defendants served a notice of intention to proceed. It cannot be the case, in my view, that the Plaintiff's agreement that the Third Party action should be heard together with the Plaintiff's claim entirely removes all responsibility from the plaintiff to ensure that matters are progressed with sufficient expedition after it has given such agreement. It also strikes me that the plaintiff's agreement to facilitate the hearing of the third party action alongside the Plaintiff's claim is an agreement which the plaintiff could have revoked at any point and, in my view, should have revoked if alleged delay in the related claim being ready for hearing was allegedly causing "knock on" delay in respect of the hearing of the Plaintiff's claim. There is no evidence that the Plaintiff in these proceedings ever considered withdrawing such consent. Even if I am entirely wrong in the foregoing, it is incontrovertible that throughout the entire period referred to by Mr. O'Brien in para. 28(b) of his affidavit, namely, from 2nd December 2015 to 10th July 2017, the Plaintiff was in delay with regard to making voluntary discovery to the Defendants.

The acknowledgement that "the plaintiff delayed in addressing the defendants' requests for discovery"

66. In para. 28(c) it is acknowledged on behalf of the plaintiff that the plaintiff delayed with regard to making discovery to the Defendants. Mr. O'Brien makes the following averment:

> *"It is the case that the plaintiff delayed in addressing the defendants' requests for discovery dated 21st August, 2015 and 20th March, 2017: however, when this was drawn to the plaintiff's attention by the defendants' solicitors' letter of the 7th June, 2019, the plaintiff addressed these omissions fully and with reasonable expedition."*

67. The fact that the plaintiff delayed in making discovery and the fact that the delay was in excess of four years from the initial request for discovery, and in excess of two years from the request for an additional category of discovery, is incontrovertible. The foregoing averment is an acknowledgement of delay on the part of the plaintiff. Having regard to the facts, it was entirely appropriate for Mr. O'Brien to acknowledge delay on the plaintiff's part. However, several other comments could be made in relation to the foregoing averment. Insofar as it is suggested that the plaintiff's delay was only drawn to the attention of the plaintiff by means of the defendants' solicitors' letter dated 7th June, 2019, the evidence shows an entirely different picture. The foregoing averment entirely ignores the following:

- The 14th October, 2015 letter from the defendants' solicitor (p.103 of the Book);

- the 18th February, 2016 letter from the defendants' solicitor (p.104 of the Book);
- the 30th June, 2016 letter from the defendants' solicitor (p.105 of the Book);
- the 19th January, 2017 letter from the defendants' solicitor (p.106 of the Book);
- the telephone calls made to the office of the solicitor for the plaintiff by the defendants' solicitor, which are specifically referred to in the 19th January, 2017 letter by the defendants' solicitors (para. two of p.106 of the Book);
- the 23rd January, 2017 letter from the plaintiff's solicitor confirming that the plaintiff agreed to make voluntary discovery some time ago, expressing regret for the delay and indicating that an affidavit of discovery would be provided in early course (p.108 of the Book).

68. In light of the evidence, it is factually incorrect to suggest that it was not until 7th June 2019 that the plaintiff's attention was drawn to the plaintiff's ongoing delay. I am satisfied that any attempt to characterise the plaintiff's delay as being the fault of the Defendant is undermined by the evidence in this case. It also has to be said that there is no evidence before the court that the plaintiff's affidavit of discovery would have been delivered as "early" as 17th September 2019, but for the fact that the defendants served a notice of intention to proceed on 7th June, 2019. In other words, the evidence discloses that the plaintiff's delivery of an affidavit of discovery was entirely reactive, not proactive, and this is acknowledged by the averment in para. 28(c).

69. I have also had regard to the averments made by Mr. O'Brien in paras. 29 to 32 of his affidavit. Among other things, Mr. O'Brien avers that, in all the circumstances, the allegation of inordinate and inexcusable delay in the commencement or prosecution of the plaintiff's claim is *"without merit"*. That averment is made in para. 30 and, in para. 31, the following averment is made which touches on the issue of prejudice.

> *"…neither the defendants nor the third party have identified any real or substantial issue of prejudice arising. I reiterate that the plaintiff's claim as against the defendants shall substantially be determined by reference to the authenticity of the document that the second named Defendant exhibited in her affidavit in the summary claim, as set out above. It is further understood that the relationship between the defendants, the third party and MPL is largely determined by reference to documentary evidence and it does not appear that any evidential shortfall exists to the detriment of any party. I do not believe that any true issue of prejudice arises in respect of the defendants. I further say and believe that the balance of justice favours allowing the plaintiff's claim to proceed to trial."*

Supplemental affidavit sworn on 29 June 2020 on behalf of the Defendants

70. Page 176 of the motion book comprises Mr. Kelly's replying affidavit on behalf of the defendants. From para. 3 onwards Mr. Kelly takes issue with certain grounds advanced by the plaintiff as a basis for the latter's claim that there has been no inordinate and no inexcusable delay. The first concerns the question of the allegedly *"doctored"* letter, as

exhibited in the affidavit of Mrs. O'Boyle which was sworn on 19th October, 2010. Mr. Kelly then makes certain averments under the heading *"Delay"* and makes reference to correspondence which I have discussed earlier in this judgment.

The Defendants' claim that the plaintiff "did nothing" (from Dec 2015 to July 2017)

71. Among other things, Mr. Kelly makes the following averment in para. 9, in response to the contents of para. 28(b) of Mr. O'Brien's affidavit, concerning the period from 2nd December 2015, up to 10th July 2017:

> *"The defendant and third party were active during this period and discovery was made on the 10th July, 2017 thereby allowing the third party issue to go forward to trial. But what Mr. O'Brien omits to mention is that during the same period the plaintiff did nothing, notwithstanding the fact that there was a request for voluntary discovery outstanding, as indeed there had been since 21st August, 2015."*

72. Having regard to the evidence, I am satisfied that the foregoing averment is correct. In paras. 10 and 11 Mr. Kelly avers that the plaintiff has offered no excuse or explanation for delay, despite Mr. O'Brien's averments in para. 2 of his affidavit "*that the matter went quiet"* and in para. 28(c) *"that the plaintiff delayed in addressing the defendants' requests for discovery"*. On the evidence I am satisfied that Mr. Kelly's averments are correct. From para. 15 onwards, averments are made under the heading the *"Balance of Justice"*. Paragraph 15 contains, *inter alia*, the following in relation to the nature of the plaintiff's case:

> *"the claim relates to a substantial loan made to a property development company (Mint Property Limited) in relation to which the defendants who at the time (in 2008) were a retired couple provided a guarantee. It is clear from the documentation discovered that they were not legally advised at the time and in fact the Third Party, which acted as the borrower's solicitors was only required to act as the defendants' solicitor by the plaintiff, when it sought to secure the borrowing and their guarantee by a mortgage over the property."*

73. From para. 16 onwards, Mr. Kelly makes averments in relation to the proceedings themselves and what is said to be the factual background to them, as well as referring to certain correspondence and, in para. 20 Mr. Kelly avers that, far from assisting the Plaintiff, the nature of the case favours the dismissal of the action. Paragraphs 21 to 25 of Mr. Kelly's affidavit concerns the Plaintiff's assertion that the copy letter exhibited by Mrs. Boyle in her 19 October, 2019 affidavit was *"doctored"*. Among other things, it is averred in para. 22 that the initial defence of the summary application was a technical one.

Issues in dispute as appears from the Defence and Counterclaim

74. It is clear, however, that the Defendants do not oppose the plaintiff's claim merely on a technical ground as is clear from the contents of the defence and counterclaim delivered. It has to be emphasised that it is not the function of this Court, in the context of the present applications, to make findings in relation to matters which are in dispute in the case as pleaded. That would be wholly impermissible. It is, however, appropriate for the

court to have some regard to the nature of the dispute between the relevant parties. This is because, in order properly to look at issues such as alleged prejudice in the context of determining where the balance of justice lies, it is necessary for this Court to have some insight into the type of evidence, including witness evidence, likely to be required at a future trial and the foregoing can only be assessed with reference to the nature of the case as pleaded. Having regard to the foregoing, I think it is useful to quote from the defence and counterclaim which was delivered by the defendants on 23rd April 2012, a copy of which appears on p.115 of the Book of Pleadings. It is not a lengthy document and I now set it out verbatim as follows:

"DEFENCE

1. *It is denied that the defendants were guarantors in respect of accounts maintained by Mint Properties Limited as alleged and the plaintiff is put on full proof of those allegations.*

2. *It is denied that the defendants guaranteed payment of all sums due, or becoming due by Mint Properties Limited to the plaintiff in any amount whatsoever subject to a limit of €1,500,000 and interest therein as alleged.*

3. *It is denied that the plaintiff made advances, or otherwise gave banking facilities to Mint Properties Limited on foot of the alleged or any guarantees executed by the defendants, which is denied.*

4. *The defendants are not liable to the plaintiff on foot of the alleged guarantee in the amount alleged or any amount.*

5. *The plaintiff is not entitled to the reliefs sought or to any relief.*

6. *Further and in the alternative and without prejudice to the foregoing, the defendants plead that the purported guarantees were signed in circumstances where Fionala Cronin, Daniel Morrissy, Edel Morrissy, Gerard O'Connor, practising under the style and title of Dobbyn & McCoy, Solicitors, 4/5 Colbeck Street, Waterford, its servants and/or agents, failed to take reasonable steps to protect the defendants' interests. Wrongfully and in breach of their duty of care to the defendants the said Messrs Dobbyn & McCoy, its servants and/or agents falsely attested to the defendants' signatures on the guarantee, failed to ensure that the defendants obtained independent legal advice, failed to explain the nature of the document being executed and failed to show the full document to each of the defendants. As a consequence thereof the defendants have suffered loss, damage, inconvenience and expense.*

7. *The defendants are an elderly couple whose only viable asset is the property at Passage Cross, Waterford. By entering into any guarantee of the debts of Mint Properties Limited, the plaintiffs put in jeopardy the defendants home and wellbeing. The principal shareholder and Director of Mint Properties Limited was*

their son, Mark Boyle, who requested the defendants to executed a guarantee in its favour to enable him pursue a commercial venture for the benefit of his company. In the premises, if which is denied, they executed the guarantee the same constituted an unconscionable transaction.

8. The plaintiff had at all material times was aware of the facts set out in the preceding paragraph hereof. Furthermore, the plaintiff was aware or ought to have been aware that the defendants did not have the benefit of any or any independent legal advice and in the premises were obliged in law to enquire into the circumstances in which the alleged guarantee was executed by the defendants. By reason of the foregoing the plaintiff was on notice that the alleged guarantee constituted an unconscionable transaction and consequently the alleged guarantee is not binding on the defendants.

9. Each and every particular, allegation, statement and averment pleaded in the statement of claim is denied as if the same were set out separately hereunder and traversed seriatim.

Counterclaim

The defendants repeat their defence and counterclaim for rescission of the alleged guarantee, the subject matter of the within proceedings."

Averments regarding alleged prejudice

75. From para. 26 onwards of his affidavit, Mr. Kelly makes averments under the heading *"Prejudice"*. In the last sentence in para. 26, he avers that the principal defence to the claim is that the Plaintiff was on notice that the guarantee represented an unconscionable transaction and accordingly the Defendants sought rescission of same in the Counterclaim. It is averred in para. 27 that the Defendants had no relationship with the plaintiff and had no dealings with the third party which, Mr. Kelly avers *"…appears to have just assumed the role of their solicitor"*. Mr. Kelly goes on to make the following averment in para. 27:

> *"…not only is this case not the simple one which Mr. O'Brien portrays in his affidavit, but the Defendants were always handicapped to some extent by the fact that their only involvement in the matter was signing the Guarantee. That disadvantage has now been greatly exacerbated by the delay on the part of the plaintiff in bringing the proceedings. Put simply, the ability of the Defendants to recall matters from over 12 years ago at their age, as to the circumstances in which they came to sign the guarantee upon which the Plaintiff sues is plainly impaired. That is both as a result of the natural fading of memory over time and for the more particular reasons expanded upon hereunder."*

76. In para. 28, Mr. Kelly takes issue with Mr. O'Brien's averment, at para. 31 of the latter's affidavit, that the third party issue *"is largely determined by reference to documentary*

evidence". Mr. Kelly goes on to make the following averment in relation to the nature of the issues as between the Third party and the Defendants and the prejudice said to arise:

> *"The nature of the issue between the Third Party and the Defendants in broad terms is that Dobbyn & McCoy purported to act as their solicitors and to witness their signatures on documents, without instructions from the Defendants and in a position of conflict of interest and duty. The lack of instructions and the false witnessing of documents are matters that depend primarily on the oral evidence of the Defendants, although it is correct that nothing has been discovered by the Third Party which is inconsistent with the Defendants' case. But even if the Defendants were not prejudiced by the difficulty they might now face in having to give evidence and be subject to cross-examination many years after the events in question, there is a further risk of prejudice in the form of the Third Party's motion to dismiss for want of prosecution."*

Medical Reports exhibited in relation to both Defendants

77. In para. 29, reference is made to the advanced age of the Defendants and to their health issues. It is averred that the Second Named Defendant is under the care of Dr. Siobhán Murphy who prepared a report dated 22nd May, 2020. The said report is exhibited at *"2PK5"* which comprises p.200 of the motion Book. The following is a verbatim quote from that report by Dr. Siobhán Murphy of Murphy Medical at Ardkeen, Waterford:

> *"Re: Margaret Boyle, Woodview, Passage Cross, Dunmore Road, Waterford.*
>
> *DOB: 17/07/1940.*
>
> *To whom it may concern,*
>
> *Margaret Boyle is a patient of this practice.*
>
> *She suffers with anxiety among other medical problems.*
>
> *Under these circumstances, she would not be available to attend court for medical reasons.*
>
> *Yours faithfully,*
>
> *Dr. Siobhán Murphy."*

78. At this juncture I would observe that no report by any other doctor is before the court which takes issue with the views expressed by Dr. Murphy, regarding the Second Named Defendant, who has recently turned 80 years of age. In paragraph 30 of Mr. Kelly's supplemental affidavit, it is averred that the First Named Defendant is also in ill health and attends a cardiologist for hypertension and Aortic Stenosis. The First Named Defendant is under the care of a Dr. Seán Hogan who prepared a report dated 10th June, 2020, comprising exhibit *"2PK6"* which can be seen at p. 202 of the motion Book. Dr. Hogan of "Carrigdhoun Surgery", Waterford states the following in his report:

"Re: Harry Boyle, Woodview, Passage Cross, Dunmore Road, Waterford.

DOB: 20/07/1938.

To whom it concerns,

Mr. Boyle has a medical history as listed below. He attends a cardiologist on an annual basis for ongoing management of his hypertension and his aortic stenosis (heart valve disease).

Past medical history:

D90 - Hiatus Hernia: and Gastritis on OGD, Hp + ve - 2018 – Mr. Murchan – STGH.

D92-Diverticular Disease: on Colonoscopy – 2018 – Mr. Murchan – STGH.

K83 – Heart Valve Disease Nos: Moderate Aortic Stenosis – 2015 – Dr. Owens.

K86 – Hyper Tension Uncomplicated:

L89 – Osteoarthritis of hip Rt Total Hip Replacement.

K78 – Atrial Fibrillation/Flutter: Paroxysmal Post Op. 2010.

D89 – Inguinal Hernia: Surgical repair right side 2011 and 2017, left sided repair 2011.

T92 – Gout.

Yours sincerely,

Dr. Seán Hogan".

79. No medical report has been put before the court which takes issue with the contents of Dr. Hogan's report in respect of the First Named Defendant, who has recently turned 82 years of age. It is averred at para. 31 of Mr. Kelly's 29th June 2020 affidavit that the untimely death of the defendants' daughter occurred on 8th March 2019. It is averred that the unresolved and continuing nature of the plaintiff's proceedings are causing the defendants extreme anxiety and are generating an obstacle to their being able to enjoy as far as possible their remaining time together. In para. 32 it is averred that this situation would not have arisen had the plaintiff moved the case forward with reasonable expedition and it is averred that the plaintiff seems to have done nothing for approximately four years, 2015 to 2019. In para. 33 reference is made to the prospect of Mrs. Boyle and perhaps Mr. Boyle being cross-examined at a future trial including in respect of the *"…charge that they or someone within their knowledge doctored the Letter of Loan Offer of 23rd November, 2007." That they would now have to face that allegation (or whatever precise allegation the plaintiff had in mind) at this very late stage of their lives is entirely the result of a strategic decision made by the plaintiff."*

Second affidavit of Mr. John O'Brien sworn 1 July 2020

80. Mr. O'Brien swore a second affidavit, on 1st July 2020, in response to Mr. Kelly's supplemental affidavit of 29th June. In para. 4, Mr. O'Brien makes certain averments with a view to demonstrating that the plaintiff's position in relation to the copy letter of sanction as exhibited by the second named defendant in her 19th October 2010 affidavit was previously made known to the defendants and he goes on to make certain averments at para. 4(a), (b) and (c). These begin with an averment regarding what information junior counsel, who appeared for the defendants in the summary application, is alleged to have been given. It is fair to say that Mr. O'Brien's source of knowledge is not clearly set out and it may be that his averment may be as a result of a conversation with counsel. I am satisfied, however, that nothing turns on the foregoing insofar as the present application is concerned. I am satisfied that the position adopted by the Plaintiff in relation to what has been described as the "doctored" letter of sanction is not new, nor is there any evidence of an intention on the Plaintiff to act unfairly in relation to a witness. That said, it is beyond doubt that witness evidence from the Defendants would be necessary for a fair determination of all the matters at issue in the proceedings. It is also appropriate to observe that Mr. O'Brien's affidavit is sworn almost a decade after the affidavit which he comments upon, namely the 19th October 2010 affidavit of the Second Named Defendant.

The plaintiff's confirmation, in October 2015, that voluntary discovery would be made

81. In para. 5, Mr. O'Brien takes issue with the suggestion that the plaintiff only responded to the defendants' initial request for voluntary discovery on 23rd January 2017 and Mr. O'Brien refers to a letter dated 16th October 2015 sent by the plaintiff's solicitors to the solicitors representing the defendants. That letter comprises the last item of correspondence in Exhibit "JRB4" to Mr. O'Brien's 3rd June 2020 affidavit. A copy can be seen at p. 159 of the book. It is a short letter which states the following: -

> *"Dear Sirs,*
>
> *We refer to the above matter and to your letter of the 14th October 2015.*
>
> *We confirm that we are awaiting our client's files on the matter and hope to be in a position to furnish the affidavit of discovery in early course.*
>
> *Yours Faithfully".*

82. In my view, this does not assist the plaintiff in terms of explaining the delay in making discovery. On the contrary, it further undermines the suggestion, made in para. 28(c) of Mr. O'Brien's first affidavit, that the plaintiff addressed its failure to make discovery *"when this was drawn to the plaintiff's attention by the defendants' solicitors letter of the 7th June 2019"*. Plainly, the plaintiff told the defendant that voluntary discovery would be forthcoming. In my view, this has a considerable bearing on how the court should look at the delay. I have already examined the relevant period in considerable detail earlier in this judgment but the following also seems to me to be appropriate comments to make in light of the averments in para. 5 of Mr. O'Brien's 1st July 2020 affidavit.

83. It can happen that a request for discovery is met with silence and, in such circumstances, a party seeking discovery might well make threats to issue a motion and follow up on those threats. In the present case, the facts are different. From 16 October 2015 the plaintiff explicitly informed the defendants that discovery would be made. As we know, the defendants' solicitor wrote several letters and also made phonecalls to the plaintiff and in my view it would be unduly harsh to criticise the Defendants to trying to progress matters by those means, given the confirmation of the plaintiff's intention to make discovery and to do so voluntarily. I make that comment specifically insofar as it relates to the Defendants' actions in relation to a case brought against it by the Plaintiff. Later in this judgment, matters will be examined from the perspective of the Defendants' claim against the Third Party.

84. In para. 6 Mr. O'Brien denies that the case was progressed slowly up to 2 December 2015 and reiterates that the claim was prosecuted expeditiously by the plaintiff throughout the period up to 2 December 2015. For the reasons set out in this judgment I do not accept that to be correct as a matter of fact. The evidence, in my view, undermines Mr. O'Brien's assertion.

85. In para. 7, Mr. O'Brien asserts that the delay in delivering the plaintiff's affidavit of discovery caused no delay in the proceedings up until the time that the pleadings and discovery had been exchanged in the Third Party action, namely up to 10 July 2017. That, in my view, does not excuse the plaintiff's delay in making discovery up to that point, nor does it evidence any or any sufficient efforts on the part of the plaintiff to ensure that the dispute between the defendants and the third party was proceeding with sufficient expedition so as not to delay the plaintiff's proceedings, in the context of the plaintiff voluntarily agreeing that both its claim and the defendants' claim against the third party would be heard together.

86. In para. 7 Mr. Kelly goes on to aver that: -

> *"Unfortunately, neither the defendants nor the third party notified me that the third party proceedings had been finalised and I remained unaware of same until I received Mr. Kelly's letter dated 7th June 2019, which led me to believe that the third party action was ready to proceed. On receipt of that letter, I immediately replied to the defendants' solicitors and expedited the delivery of the plaintiff's affidavit of discovery".*

It is clear from the foregoing averment that the plaintiff either took no or no sufficient steps to ascertain the status of the progress of the Defendants' claim against the Third Party. This is despite the fact that, having agreed to both claims being heard together, the plaintiff's action would inevitably be delayed indefinitely for so long as there was delay with regard to the prosecution by the defendants of their claim against the third party. It also evidences the fact that at no stage did the plaintiff withdraw their consent to the defendants' claim against the third party (the progress of which it was wholly unaware) being heard along with the plaintiff's claim. As a matter of fact, the plaintiff could have "decoupled" its claim from the defendants' claim against the third party in order to ensure

that the Plaintiff's claim was not delayed, but did not do so. It is clear from the foregoing averment that the plaintiff took what can fairly be characterised as an entirely *passive* role in relation to the onward progression of the defendants' claim against the third party, notwithstanding that the progress of same played a fundamental role in the ongoing delay of the plaintiffs' claim, in respect of a trial date for which the plaintiff also played a wholly passive role, as its ongoing failure to make discovery for a four year period illustrates.

There is a second aspect to the plaintiffs' delay in that, as averred by Mr. O'Brien, it was only when the plaintiff received the 7 June 2019 letter that the plaintiff was led to believe that the third party's action was ready to proceed and it was only at that point that the plaintiff *"expedited the delivery of the plaintiff's affidavit of discovery"*. There is no reason proferred as to why it took over four years for the plaintiff to make discovery. Mr. O'Brien avers as to the fact that he immediately expedited discovery, following receipt of Mr. Kelly's 7 June 2019 letter, but does not aver that there was anything preventing the plaintiff from delivering an affidavit of discovery sooner. The averment in para. 7 is entirely consistent with my finding of fact that the plaintiff's delivery of the affidavit of discovery was entirely *reactive*, rather than proactive and that there were never any difficulties which prevented the Plaintiff from making discovery expeditiously. I am also entitled to conclude that it was not, in truth, the plaintiff's determination to press its own claim ahead with anything like sufficient speed which resulted in the end of the delay of over four years but, rather, the delay came to an end because of the domino effect caused by the 7 June 2019 correspondence from the defendants' solicitors enclosing the notice of intention to procced. Indeed, there is no evidence before the court from which I could safely conclude that the plaintiff's delay would not have continued *beyond* September 2019, but for the delivery by the defendants of a notice of intention to proceed.

87. My findings of fact aforesaid are underlined by the contents of para. 9 of Mr. O'Brien's affidavit. There, he refers to letters in which the plaintiff sought copies of certain proceedings in the third party matter. These letters comprise the following:

- There are 3 letters dating from 2012 (namely letters of 20 August, 12 September and 5 October 2012);
- There are 2 letters from 2013 (being dated 25 January and 8 May 2013);
- There is no correspondence from 2014;
- There is a single letter from 2015 (dated 12 November of that year);
- There is no letter from 2016;
- There is a single letter from 2017 (dated 23 January 2017);
- There is no letter beyond that.

88. It is self – evident that the period from January 2017 to September 2019 is a period of two years and eight months. I am entitled to conclude on the evidence that, throughout that entire period, the plaintiff did not once look to either the Defendants or the Third Party for even an update in relation to the progress of the claim *inter se*, despite the plaintiff agreeing in December 2015 that the plaintiff's claim would be heard alongside the Defendants' claim against the third party. It will be recalled that, in para. 20 of his 3 June 2020 affidavit, Mr. O'Brien averred inter alia *that ". . . an application was made on the 2nd December 2015 to vacate the trial date and adjourn the proceedings generally with liberty to re – enter when all matters were finalised and the Third Party proceedings in a position to proceed".* Put simply, the evidence reveals (1) an entire failure on the part of the plaintiff, from December 2015 onwards, even to monitor, much less ensure the expeditious progress of, the Third Party issue, despite agreeing that it would be heard alongside the plaintiff's claim, as well as (2) a complete failure to make discovery to the Defendants at all, much less expeditiously, and (3) a failure to withdraw, or even threaten to withdraw, the Plaintiff's consent to both claims being heard together, with a view to getting the Plaintiff's claim heard without further delay, as the months and years elapsed from December 2015 onwards

The plaintiff's complaint regarding lack of notice

89. It is not unfair to characterise para. 10 of Mr. O'Brien's affidavit as an attempt to suggest that, because the Defendant and Third Party did not inform the Plaintiff that they were ready, this excuses the plaintiff's delay. In particular, Mr. O'Brien avers: -

> *"It is unfortunate that neither the defendants nor the third party notified this office previously that the third party pleadings and discovery had been completed as I would have expedited the finalisation of the plaintiff's own discovery had I been made aware of that at an earlier stage".*

The first observation I would make is that the Plaintiff agreed to adjourn the trial of its claim against the Defendants without reference to the Third Party and there is no evidence that the latter was asked to agree to that arrangement. Secondly, the Plaintiff was not suing the Third Party. In my view, having agreed to make discovery to the Defendants, the plaintiff was obliged to make such discovery and to make it with reasonable expedition but, as a matter of fact, failed to do so. I also take the view, that having agreed to the third party issue being heard alongside the plaintiff's claim, the plaintiff had some duty to ensure that its claim was not unduly delayed by any slow progress in relation to the third party issue. I am satisfied on the evidence that, as a matter of fact, the plaintiff either took no step, or no adequate step, in this regard and adopted an entirely *passive* approach. This is evidenced by the Plaintiff's failure even to seek information as regards the progress of the claim between the Defendants and the Third Party at any point after January 2017. As a matter of fact, it was also open to the plaintiff at any stage to withdraw its consent to the third party issue being heard alongside the plaintiff's claim. Thus, even if it is the case, as averred by Mr. O'Brien, that both he and his counsel understood that both cases were to be heard together and even if it is a fact that such an arrangement was in ease of the defendant, that does not mean,

and in my view cannot mean, that a plaintiff can play an entirely passive role, as happened on the facts of the present case, and simply wait for years to be told (without enquiring) when the third party claim is ready.

90. In para. 12, reference is made to the defendants' defence and counterclaim and, in para. 13, an assertion is made that the position advanced by the defendants is inconsistent with that previously set out in the pleadings. In my view, it is neither possible nor appropriate to attempt to resolve any such issue which, I am satisfied, does not fall for determination by this Court. The contents of the pleadings is not in dispute. Para. 13 goes on to refer to a prior guarantee dated 12 December 2017 and a guarantee dated 8 February 2007. In paras. 15 to 17 of Mr. O'Brien's affidavit, he takes issue with paras. 17 to 20 of Mr. Kelly's. In para. 18 it is again averred on behalf of the plaintiff that it took a view that an oral hearing was required. I would simply observe that this decision was one made by the plaintiff following its receipt of an affidavit sworn on 19 October 2010 by the Second Named Defendant and, therefore, a decision that a trial involving oral evidence was required is a decision made by the plaintiff almost a decade ago. Among other things, Mr. O'Brien also takes issue with the suggestion made by Mr. Kelly that the plaintiff was, inter alia, motivated by a desire to challenge the defendants, or more particularly, Mrs. Boyle, in cross – examination and asserts there is no basis for same. I have already touched on this issue and repeat that there is no evidence of the Plaintiff attempting to act unfairly insofar as the cross examination of any witness is concerned. Plainly, the circumstances in which documents were signed and the basis on which they were signed are issues thrown up by the pleadings which are before this Court and, as I have previously said, it is clear that oral evidence from a range of witnesses would be necessary for a fair determination by any future trial court of all the matters in dispute.

91. Averments in relation to the pleadings and the plaintiff's stance are made, including in paras. 21 and 22. In para. 23, issue was taken with Mr. Kelly's assertion that the Defendants' ability to recall matters is impaired by the passage of time. Mr. O'Brien avers that the reports in respect of the defendant's health are noted but he goes on to suggest that nothing in those reports would indicate that either defendant is unable to give evidence in defence of the claim. No medical evidence is proffered on behalf of the Plaintiff.

The foregoing comprises the entire of the affidavits before the court.

Legal principles

92. Order 122, r. 11 of the Rules of the Superior Courts provide that, where there has been no proceeding for two years, a defendant may apply to the court to dismiss the claim for want of prosecution and, on the hearing of such an application, this Court may order the matter to be dismissed or may make such other order as to the court may seem just. In addition to the specific wording in O. 122, r. 11, appropriate considerations for this Court include the principles which emerge from two overlapping streams of jurisprudence which emerge from two seminal decisions. The first in time was the Supreme Court's decision in *O'Domhnaill v. Merrick* [1984] IR 151. The second was the well – known decision in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459.

The facts of *Primor* can be summarised as follows. The defendant acted as auditors for the Plaintiff in relation to the financial year ending 31 December 1978. In December 1984, the Plaintiff issued proceedings claiming, inter alia, that the Defendant had failed to carry out its obligations in a prudent and careful manner. Proceedings were served the following year and a statement of claim was delivered in January 1986. A defence was delivered in January 1991, shortly after which cross – orders for discovery were made on consent. In February 1994, the High Court refused the Defendant's application to dismiss the claim for want of prosecution finding that, although the plaintiff had been guilty of inordinate and inexcusable delay, the fact that the defendant had sought a cross – order for discovery in January 1991 and the fact that the Plaintiff had incurred considerable expense in complying with the order, estopped the Defendant from obtaining a dismissal of the proceedings. The Defendant appealed to the Supreme Court, as did another firm of accountants who were named in a second set of proceedings also brought by the plaintiff, in which similar allegations were made in respect of the following financial year. In allowing the appeals and dismissing the proceedings for want of prosecution the then – Chief Justice Hamilton set out, in some considerable detail, the legal principles relevant to striking out proceedings for want of prosecution. It is appropriate that I quote from p. 475 of the decision of Hamilton C.J. 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 plaintiff's action,
> (iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,
> (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
> (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in

exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business".

It is fair to say that *Primor* essentially lays down a three – limb test, in that the court must ask:

(i) Is the delay inordinate?

(ii) Is the delay inexcusable?

(iii) If the delay is both inordinate and inexcusable, is the balance of justice in favour of, or against, the case being allowed to proceed?

"Inordinate"

93. As to the meaning of the term "inordinate", this Court held, in *Framus Ltd v. CRH plc* [2012] IEHC 316, at para. 23 of the judgment of Cooke J., that: -

> "In its ordinary meaning delay is "inordinate" when it is irregular, outside normal limits, immoderate or excessive".

Failure to prosecute / Interests of Justice

94. The *Primor* test sets out the appropriate approach for this Court to take to an application to dismiss proceedings for failure to prosecute same. A slightly different set of principles, stemming from the decision in *O'Domhnaill*, inform how this Court should look at an application to dismiss proceedings in the interests of justice. The fact that this court has an inherent jurisdiction to dismiss proceedings in the interest of justice is not in dispute. As McKechnie J. put it at paragraph 40 of his judgment in the Supreme Court's decision in *Comcast International Holdings Ltd. v. Minister for Public Enterprise* [2012] IESC 50 (at para. 40): -

> "That the courts have such an inherent jurisdiction cannot be doubted. It surfaced in *O'Domhnaill*, was further established in *Toal (No. 1)* and *Toal (No. 2)*, and since then, in several cases, has been accepted without question. It has a somewhat distinct basis and separate existence from *Primor*, but many of the matters relevant for its application are common to both. The test to be applied has been described variously such as, by reason of lapse of time or delay:
>
> (i) is there a real and serious risk of an unfair trial, and/or of an unjust result;
> (ii) is there a clear and patent injustice in asking the defendant to defend; or
> (iii) does it place an inexcusable and unfair burden on such defendant to so defend?"

95. McKechnie J.'s articulation of the *O'Domhnaill* test mirrors the formulation proposed by Finlay Geoghegan J. in her decision in *Manning v. Benson & Hedges Ltd.* [2005] 1 ILRM 190. Having referred to the aforesaid test, Finlay Geoghegan J. suggested that the factors to be considered in relation to each element of the test might include the following: -

> "1. Has the defendant contributed to the lapse of time?
>
> 2. The nature of the claims.
>
> 3. The probable issues to be determined by the court; in particular, whether there will be factual issues to be determined or only legal issues.
>
> 4. The nature of the principal evidence; in particular, whether there will be oral evidence.
>
> 5. The availability of relevant witnesses.
>
> 6. The length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and probable trial date".

Earlier in this judgment I looked closely at the delay attributable to the various parties. Insofar as the Plaintiff's claim against the Defendants is concerned, it is fair to say that, although the Defendants have contributed to delay in the period up to 2015, and this is something I have taken due account of, the Plaintiff is responsible for at least twice the amount of delay which occurred up to December 2015. Moreover, I am satisfied that, from December 2015 onwards, it is the Plaintiff which caused the delay and it would be unfair to hold that the Defendants contributed to same. I have also examined the delay which arose in the progress of the Defendants' claim against the Third Party and have taken due account of any delay which can fairly be said to have been the Third Party's responsibility. It is, however, beyond doubt that the Third Party made discovery promptly in 2017 and cannot fairly be said to have contributed to the delay thereafter all of which, I am satisfied, was the Defendants' responsibility. Earlier in this judgment, I quoted from certain pleadings in order to explore, to a sufficient degree for the purposes of this application, the nature of the various claims and it is clear to me that there are both factual and legal issues which are required to be determined at a future trial, with oral evidence from a range of witnesses being essential including, in particular, oral evidence from both of the defendants who are now in their 80s. It is also clear that the time which has elapsed between the guarantee on foot of which the plaintiff's claim is brought and today's date is almost twelve and a half years and it seems highly unlikely that a trial would take place in a matter of weeks, as opposed to months, from now at the earliest. Thus, it is reasonable to assume that at a future trial, a couple in their 80s would need to be examined and cross examined as to their recollection of specific events of 13 years earlier. The Reply to Particulars delivered by the Defendants on 28 January 2014 gives a clear indication of the type of evidence including witness evidence which might well be

required at a future trial, were it to proceed. The said reply to particulars includes, inter alia, the following: -

"1.(a) The guarantee was executed by the defendants in the kitchen of their house at Passage Cross, Dunmore Road, Waterford . . .

(c) The defendants' son, Mark Boyle, was the only person present when the guarantee was being executed by the defendants . . .

(e) The defendants gave the guarantee to their son, Mark Boyle, after signing same. Neither Daniel Morrissey, nor a representative of Dobbyn and McCoy were present at the time of the signing of the guarantee and the defendants did not give or send the guarantee to either Daniel Morrissey or Dobbyn and McCoy after signing same. Their son informed them that Daniel Morrissey had given him the guarantee and that he would return same to Daniel Morrissey.

(2) Dobbyn and McCoy Solicitors were not present at the time of the signing of the guarantee by either the first or second named defendant. The nature of the document and its implications were not verbally explained to the defendants, nor was it explained in writing to the defendants, by either Dobbyn and McCoy Solicitors or their son, Mark Boyle. . ."

96. It should be emphasised at this juncture that the Third Party has filed a full and detailed Defence to the proceedings and trenchantly objects to the assertions made. It will be recalled that the name *"Mark Boyle"* and the date *"29/11/2007"* appears at the bottom of what certainly appears to be a faxed copy letter of the Letter of Sanction which Mrs Boyle exhibited in her 19th October 2010 Affidavit. That being so, events going back at least as far as November 2007 would appear to be relevant and likely to give rise to examination and cross-examination of witnesses at any future trial. That this is so, has been known to the Plaintiff for almost a decade, given the Plaintiff's receipt of the 19th October 2010 Affidavit, giving rise to the Plaintiff's decision that a plenary trial was necessary. Again, I would emphasise that this Court cannot make any findings of fact and is not purporting to do so. However, it is necessary for this court to have a sufficient appreciation of the nature of the issues in dispute, and the type of evidence which would be required in order for the trial court to be in a position fairly to dispose of the disputes, so that this Court to consider whether any prejudice arises of any type identified in the authorities as a result of what is said by the Defendants to constitute inordinate and inexcusable delay on the part of the Plaintiff and in circumstances where the Third Party defendant makes similar assertions in relation to the Defendants' prosecution of its claim against the Third Party is concerned and to determine where the balance of justice lies.

The Primor and O'Domhnaill approaches contrasted

97. I think it I fair to say that, a comparison of the *Primor* and *O'Domhnaill* approaches, indicates that *Primor* concentrates on the plaintiff's conduct, before moving to the defendant's position, whereas *O'Domhnaill* concentrates on the defendant and whether they would suffer a patent injustice or unfair burden if required to meet the delayed

claim. This distinction, as well as other features of the court's jurisdiction under the *O'Domhnaill* principles, including the applicable thresholds, was explained by McKechnie J. in *Comcast*, as follows: -

> "There are a number of features to this jurisdiction which are worthy of note: firstly that it applies even if the proceedings are instituted within the statutory period prescribed for by the Oireachtas; secondly, that a defendant can succeed in avoiding a merit hearing even where a plaintiff is entirely blameless for the delay, in either (sic) in a personal or a vicarious sense; and thirdly, that the time period looked at, commences from the date of the alleged wrongful acts and continues to the anticipated date of trial. In addition, however, it also has the distinct feature of its focus being on the defendant: as appears from the descriptive nature of the test as given, the criterion essentially is defendant directed. This is in stark contrast to the *Primor* principles where the positions of both are equally considered. It is therefore clear that this is a wider jurisdiction than *Primor* with a lower threshold to surmount before its successful invocation. That distinction, coupled with the others as identified, makes this jurisdiction one which should be sparsely used and little availed of. I fully agree with the words of Hogan J. in *Donnellan v. Westport Textiles Limited (In Voluntary Liquidation) and the Minister for Defence, Ireland and the Attorney General* [2011] IEHC 11, where in this context, the learned judge, having stated that such jurisdiction permits the court in an appropriate case to "strike out proceedings, even though the third limb of the *Primor* test might not have been established", went on to caution that, "[o]f course, such cases would have to be exceptional"."

Striking out even though the 3rd limb of Primor might not have been established

98. In *Donnellan* (at para. 29 – 30), Mr Justice Hogan made the following clear, with regard to the interplay between the test in *Primor* and this Court's inherent jurisdiction to strike out proceedings for delay in the interests of justice. Commenting on the decision of Geoghegan J. in *McBrearty v. North Western Health Board* [2010] IESC 27, Hogan J. went on to state the following: -

> " . . . . Geoghegan J. expressly confirmed that the *Primor* principles were not to be regarded as exclusive or all-encompassing and . . . that the Court's constitutionally derived inherent jurisdiction could be exercised even though some elements of the *Primor* test had not been established. If this is correct, then it follows that in an appropriate case this Court can strike out proceedings, even though the third limb of the *Primor* test might not have been established".

Prejudice to the public interest

99. Having examined the decision of Peart J. in *Byrne v. Minister for Defence* [2005] IEHC 147, in which the concept of prejudice to the "public interest" as opposed to the specific prejudice to a defendant was examined, Hogan J. struck out the specific claim before him in Donnellan and held, inter alia, the following: -

> " . . . .

B. The Supreme Court's decision in *McBrearty* confirms that the *Primor* rules are not exhaustive and all-encompassing, but that the courts enjoy a separate and distinct constitutionally derived inherent jurisdiction to protect the proper administration of justice.

C. Even if one assumes in the plaintiff's favour that no specific prejudice has been caused to the State defendants by this delay, the lapse of time between the events complained of and the present day is so enormous that the courts simply cannot fulfil their constitutional mandate of administering justice in a case such as this.

D. The judicial duty to ensure the timely administration of justice which is derived from Article 34.1 and *Re Haughey*-style basic fairness of procedures (which is in turn derived from Article 40.3.1) extends to protecting the public interest. The delay in the present [case] is prejudicial to that public interest for all the reasons set out by Peart J. in *Byrne v. Minister for Defence. . .*"

100. In light of the foregoing authorities it is clear that undue delay by a plaintiff is capable of prejudicing the *public interest* even if the defendant's interest was not specifically prejudiced. In *Byrne*, Peart J. explained the nature of the public interest which is compromised by delay in the following terms: -

> " . . . there is a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up the valuable and important time of the Courts, and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their litigation, as well as increase the cost to the Courts Service, and through that body to the taxpayers, of providing a service of access to the Courts which serves best the public interest".

The court's tolerance of delay

101. In another decision by the now Chief Justice, in *Stephens v. Paul Flynn Ltd.* [2005] IEHC 148, the following was stated, against the background of the provisions of Article 6 of the European Convention on Human Rights: -

> "Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing [a] greater obligation of expedition and against requiring the same level of prejudice as heretofore".

The importance of no "excessive indulgence of delay" by the Courts

102. It is clear from the authorities that a less indulgent approach to delay has been taken in recent years. The public policy behind this was expressed in the following terms by Clarke J. (as he then was) in his decision in *Rodenhuis and Verloop B.V. v. HDS Energy Ltd.* [2011] 1 IR 611 (at 616) as follows: -

> "As long as it remains the case that the procedure in this jurisdiction is left largely in the hands of the parties, then it follows that the pace at which litigation will

progress will be highly dependent on the initiative shown by those parties. To the extent that it becomes clear that parties will be significantly indulged even though they engage in delay, then that fact is only likely to encourage delay. If parties feel they can get away it, and if that feeling is justified by the response of the courts, then there is likely to be more delay. It seems to me, therefore, that it is necessary, in a system where the initiative is left largely up to the parties to progress proceedings, for the courts make clear that there will not be an excessive indulgence of delay, because if the courts do not make that clear, it follows that the courts actions will encourage delay and, thus, will encourage a situation where cases will not be completed within the sort of times which would be consistent with compliance with Ireland's obligations under the ECHR".

Pro-activity by the Courts

103. The foregoing views were reflected in a decision by Hogan J. in *Quinn v. Faulkner* [2011] IEHC 103 (at para. 29), as follows: -

> "While as Charleton J. pointed out in *Kelly v. Doyle* [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "endless indulgence" towards such delays led in turn to a situation where inordinate delay was all too common . . ."

The Primor principles have "stood the test of time"

104. Despite the comments made in relation to the courts' disapproval of delay and the importance of not indulging delay, it is clear that there has been no departure from the jurisprudence, including the *Primor* principles, even against the background of Article 6 of the European Convention on Human rights. As Mr. Justice McKechnie stated in para. Comcast:

> "In *McBrearty and Others v. the North Western Health Board and Others* [2010] I.E.S.C. 27 (*"McBrearty"*), the most recent case of direct relevance on this issue, Geoghegan J., with whom the other members of the Court agreed, once more referred to this matter and reiterated that the *Primor* principles "had stood the test of time". Whilst pointing out that vigilance must be exercised, particularly if "culpable delay" had been established, he held nonetheless that there was "no justification for any major departure from these established and well-tried principles"."

The court's discretion

105. In the context of emphasising that it was not necessary for any formal reassessment of how the *Primor* principles should be applied, Mr Justice McKechnie also commented as follows on the Court's discretion:

> "… in my view, when both inordinate and inexcusable delay is being considered and when the balance of justice is being looked at, the court always has a discretion in

its evaluation of the presenting circumstances, from which the ultimate decision is made. That discretion is, and in my opinion should remain, sufficiently flexible to deal with any situation or event: in its application to date I know of no case where it could be legitimately argued or suggested that the result arrived at was the wrong one or was an unjust one."

No return to the days of "endless indulgence"

106. Later, in the same judgment, Mr. Justice McKechnie emphasised the importance of the court not indulging delay, by means of the appropriate application of the established principles to the facts in each particular case. Paragraph 33 of his decision in Comcast states as follows:

> "…may I immediately disown any interpretation which suggests that the old days of "endless indulgence" have returned. I hold no such views. It is not what I convey or intend to convey. My point is utterly simple. In the situation under discussion justice is best achieved by letting it react to given facts. The same period of delay, in different cases, may demand different treatment. Justice is not always referenced to the highest bar. If that were the case the wealthy, powerful, and the influential would set it. That should not be allowed. Justice sets its own bar. A failure of the average man and his average lawyer to match the gold standard of their opposite in society and in practice must not be necessarily condemned."

Obligation on the Courts to ensure litigation is completed in a timely fashion

107. More recently, in *William Connolly and Sons Ltd v. Torc Grain and Feed Limited* [2015] IECA 280, the Court of Appeal emphasised the obligation on the Courts to ensure that litigation is conducted in a timely fashion, stating (from para.25):

> "As was so aptly observed almost fifty years ago by Diplock L.J. in *Allen .v. Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229* at page 255: —
>
> > 'The chances of the courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard'
>
> 26. Accordingly, it is clear that entirely independent of the views of the parties to litigation, the court itself must, because of its constitutional mandate, by its own conduct ensure that litigation is completed in a timely fashion. Its obligation in this regard is inconsistent with affording any undue tolerance to unnecessary delay in the course of litigation. Further, as can be seen from many recent judgments, recognition of this obligation on the part of the courts has had a significant beneficial impact in bringing to an end the culture of delay that previously bedevilled litigation in this jurisdiction."

Analysing the role of a defendant in litigation

108. In para. 34 of his judgment in *Comcast*, Mr. Justice McKechnie offered the following views in relation to the court's analysis of delay on the part of a defendant who brings an application to have a plaintiff's claim against it dismissed on delay grounds, stating:

"34. In the same general context there is another matter which I would like to touch on. It relates to the "inactivity" on the part of a defendant, in circumstances in which he subsequently complains of inordinate and inexcusable delay on the part of the plaintiff. In a number of cases, a distinction has been made between what has been described variously as "active delay" or "culpable delay" as distinct from "inactive delay" or "mere delay". The former in general refers to an undischarged obligation on the defendant's part whereas the latter is intended to reflect the passage of time *simpliciter* or the "do nothing" approach. Again, I remain unconvinced that such a formal departmentalising of the defendant's conduct is justified. In *Dowd v. Kerry County Council* [1970] I.R. 27 O'Dálaigh C.J., with whom Walsh and Budd JJ. agreed, said the following by way of a general observation:

> "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. There is the provision of Order 27, r. 1, and the provision of Order 108, r. 11, where there has been no proceeding for two years. *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"* [emphasis added].

35. The passage from the judgment of Finlay P. in *Rainsford*, where he said that "[d]elay 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" [emphasis added], is, on occasion, relied upon as justifying the distinction above referred to, with the consequence that depending on how this activity can be categorised, different weight considerations apply. It is not at all clear to me that the learned President, as he then was, intended such a distinction. Certainly I do not believe that *Primor* supports such a view, but I readily accept that to varying degrees other judges have.

36. Whilst there can be no doubt but that the moving party has the greater obligation of expedition overall, nonetheless the defendant's interaction or lack of it, as the case may be, with the delay of which he later complains, whether active or purely inactive, to use such phrase, may rightfully attract condemnation by virtue of many other circumstances such as: the identity and character of the particular defendant; the position which he holds; whether that be public or private; the standing and accountability of that position, whether it be representative of the public, of an institution which it serves or otherwise; and the nature of the issues which he is called upon to answer….. Whilst I readily accept that what in truth is the plaintiffs' delay should not rest on the defendant's table, nonetheless it must be remembered that the constitutional guarantee of fair procedures and the right to a fair trial -

> both of which are invariably relied upon in motions to dismiss for either want of prosecution or in the interests of justice - are at the disposal of a defendant in a host of varying circumstances, and relatively speaking from a very early stage of the proceedings. See O 27 R 1, dealing with a failure to deliver a Statement of Claim, O 36 R 12, regarding the absence of a Notice of Trial, and O 122 R 11, permitting a dismiss application for want of prosecution, of the Rules. Those rules, coupled with many statutory provisions, as well as judicial precedent, are all designed to further, in an administrative, practical and operational sense, the defendant's rights, every bit as much as the plaintiff's rights.

Mr. Justice Clarke, in paragraph 3.11 of his judgment in *Comcast*, commented, inter alia, as follows on Mr. Justice McKechnie's views regarding the related issues of the need for a more time-conscious regime and the obligations placed on a defendant in that context:

> "…I agree with the views expressed by McKechnie J. as to the need to apply any heightened standards of expedition to defendants as well. If the true rationale for a tightening up is the need for a more time-conscious regime to ensure that proceedings are determined in timely fashion, then it follows that the need for such a regime places obligations on the defendants as well…The Rules of Court provide various mechanisms which allow a defendant, who is concerned by the slow pace of litigation, to seek to have the process accelerated. A defendant who does not avail of those procedures is, in my view, in a different position from a defendant who has sought to speed up the process but has been frustrated in that endeavour by a failure on the part of the relevant plaintiff to respond reasonably."

109. In light of the foregoing guidance given in *Comcast*, I am satisfied that there can be no doubt about the reality that the moving party has the greater obligation to progress its case expeditiously. In the present case that means the primary obligation rested on the Plaintiff to progress its case against the Defendants. Furthermore, the Defendants had the greater obligation, insofar as their claim against the Third Party was concerned, to ensure that its case against the Third Party was progressed with sufficient speed. That being so, I have examined in this decision, and have taken account for the purposes of this judgment, the conduct of *all* parties throughout the progress of *both* claims, from the point at which the respective claims were initiated. Without an undue attachment to labelling specific delay, I have taken into account, for the purposes of this judgment, any delay for which it can fairly be said each of the relevant parties were responsible, consistent with their obligations as parties to litigation and having regard to the provisions of the Rules of the Superior Courts.

Global Appreciation of the interests of justice

110. In *Anglo Irish Beef Processors Ltd*, Mr Justice Fennelly commented on the judgment of the then Chief Justice Hamilton in *Primor*, as follows:

> "The judgment of Hamilton C.J. in *Primor plc v Stokes Kennedy Crowley* [1996] I. R. 459 sums up the elements that are necessary to enable the courts to dispose of motions of the present type. The important passage cited by the Chief Justice

> distills the essence of the extensive case-law summarised and reviewed in the preceding part of the judgment. The governing consideration is that first stated by Hamilton C.J., namely that *"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."* It is always necessary for the defendant applicant to demonstrate, and he bears that burden, that the plaintiff has been guilty of inordinate and inexcusable delay. Subject to that, however, the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation. The separate considerations mentioned by Hamilton C.J. should not be treated as distinct cumulative tests but as related matters affecting the control decision as to what is just. In particular, as was said by O'Dalaigh C.J. in Dowd v Kerry County Council [1970] I.R. 27 at p 41: *"Litigation is a two party operation and the conduct of both parties should be looked at."*

It is clear from the foregoing that, although the conduct of all parties to litigation must be looked at, the various considerations for the court as outlined in Primor do not constitute separate tests, each to be looked at in a vacuum. Rather, all relevant factors need to be considered together, in order for the Court to arrive at a conclusion as to where the balance of justice lies. That is the approach I have taken.

Disparity in resources

111. In a separate judgement in the same case, Mr. Justice Clarke made the following clear, in para. 3.10 of his decision in *Comcast*, in relation to the account which the Court should take of any disparity in the resources available to the parties to proceedings in the context of a dismissal application:

> "The circumstances of the parties and, in particular, any disparity in the resources available to the parties must always be a factor which the court takes into account. The degree of expedition and compliance with time limits which could properly be expected of large corporations involved in commercial disputes cannot reasonably be required of poorly resourced or otherwise disadvantaged litigants…".

In the present case, the Plaintiff is a Plc, the Defendants are an elderly couple and the Third Party is a firm of solicitors. The Plaintiff in the present case is a major bank and there can be no question of any deficiency in resources or any disparity in the resources between the Plaintiff and Defendants playing any part in any delay with regard to how the Plaintiff's claim progressed. Nor is there is any evidence that any disparity in terms of resources played any part insofar as delay in progressing the Defendants' claim against the Third Party is concerned.

A lower threshold to dismiss proceedings where there is culpable delay

112. It is clear from the authorities that the concept of prejudice to the public interest in the administration of justice has been recognised. The authorities also make very clear that, in certain circumstances, the inherent jurisdiction of this Court as per the *O'Domhnaill* principles can still be invoked even where, applying the *Primor* principles, no culpable

delay was found and/or no specific prejudice was identifed. Very clear too, is the proposition that where culpable delay is found to exist, a *lower* threshold applies in terms of dismissing the claim under the Primor approach, whereas even a blameless plaintiff may have their case struck out if the interests of justice require it but the threshold in the latter scenario is *higher*. The foregoing is made clear in para. 4.3 of the judgment of Clarke J. (as he then was) in *Comcast*, as follows:

> "…It seems to me that the threshold which must be surmounted to justify the dismissal of proceedings where there is no culpable delay on the part of the plaintiff must necessarily be more onerous than that which applies in the case of culpable delay. If the thresholds were the same then the jurisprudence on delay in such cases would be meaningless for the level of impairment in the ability to present a defence which would have to be shown would be the same whether there was or was not culpable delay. Furthermore, a test which made it easier to dismiss proceedings where there was no culpable delay would be illogical. It follows, in my view, that whatever approach is adopted to the dismissal of cases where no culpable delay is established, it must, necessarily, require that a higher threshold be met. The rationale behind the existence of two separate bases for dismissal is that there will be some cases where the degree of unfairness to a defendant (whether because of severe impairment in the ability to mount a defence or other factors) may be so great the (sic) even a blameless plaintiff may have to suffer their proceedings being dismissed".

Lesser burden of proof under *Primor*, regarding degree of prejudice

113. In the Court of Appeal's decision in *Cassidy v. The Provicialate* [2015] IECA 74, Irvine J. (as she than was) looked at the difference between the *Primor and O'Domhnaill* lines of authority and stated the following, from para. 35 onwards: -

> "I am satisfied that the third leg of the *Primor* test, which obliges the defendant to prove that the balance of justice favours the dismissal of the claim, does not carry the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the *O'Domhnaill* test".

Where culpable delay is found, *moderate* prejudice is sufficient under *Primor*

114. The following year, Irvine J. (as she then was) stated the following in the Court of Appeal's decision in *McNamee v. Boyce* [2016] IECA 19, at para. 35: -

> "Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the *Primor* test".

The probable effect of 4 to 5 years delay on witness evidence

115. In *Rogers v. Michelin Tyre plc* [2005] IEHC 294, Clarke J. (as he then was) commented that the court may have regard to general prejudice which could reasonably be expected to occur. In that decision, the Court referred to the comments of Finlay Geoghegan J. in *Manning v. Benson & Hedges Ltd.* [2005] 1 ILRM 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".

Clarke J. (as he then was) went on to observe in *Rogers* that: -

> "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".

General prejudice

116. The Court in *Rogers* went on to refer to "general prejudice" which was explained as follows: -

> "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 naïve 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".

It is sufficient that prejudice be likely

117. With regard to the issue of prejudice, the following comments were made by Baker J. in *Boliden Tara Mines Ltd. v. Irish Pension Trusts Ltd.* [2014] IEHC 488, at para. 36:

> "It is settled law that likely or actual prejudice to another party is a matter of significant weight in the discretion of the court in hearing an application to dismiss proceedings or extend time for the service of pleadings. The law does not go so far to say that there must be actual prejudice and it is sufficient that prejudice be likely or probable. Prejudice may be either specific or general and again this is clear from the case law. *In Rogers v. Michelin Tyre Plc& Anor.* [2005] IEHC 294, Clarke J. made it clear that the court would look at both general prejudice that would be expected to occur in any case in particular or specific prejudice, the actual prejudice which is found or argued to be found in an individual case. The prejudice, having

regard to the characterisation of the jurisdiction of the court, is not merely specific to an individual case but also one which the court must exercise in the context of evolving jurisprudence and the desire to prevent a culture of delay in litigation and accordingly, both forms of prejudice are relevant to me, and actual prejudice does not have to be shown".

Decision in relation to the Defendants' application

118. I have carefully considered all the evidence before the court as well as carefully all submissions, both written and oral, made so skilfully by counsel representing the parties to these proceedings. Dealing first with the defendant's motion as against the plaintiff, my findings are as follows:

> I am satisfied that the plaintiff can fairly be said to be guilty of inordinate delay with regard to the prosecution of its claim against the defendant, in particular the period of delay on the part of the Plaintiff which resulted in the service by the Defendant of a Notice of Intention to Proceed in June 2019. That delay, I am satisfied, can fairly be called out of the ordinary, outside of normal limits, irregular and excessive. I have also identified, earlier in this judgment, other periods of avoidable delay which occurred *prior to* December 2015 (one year after the Plaintiff's case was certified as ready to proceed), being the point at which the Plaintiff agreed to have the defendants' claim against the third party heard alongside the plaintiff's claim. In the manner examined above, it took the Plaintiff 9 months to seek particulars of the Defence delivered and a period of 13 months to reply to a notice for particulars raised by the Defendants. A particularly excessive period of delay is that commencing with the defendants' request for voluntary discovery, on 21 August 2015, which period of delay ran up to 17 September 2019, when the Plaintiff ultimately delivered an affidavit of discovery, following the service in June 2019 of the Defendants' Notice of Intention to Proceed. That period was punctuated by the Defendants' request in 2017 for a second category of discovery, but the evidence demonstrates inaction on the Plaintiff's part both prior and subsequent to that request. I am satisfied that, but for the Plaintiff's delay, a trial of the case against the Defendants could have taken place at least 5 if not 6 years earlier. In light of the evidence before the court and taking into account the principles derived from the authorities, I am satisfied that the Plaintiff's delay can fairly be called inordinate

In Anglo Irish Beef Processors Ltd. V. Montgomery [2002] IESC 60, a case in which the pleadings were closed in 1994 and the defendants brought motions in 2001 seeking to dismiss the plaintiff's claim, Mr Justice Fennelly stated the following (p.518):

> "It is no exaggeration, in these circumstances to say that the plaintiffs have not even made pretence of an attempt to explain, still less offered an excuse for their quite extraordinary delay in pursuing the claim. There may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or

> service may, through no fault of the litigant, impede the progress of a claim. No comparable misfortune has been advanced in the present case. The claim is of a purely commercial character. On the plaintiffs own version of it, it is perfectly straightforward. The claimant is a well-advised, well-known company and is fully armed with all the means of pursuing its claim to judgment. Its stark failure to proffer even the vestige of an explanation for its delay is a circumstance which should not be overlooked.

119. It is plain that the various possible explanations for delay referred to by Mr. Justice Fennelly constitute no more than examples in a non-exhaustive list. Nevertheless, it is worth observing that nothing of kind has been said on behalf of the Plaintiff by way of an excuse for its delay. It can fairly be said that no comparable misfortune, of the type referred to by Mr. Justice Fennelly, has been advanced in the present case. It can also be said that the Plaintiff's claim is of a purely commercial character and that the plaintiff is a well-advised, well-known company and is fully armed with all the means of pursuing its claim to judgment. Rather than any "misfortune" being put forward in an attempt to excuse delay, the Plaintiff asserts that there was *no* inordinate *or* inexcusable delay on its part. That is an assertion made very starkly in paragraph 3 of Mr. O'Brien's 3 June 2020 Affidavit, in which he avers that:

> "It is alleged…that the plaintiff has been guilty of inordinate and inexcusable delay in the prosecution of the present proceedings and that the balance of justice lies in the within case not proceeding. I do not believe that either of those allegations stands up to scrutiny…" (emphasis added)

The Affidavits sworn on the Plaintiff's behalf make it very clear that the Plaintiff does not accept that it has been guilty of inordinate delay as paragraph 30 of Mr. O'Brien's 3 June 2020 Affidavit also illustrates:

> "…I say and believe that the allegation that the plaintiff has delayed inordinately and inexcusably in the commencement and/or prosecution of the present claim is without merit." (emphasis added)

By adoption the stance that there has been *no* inordinate delay, it is perhaps unsurprising that the Plaintiff has offered little by way of an attempt to excuse delay which it stridently maintains did not occur. That said, I have very carefully considered everything offered by way of an "excuse" and am satisfied that it is inadequate. While not acknowledging any excessive delay on its part, the key arguments made by the Plaintiff in opposition to the Defendants' application can fairly be summarised as follows:

1. That the Defendants' and the Third Party failed to keep the Plaintiff updated regarding the pleadings *inter se*;

2. That the Defendants should have issued a motion against the Plaintiff to force it to make discovery;

3. That as soon as the Defendants drew attention to the Plaintiff's delay regarding discovery, it acted expeditiously to rectify matters;

4. That once the Plaintiff delivered its Affidavit of Discovery in September 2019, it was entitled to consider that it no longer would have to face any application to strike out its claim and that the Defendants' application came "out of the blue" and is opportunistic.

120. All the foregoing wholly ignores the obligations on the Plaintiff as the party with primary responsibility to progress its own case, as well as the very significant delay on the part of the Plaintiff. Indeed, looking back to the date when the originating Summons was issued by the Plaintiff in February 2010, and taking due account of delay on the Defendants' part, it is not unfair to say that the progress of the proceedings has been characterised by delay on the Plaintiff's part resulting in at least 5 years being "lost" in a very real sense. In the manner analysed in this judgment, I am satisfied that, but for the Plaintiff's delay, the case could and should have been ready to go to trial at least 5 years ago. In addition to the Plaintiff's primary obligation to move its case forward, the foregoing "excuses" 1 – 4 ignore critical facts. An examination of the evidence demonstrates that, as regards "excuse" no.1 above, the fact is that, after January 2017, the Plaintiff never once looked for even an update from either the Defendants or the Third Party. As to "excuse" no. 2, it ignores the fact that the Defendants were not silent and, in response to a number of letters and calls asking the Plaintiff to furnish the discovery it had agreed to make, the Plaintiff made it clear in writing that it would make discovery voluntarily, was sorry for the delay and expected to furnish an affidavit to the Defendants. As to no. 3, it is simply not the case that the Plaintiff's delay was only drawn to its attention in 2019, but it is incontrovertible that the Plaintiff only complied with its obligation to make discovery in the wake of the Defendants' Notice of Intention to proceed. In my view, the Defendants' application cannot fairly be described as opportunistic given the background of delay against which it was brought and having regard to the Defendants' situation. If the Plaintiff was surprised by it, I am satisfied that it was an application the Defendants were entitled to bring. Moreover, given that it is was an application brought in the wake of some 4 years' delay on the Plaintiff's part with regard to the making of discovery, of which some 2 years post-dated the Plaintiff's apology for delay and commitment to make discovery, and given the fact that events at the heart of the issues in dispute go back to 2007 and 2008, and given the fact that the Plaintiff decided a decade ago that witness evidence at a plenary trial would be necessary for the issues to be determined, and given that the Defendants were at all material times going to be vital witnesses and given that they are now in their 80s, I fail to see the basis for the Plaintiff's surprise.

121. In light of the findings of fact in this judgment and, having had careful regard to the authorities, I am satisfied that the plaintiff's delay is inexcusable as well as being inordinate. I am satisfied that the Plaintiff has put forward no valid excuse for the delay of over two years from the Defendant's request, in 2017, for one additional category of discovery, up to September 2019, when the Discovery affidavit was ultimately furnished by the Plaintiff. Nor does anything said on behalf of the Plaintiff adequately explain or

excuse the Plaintiff's delay, of over four years, between the initial request for Discovery, which was made by the Defendants in August 2015, and the delivery by the Plaintiff of an affidavit of discovery, in September 2019. In the manner analysed earlier in this judgment, the Plaintiff also delayed in relation to the progress of its case against the Defendants up to December 2015. Among the submissions made on the Plaintiff's behalf it was suggested that any practitioner familiar with litigation would be unsurprised by the periods of delay which arose in the present case and it was submitted that a period of 2 years of delay was, if not commonplace, then wholly unsurprising and, thus, neither inordinate nor inexcusable. I do not accept that submission. Few litigation practitioners will be unfamiliar with the Commercial List of this Court or with the provisions of Order 67A of the Rules of the Superior Courts. It is uncontroversial to say that, even where cases involved complex commercial disputes, it is entirely possible for all pleadings to be closed, discovery to be made, witness statements exchanged and the case ready for trial within 12 months of the originating summons. The pace of such claims is dictated by the giving of direction by the court. No application was made to admit the present claim into the Commercial List and no criticism is made of any party for that, but there is no evidence that the case could not have been progressed with far more speed than it was approached and no evidence that delays for periods approaching 2 years at a time and, cumulatively, amounting to 5 or 6 years, were justified. If delays of 2 years are commonplace in legal proceedings, they should not be, absent specific and valid excuses.

122. With regard to where the balance of justice lies, it is submitted on behalf of the Plaintiff that no specific prejudice in relation to witnesses or documentation is identified, save averments in general terms. It was also submitted on the Plaintiff's behalf that there is no evidence of either of the Defendants suffering from dementia and that this meant there was no prejudice arising. Furthermore, it was suggested on behalf of the Plaintiff that the Defendants' evidence could be taken on commission or could be given by them remotely. I should also add that Counsel for the Third Party made it clear that the Third Party would not accept any taking of evidence on commission or the giving of any evidence by witnesses, remotely, having regard to the nature of the allegations by the Defendants against the Third Party. Regardless of how skilfully made, I do not regard the foregoing submissions on the Plaintiff's behalf as accurately reflecting the evidence before the court or the effect of the Plaintiff's delay insofar as prejudice to the Defendants is concerned.

123. It is incontrovertible that a future trial court would be reliant on evidence given by the Defendants. These are an elderly couple, now both in their 80s, both of whom have medical difficulties. The Second Named Defendant is, according to her doctor, *"not available to attend court for medical reasons"*. I am satisfied that, as a result of the delay in this case for which the Plaintiff is responsible, the potential for the Defendants to assist the court in terms of their witness evidence at a future trial has been impaired as a matter of probability.

The following is an extract from paragraphs 19 and 20 of the decision in *Rodenhuis*:

> "…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.
>
> [20] Furthermore, in addition to the general prejudice which any party might be likely to suffer by significant delay, it seems to me that there is specific prejudice on the part of the defendant established in this case. So far as the workmanship issue is concerned, there is likely to be some prejudice in attempting to establish matters that happened between ten and thirteen years ago."

The present case is not one in which the issues are confined to an interpretation of documents. The examination and cross-examination of witnesses, as to their recollection of events going back 12 or 13 years, would be necessary for a fair determination by a trial judge of all the matters at issue.

124. In *Boliden Tara Mines Ltd.*, the Court made clear, inter alia, that *"The law does not go so far to say that there must be actual prejudice and it is sufficient that prejudice be likely or probable."* In my view prejudice has arisen or is probable, namely impairment of the Defendants' ability to given witness evidence. It is incontrovertible that the crucial period in respect of which evidence from the first and second named defendant is required dates back to February 2008 (insofar as the Guarantee is concerned) and to November 2007 (insofar as the Letter of Sanction exhibited by the Second Named Defendant in her 19 October 2010 Affidavit is concerned). In light of the foregoing and having regard to averments as to the Defendants' age and medical condition, which are not controverted, and having regard to the contents of medical reports exhibited, and taking on board the nature of the case and the necessity for a trial judge to make determinations of fact, for which witness evidence would be required, in addition to determining legal issues, I take the view that specific or actual prejudice to the Defendants arises in this case, or is probable. In *Michael O'Riordan v. Maher & Ors.* [2012] IEHC 274, Mr. Justice Birmingham stated, at para. 21 that:

> "Central to determining where the balance of justice lies is to determine whether and to what extent the ability of the defendants to defend the case has been impaired."

In my view, the ability of the Defendants to defend the case has been impaired to a material extent, in fact or as a matter of probability, specifically the actual or probable impairment of their ability to assist the court as witnesses in respect of their recollection of events going back to 2008 and 2007.

125. Commenting on the judgment in Primor , Mr Justice Fennelly stated the following in *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510:

> "One of the authorities cited by Hamilton C.J. was *O'Domhnaill v Merrick* [1984] I.R. 151, where Henchy J said:
>
> > *"Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of case. However, where as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant, or the inability on the part of an infant plaintiff to control or terminate the delay of his or her agent."(emphasis added).*
>
> That statement of the law indicates that the author of delay which is found to be both inordinate and inexcusable will not be absolved of fault unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess the third consideration in the cited passage from the judgment of Hamilton C.J. namely whether *"on the facts the balance of justice is in favour of or against the proceeding of the case."* As I have already suggested, the respondents were unable to point to any disadvantage or disability affecting them. Nor was there any delay or acquiescence of the appellants, which might redress the balance of fault.
>
> In such circumstances, when the court comes to strike that *"balance of justice"* in application of the comprehensive list of considerations set out in the judgment of Hamilton C.J., it will need to find something weighty to cancel out the effects of the plantiffs' behaviour. It will attach weight to the character of the claim and to the character of the plaintiffs. When considering any allegation of delay or acquiescence by the defendants, it will be careful to distinguish between any culpable delay in taking any step in the action and mere failure to apply to have the plaintiffs' claim dismissed."

In the present case I am unable to point to "countervailing circumstances" sufficient to absolve the Plaintiff of fault. Nor have I been able to identify "weighty considerations" sufficient to cancel out the effects of the Plaintiff's behaviour, in the sense that phrase was used by Mr. Justice Fennelly in Anglo Irish Beef Processors Ltd.

In Bank of Ireland v. Kelly & Ors [2017] IECA 288, the Court of Appeal stressed (at para.52) that:

- "…the purpose of the jurisdiction which the Court has to strike out proceedings on the grounds of delay exists in order to prevent injustice in the form of an unfair trial arising from culpable and unexcused delay by the plaintiff, and as a deterrent to culpable delay by a plaintiff leading to injustice to the defendant. The matters referred to at (i) and (ii) make this clear. The jurisdiction does not exist so that

> some form of punishment can be inflicted upon a dilatory plaintiff as a mark of the Court's displeasure. In an ideal world no time limit prescribed by the rules of court for the taking of a step in proceedings by either a defendant or a plaintiff would be exceeded. Sadly the ideal world is not the real world, and neither the most enthusiastic and energetic plaintiff nor the most resolute and determined defendant will for many reasons be able to adhere strictly to the prescribed periods. The flexibility with which the Courts will extend time upon being satisfied that there are good reasons for having filed to take a step within the permitted time ensures that a rigid application of such time limits as are prescribed do not themselves lead to injustice." (emphasis added)

My decision is neither a reflection of judicial displeasure nor an infliction of punishment, but a decision which flows from an application of the Primor principles and a view, on the evidence, that a real risk has arisen that a fair trial is not possible and a view that specific prejudice to the Defendants has arisen or is probable. In *Bank of Ireland*, the Court of Appeal went on to hold (para. 54) that:

> "Stress and anxiety is sadly a feature of most litigation, especially for individual parties as opposed to corporations. But it is an entirely different matter to establish that this has been caused by the plaintiff's delay. No evidence beyond mere assertion has been advanced in relation to such stress and anxiety."

126. In the present case, evidence has been advanced in the form of Medical reports which, inter alia, make clear that the second named Defendant suffers with anxiety and it is averred that delay has contributed to same. The nature of the defence to the claim which is advanced in the present proceedings is also different to that advanced in Bank of Ireland. Furthermore, in *Bank of Ireland*, the Court of Appeal found "…a complete absence of any correspondence by or on behalf of either appellant complaining about the bank's delay". That contrasts with the facts in the present proceedings which include evidence of the Defendants' solicitors writing on numerous occasions and telephoning the Plaintiff's solicitors to press for discovery. Furthermore, in Bank of Ireland the court found that the failure of the appellants to press the Bank to be "…perhaps understandable given that the appellants' themselves have even to this day failed to provide the bank with replies to the notice for particulars which they received some six years ago, despite reminders and warning letters, all of which were simply ignored." The evidence in the present case is markedly different in that the Defendants had met their obligations insofar as the pleadings were concerned. In particular, the final period of delay was one during which it was the Plaintiff alone which was in default regarding an obligation. On the facts, the Court of Appeal did not characterise the Appellants' conduct to amount to acquiescence for the purposes of (iii) of the *Primor* principles but held that the appellants' conduct was relevant and in the Court's view tilted the balance of justice in favour of the bank, the evidence having demonstrated that the appellants had "…deliberately, consciously and steadfastly refused to furnish particulars of their counterclaim…" and that refusal continued up to the date of the hearing before the Court of Appeal. In the present case, the facts are entirely different and, whilst I am satisfied that the Defendants' conduct

cannot fairly be said to be acquiescence I have weighted it up carefully as I have the Plaintiff's and I am satisfied that the balance of justice tilts decisively against the Plaintiff's claim being allowed to proceed.

127. Even if I am wrong in the view that specific prejudice has occurred or is probable, I am satisfied that the present claim is one in which, at the very least, "general" or "moderate" prejudice arises as a consequence of the Plaintiff's delay, of the type referred to in in *Rogers*. I have reached the foregoing conclusions in light of the *Primor* principles, having given due consideration and due weight to all relevant matters as per the *Primor* test. There are, however, two further matters which require comment, as follows.

> Firstly, and very sadly, it is a fact that the Defendants lost their daughter in recent times. The evidence suggests that, had the Plaintiff conducted its case with reasonable expedition, the Defendants would not have had to cope with that tragic loss, and the adverse health consequences in terms of anxiety, against the background of a set of proceedings which have been in existence for more than a decade. The case would have, and in my view should have, been concluded prior to that personal tragedy which the Defendants have experienced, but for the Plaintiff's delay.
>
> Secondly, neither the plaintiff's claim against the Defendants nor the Defendants' claim against the Third Party can fairly be characterised as claims capable of being determined simply and with reference only to the interpretation of documentation. Both undoubtedly require oral, as well as documentary evidence, with a testing of witnesses under cross – examination being essential for a fair determination of the matters in dispute. The plaintiff has known for almost a decade that this was so, and it is not in dispute that the decision to opt for a plenary hearing, rather than proceed by way of summary summons, is a decision made by the plaintiff following receipt of an affidavit sworn by the second named defendant in October 2010. In the manner explained earlier in this judgment, there is no question of the complexity of the pleadings explaining the inordinate and inexcusable delay and no excuse is proffered which explains the Plaintiff's delay. It is also fair to characterise the plaintiff's attitude to the claim, particularly from December 2015 onwards, as either entirely or substantially *passive*. It is a case where the evidential disputes will centre around a Guarantee signed in February 2008 and a Letter of Sanction which appears to have been furnished to the Second Named Defendant in November 2007 will also be the subject of examination and cross examination of witnesses who are now in their 80s. It is also a case which was certified as ready to proceed in 2014. In light of the foregoing, I take the view that, in addition to (a) *specific* prejudice occurring or being probable and in addition to (b) there being *general* or *moderate* prejudice, this is a case where I am satisfied that (c) *prejudice to the public interest in the administration of justice* arises, in the sense outlined in the authorities to which I have referred. I should make clear that I do not take the view that prejudice to the public interest, as it arises on the facts of this case, would be sufficient, of itself, to justify a dismissal of the Plaintiff's claim

under the *O'Domhnaill* principles. Nevertheless, it is in my view an added element of prejudice which arises on the facts.

In circumstances where I am satisfied that the plaintiff's delay is both inordinate and inexcusable and having weighed up all relevant factors and having carefully applied the principles as set out in the authorities, I have come to the view that the balance of justice is in favour of granting the reliefs sought by the defendants and dismissing the plaintiff's claim.

Decision in relation to the Third Party's Motion

128. As regards the Defendants' claim against the Third Party, no step was taken by the Defendants from July 2017, when discovery was finalised, and a period of almost two years elapsed before a Notice of Intention to proceed was issued by the Defendants, in June 2019. It is also a matter of fact that this was not the only example of delay on the part of the Defendants and I have referred, earlier in this judgment, to the fact and quantum of prior delay, which I have identified. In summary, the evidence demonstrates that at least 2 years were lost through avoidable delay, *prior* to July 2017, and I am also satisfied in light of the evidence that, cumulatively, delay accounts for at least 4 years of the period from the commencement by the Defendants of their claim against the Third Party, in July 2012, to the service of a Notice of Intention to Proceed, in June 2019.

129. In submissions by Counsel for the Defendants it was suggested, inter alia, that a period of two years was not unusual in applications such as these and that such delay was not inordinate. It was also submitted that the defendants were waiting for the plaintiff to make discovery and that, insofar as the defendants' admitted failure to issue a motion to compel the plaintiff to make discovery is concerned, it was submitted that the defendants received no warning from the Third Party. Having carefully considered the evidence and the authorities, I am satisfied that the Defendants have been responsible for what can fairly be described as inordinate delay. In my view, the Defendants' delay was out of the ordinary, excessive and can reasonably be described as inordinate in the sense in which that term was explained by Mr. Justice Cooke in *Framus*, to which authority I have referred earlier in this decision.

130. It was clear from both the evidence, in the form of averments and exhibits relied upon by Mr. Kelly, and from the skilled submissions by the Defendants' counsel, that a key factor proffered by way of an excuse for the Defendants delay is that the Defendant was waiting for the plaintiff to make Discovery. On behalf of the Defendants the rhetorical question was asked *"How can it be inordinate or inexcusable delay for the defendants to wait for discovery from the plaintiff which includes material relevant to the Third Party claim?"*

In light of the authorities, it is uncontroversial to say that a plaintiff has an obligation to press ahead with its claim with sufficient speed and fails to do so at its peril. Earlier in this judgment, I looked at the Plaintiff's actions and came to the view that it adopted what could fairly be described as a *passive* approach to getting its claim against the Defendants on for trial, delaying inordinately and inexcusably. In my view, the same can fairly be said insofar as the Defendants claim against the Third party is concerned.

131. If, as the Defendants submit, it needed discovery from the Plaintiff, in order to progress its claim against the Third Party, it is no answer to an allegation of inordinate and inexcusable delay for the Defendants to complain that it was the Third Party's responsibility to warn or pompt them to take a more active role in pressing the Plaintiff for such discovery (e.g. by means of a motion brought to be brought by the Defendants against the Plaintiff if, but only if, the Third Party prompted them to issue same). Just as the Plaintiff had obligations to progress actively its claim against the Defendants, the same is true in relation to the Defendants obligations to press ahead its claim against the Third Party in a sufficiently timely manner. I do not accept that simply waiting for the plaintiff to make discovery discharged the Defendants' obligations insofar as their claim against the Third Party is concerned.

132. It is a matter of fact that the Defendants did not issue a motion to compel discovery by the Plaintiff. That was their choice and it may well have been an understandable choice and, indeed a reasonable choice having regard to the correspondence which passed between the Plaintiff and the Defendants solicitors was concerned. I make the foregoing comment however in the context of the Plaintiff's claim against the Defendants *not* in the context of the Defendants' claim against the Third Party. The Plaintiff is not suing the Third Party.

When looking at the Plaintiff's claim against the Defendants and examining the Plaintiff's conduct through the lens of the *Primor* principles, I took due account of the Defendants' role and came to the view, in the foregoing context, that it would be unfair to characterise the Defendants' as having acquiesced or delayed, insofar as Discovery by the Plaintiff was concerned. That was a finding in relation to the Plaintiff's claim against the Defendants. The plaintiff had agreed in writing to make discovery, apologised in writing for delay and indicated a willingness to furnish the relevant affidavit to the Defendants. It is fair to say that the "ball" was in the plaintiff's "court", as the correspondence between the Plaintiff and the Defendants illustrates. It was against that background I took into account the fact that the Defendant did not issue a motion against the Plaintiff when looking at where the balance of justice lay, having regard to the *Primor* principles and I came to the view that the balance of justice favoured the dismissal of the Plaintiff's claim against the Defendants, taking all the relevant factors into consideration.

133. However, the claim against the Third Party is the Defendants' claim and, insofar as that claim is concerned, they are the "plaintiff", with commensurate obligations to progress their proceedings. Failure to do so carries serious risks as the authorities cited above make clear. Blaming the Plaintiff's delay in making discovery, and/or suggesting that the Third Party failed to warn or prompt them into further action, is not in my view an adequate or reasonable excuse in the context of the Defendants' obligation to press ahead with its claim against the Third Party, particularly in light of the facts which I have examined earlier in this judgment.

134. In essence, if the Defendants regarded the documentation which the Plaintiff had failed to make discovery of, as being essential to its ability to progress its claim against the Third

Party, they should have taken such steps as were necessary to obtain it without inordinate delay resulting. They failed to take such steps. However, the evidence also suggests that such discovery may *not*, in fact, have been essential to the Defendants claim against the Third Party in light of the facts as found, of which the following will be recalled.

135. On 20th March 2017, the Defendants' solicitors wrote to the Third Party's solicitors seeking discovery on a voluntary basis of 3 numbered categories, the 3rd of which was *"Any documentation furnished to the Plaintiff from the Third Party on behalf of the Defendants"*. On 20th March 2017, the Defendants also asked the Plaintiff to furnish by way of an additional category of voluntary *discovery "All documents furnished to the Plaintiff by the Third Party on behalf of the Defendants herein"*, being the *same* category of documentation which the Third Party had been asked to furnish. The Defendants cannot be criticised for seeking discovery of the same category of documentation from both the sender and the recipient of the documents in question. However, they can fairly be criticised if they fail, in the context of a claim which they say they wish to maintain against the Third Party, to progress that claim actively and in a timely manner. In my view, the Defendants' approach to their claim against the Third Party, from July 2017, onwards was neither active nor timely. Furthermore, it is a matter of fact that the Defendants received discovery from the Third Party within 4 months i.e. it is not in dispute that the Defendants received the Third Party's 10th July 2017 affidavit on 25th July 2017. There is no evidence before the Court that the discovery furnished by the Third Party was in any way deficient. It is a fact that the Defendants did not seek any further or better discovery from the Third Party. On the evidence, I am entitled to conclude that, in July 2017, the Defendants were provided with discovery of all *"documents furnished to the Plaintiff by the Third Party on behalf of the Defendants"*. That being so, I am entitled to conclude that the Defendants did not, in fact, need to obtain the very same category of documents from the Plaintiff which they had already received from the Third Party (the latter being the sender and the former being the *recipient* of what was the self-same category of documents).

136. In short, I am entitled to conclude in light of the evidence that, having received proper discovery from the Third Party, on 25th July 2017, of *"All documents furnished to the Plaintiff by the Third Party on behalf of the Defendants herein"*, the submission that Defendants needed to wait for the plaintiff to make discovery of *"Any documentation furnished to the Plaintiff from the Third Party on behalf of the Defendants"* does not excuse the Defendants' delay in relation to progressing its claim against the Third Party. The evidence suggests that what the Defendants say they were waiting for the Plaintiff to provide by way of discovery was documentation which was not in fact essential to the Defendants' ability to progress its claim against the Third Party and which was in fact in the Defendants' possession from July 2017. In my view the Defendants' delay was both inordinate and inexcusable insofar as progressing the Defendants' claim against the Third Party, from 25th July 2017 onwards, is concerned.

Insofar as exercising the Court's discretion, in light of the facts, as to where the balance of justice lies, I have carefully considered all the evidence and submissions by Counsel as well as the authorities, in particular the decision in *Primor* and the principles set out therein.

137. It is true that the Third Party has known of the relevant claim since the delivery by the Defendants' solicitor, on 15th May 2013, of a Third Party statement of claim, but the foregoing does not mean that no prejudice arises for the defendant, having regard to the nature of the Defendants' claim against the Third Party. It is not controversial to suggest that witnessing a signature is not an uncommon event for a solicitor. Under normal circumstances it would not be expected that a solicitor would have a recollection of every signature she or he witnessed. It also a matter of fact that it was already almost five and a half years *after* the signing of the relevant guarantee by the Defendants, before the Third Party was served with a statement of claim which pleaded that a solicitor in the third party, whose signature appears as a witness on the relevant guarantee, was not present when the Defendants' signed the guarantee. This is a unique feature of the case and, in circumstances where a trial could not be anticipated until late 2020 at the earliest, I take the view that there is a substantial risk, as a result of the Defendants' delay in progressing the claim against the Third Party, that a fair trial is not possible. Having been told over five years later, that a serious issue arises in respect of a single document witnessed by a solicitor, and for the claim in which that issue plays a central part not to have been determined at a trial, despite the passage of more than a further seven years, in my view evidences both actual prejudice to the Third Party, as well as what was described in *Rogers* as "general prejudice" and what the Court of Appeal in *McNamee* referred to as "moderate prejudice". I also take the view that prejudice arises of the type referred to by Peart J. in *Byrne v. Minister for Defence* [2005] IEHC 147 (being prejudice to the public interest, independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up valuable and scarce court resources).

138. The nature of the case has been commented on earlier in this judgment and it seems to me that, although the court cannot know definitively what questions will be put to witnesses, it is clear that examination and cross examination of witnesses will be required for a fair trial. This would seem to include at least one witness from the Third Party, as well as witness evidence being vital from both of the Defendants whose names appear on the guarantee at the heart of the proceedings. It is equally clear that, with regard to the claim against the Third Party, the key period concerns that leading up to the signing of a guarantee, which is dated 13 February 2008. Thus, a number of witnesses will need to have their evidence tested in respect of events going back well over a dozen years.

139. There is no evidence that, as matters stand, any specific witness is no longer available as a result of delay but I accept, as valid, Mr Tunney' averment as to concerns about what witnesses remember of events going back to 2008 and I am satisfied that the Court is entitled to conclude that, as a result of delay for which the Defendants are responsible, there is there is a real risk that witness memories will be impaired or less reliable than would have been the case had the proceedings been progressed with the requisite

expedition. I am fortified in that view by the authorities I have referred to, in particular, by the 2005 decision of Ms. Justice Finlay Geoghegan in *Manning*, wherein the court observed 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"*. On the particular facts of the present case, there has undoubtedly been cumulative delay of over 4 years with regard to the progress of the Defendants' claim for which the Defendants are exclusively responsible and, on the evidence, I am satisfied that the probable effect is that outlined in *Manning* insofar as the Third Party's witness or witnesses are concerned.

140. In addition to the foregoing, I also take the view that the uncontroverted averments and medical reports in relation to the Defendants' age and health difficulties are not simply relevant to the Plaintiff's claim against the Defendants. That evidence seems to me to be equally relevant to the issue of whether a fair trial is possible, insofar as the Defendants' claim against the Third Party is concerned. Accurate recall from both of the Defendants, in terms of their witness evidence at a future trial, would seem to me to be necessary to a fair trial taking place. The passage of time since the events at the heart of the case, together with the time lost due to the Defendants' delay, in addition to the Defendants' advanced age and undoubted health issues, taken together, cause me to take the view that relevant witnesses evidence is likely to be impaired or less reliable due to the Defendants' delay. Having regard to the evidence, it can be expected that the memories of all potential witnesses, including the Defendants, will not be as reliable as they would and could have been, but for the delay which I have identified in this judgment. That seems to me to create a risk of an unfair trial and prejudice insofar as the Third Party's position is concerned.

141. It may well be that the Defendants' decision to take no step to progress their claim against the Third Party for some 2 years, from July 2017 onwards, was because they were taking the attitude that it might be better to *"let sleeping dogs lie"*, insofar as the Plaintiff's claim against them was concerned. Whatever the reason, from August 2017 onwards, the Defendants took what can fairly be described as an entirely passive attitude to moving ahead with their claim against the Third Party, despite the fact that over 9 years had already elapsed since the signing of the document which is at the heart of their claim against the Third Party. The decision by the Defendants not to progress their claim against the Third Party was, in my view, unfair to the Third Party and inconsistent with the duty of a party who makes a claim to progress that claim with reasonable expedition.

142. Mr. Tunney averred on behalf of the Third Party, in paragraph 10 of his grounding affidavit sworn on 4th February, that the ongoing proceedings have created difficulty in obtaining professional indemnity insurance. This factor does not seem to me to be one to attach any weight to in determining where the interests of justice lie, in that it is not averred that it has proved *impossible* to obtain such insurance. It was also submitted that the Defendants' proceedings cast a shadow over the reputation of the Third Party. The latter does seem to me to be a factor of which some account should be taken, for the following reason. The Defendants' claim is not merely one of negligence against a firm of solicitors. Such claims are not uncommon and this is precisely the reason why

professional indemnity insurance is required. The Defendants' claim, however, includes serious allegations, which go beyond a claim that a mere mistake was made. That being so, this is a factor of which some account should be taken, although I should say that, even without giving any weight to the issue of potential damage to the Third Party's reputation arising from the delayed claim, I am satisfied that the balance of justice favours the striking out of the Defendants' claim, by reason of prejudice, in the manner explained above.

143. This is not to say that a delay in the region of 2 years will necessarily result in a claim being dismissed in another case. There can be no "hard and fast" rule or "one size fits all" approach. This is for the simple, but crucial, reason that justice can only be done in the context of and by reacting to the specific facts of a given case. On the particular facts in this case, justice favours the dismissal of both the Plaintiff's claim against the Defendants and the latter's claim against the Third Party.

144. I should also make clear that, having been satisfied that in this case the Defendants' delay regarding the prosecution of their case against the Third Party has been both inordinate and inexcusable, I looked closely to see if the evidence disclosed what were referred to as *"…countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant…"* which might allow the court to overlook the Defendants' delay but weighing everything in the balance I am satisfied that justice favours the dismissal of the Defendants' claim against the Third Party. In short, given the significance of witness evidence to the fair and just determination by a future trial court of the matters at issue, having regard to the fact that events at the heart of the dispute between the parties go back to February 2008, I am satisfied that, on the evidence before this court, specific or actual prejudice arises and, even if I am entirely wrong in that, I am satisfied that what has been described as general or moderate prejudice arises in the manner described in the authorities, insofar as the Third Party is concerned, such as would make it unfair to the Third Party to allow the Defendants' claim to proceed. Taking all the evidence into account and applying the principles set out in *Primor*, I am satisfied that the balance of justice favours the dismissal of the Defendants' claim against the Third Party.

145. It is clear that the Defendants "awoke" on 6th June 2019, insofar as their claim against the Third Party is concerned. On that date, the Defendants issued a Notice of Intention to Proceed against the Third Party and likewise against the Plaintiff. For the reasons explained in this judgment, the Defendants were entitled to accuse the Plaintiff of inordinate and inexcusable delay on the part of the Plaintiff rendering it in the interests of justice to have the Plaintiff's claim against them dismissed, but the Defendants cannot escape the same criticism being made of them by the Third Party in respect of the fact and effect of their delay, insofar as the Defendants' claim against the Third Party is concerned. However tempting it may be to "let sleeping dogs lie", it is an attitude to the conduct of proceedings which the court cannot condone particularly if, as in this case, the effect of the delay is prejudice to the party against which the claim is brought. A second venerable phrase, involving sauce, geese and ganders would also seem to be apt, as regards the existence and consequences of inordinate and inexcusable delay, of which the

Defendants complain but were themselves guilty of, in particular the period of delay approaching 2 years, from July 2017.