[2020] IEHC 49

THE HIGH COURT

[2014 No. 8907P]

BETWEEN

JOHN PUGH & RORY HARTE

PLAINTIFFS

AND

P.G.M. FINANCIAL SERVICES LIMITED,
PATRICK MCENTEE, WEALTH OPTIONS TRUSTEES LIMITED,
ROWAN ASSET MANAGEMENT LIMITED,
PETER DUNNE, PRACTISING UNDER THE STYLE AND TITLE OF
PETER DUNNE & CO,
CANADA LIFE (IRELAND) LIMITED TRADING AS CANADA LIFE,
IRISH LIFE ASSURANCE PLC TRADING AS IRISH LIFE

DEFENDANTS

JUDGMENT of Mr. Justice Sanfey delivered on the 23rd day of January 2020

1. This is an application by the first and second named defendants for an order pursuant to the inherent jurisdiction of the court or pursuant to O. 36, r. 12 of the Rules of the Superior Courts dismissing the plaintiff's proceedings as against the first and second named defendants for delay and want of prosecution. The first and second named defendants seek in the alternative orders pursuant to O. 19, r. 27 and 28 of the Rules of the Superior Courts striking out the plaintiff's claims for fraudulent misrepresentation and deceit, and dishonest breach of trust as against the first and second named defendants contained in para. 3 of the general endorsement of claim in the plenary summons, and striking out the plaintiff's claims for the reliefs sought in para. 3 at the conclusion of the statement of claim, including in particular the claim for fraudulent misrepresentation and misstatement as against the second named defendant. The first and second named defendants seek these latter reliefs by reason of the alleged failure of the plaintiff to provide particulars of those claims as required by O. 19, r. 5(2).

2. It is clear that the application to strike out claims set out in the plenary summons and statement of claim only arises in the event that the application to dismiss the plaintiff's proceedings as against the first and second named defendants for want of prosecution is unsuccessful. It is therefore proposed to deal firstly with the application to dismiss for want of prosecution, and in order to do so, it is necessary to examine the allegations set out in the pleadings, the positions of the parties and the issues arising therefrom.

Factual Background

3. The first and second named plaintiffs are described in the statement of claim as a businessman and a sales director respectively. The second named defendant is a financial adviser and is an employee and/or director of the first named defendant.

4. It is alleged in the statement of claim – and not disputed by the second named defendant – that the first named plaintiff knew the second named defendant from approximately the late 1980's. The second named plaintiff was introduced to the second named defendant by the first named plaintiff. However, the second named defendant specifically denies in the defence that either of the plaintiffs reposed trust and confidence in him as alleged in the statement of claim. It would therefore appear that there is a fundamental dispute

about the nature of the longstanding relationship between the plaintiffs and the second named defendant.

5. In 2007, the second named plaintiff was advised by the second named defendant in relation to investment options for the balance available to him on the closure of the second named plaintiff's defined benefit pension scheme. The first named plaintiff also received advice and recommendations from the second named defendant regarding his pension options. In late 2007 – or January 2008 as the first and second named defendants allege – the first and second named defendants organised a meeting that was attended by the plaintiffs and a number of other people. The plaintiffs allege that the second named defendant hosted the meeting, introducing the parties who he said would be involved in the organisation, operation and management of the "PGM Property Fund". The plaintiffs allege that those present at the meeting were informed of a number of matters, including that the fund would invest in prime locations in central London; that it would purchase properties in the £2m - £5m price range; that it would purchase properties with leases that could be tidied up, and the properties sold on in an eighteen month to three-year timeframe; that the fund would be a leveraged fund; and that there would be a constant communication and reporting to investors. It is alleged that certain speakers at the meeting gave assurances in relation to past performance of the value of the funds as set out in a promotional brochure, and that details were given of prestigious properties in central London.

6. The first and second named defendants deny that they made any of the aforesaid statements or representations, and allege that the presentation at the meeting was made by representatives of the third named defendant and further say that neither the first or second named defendants had any input into the content of that presentation.

7. The plaintiffs go on to allege that the second named defendant informed them that he was the "lead investor" in the "PGM Property Fund/Rowan 4 Fund". The plaintiffs allege that other assurances were made to them by the second named defendant, and in particular that the second named defendant encouraged them to invest in the fund which they refer to as the "Rowan 4 Fund". This fund is described by the plaintiffs in the statement of claim as a "seven year closed leveraged property fund", and the second named plaintiff claims that the recommendation of the fund to him by the second named defendant was... "inappropriate given his age, future earning capacity and risk profile" [para. 13 statement of claim].

8. It is further pleaded in the statement of claim that the "second named defendant assumed personal responsibility to advise the plaintiffs fully, adequately and honestly in relation to their monies…", and that "to the extent that [the second named defendant] was acting as employee or director of the first named defendant it owed the same duties to the plaintiffs" [para. 14].

9. At para. 33 of the statement of claim, particulars are given of the manner in which it is alleged that "…the first and second named defendants have breached their obligations to the plaintiffs…". It is clear from these particulars, which are quite general in nature, that

the plaintiffs consider that the first and second named defendants had an ongoing responsibility to them to advise them and act in their interests throughout the period of the investment. Two of these particulars give a clear sense of the sort of matters grounding the claims by the plaintiffs against the first and second named defendants:

> "33.4 Failing and neglecting to advise or account for what became of the fund assets or to take such steps as would be expected of a competent and professional investment advisor in the circumstances;
>
> 33.7 Failing and neglecting to hold anybody to account, or question them and seek reasons for the catastrophic losses suffered by the Rowan 4 Fund, thus failing in their role to advise anybody and identify fault for the losses;…"

10. The statement of claim details claims against the third to seventh named defendants, and in the "reliefs" section of the statement of claim, makes a range of claims expressed in general terms against "the defendants". The only claim made against a specific defendant is at para. 3 of the reliefs sought, which is as follows:

> "3. An order directing the second and third named defendants to disclose to the plaintiffs the precise sum invested by the second named defendant in the Rowan 4 Fund, and if the sum thus disclosed renders his prior representations false, damages for fraudulent and/or negligent misrepresentation and misstatement against him".

11. In their defence, the first and second named defendants dispute utterly the terms of the relationship between the plaintiffs and the second named defendant as alleged by the plaintiffs, denying that they owed fiduciary duties to the plaintiffs or that the plaintiffs reposed trust and confidence in the second named defendant. It is admitted that the second named defendant informed the plaintiffs that he was the "lead investor" in the fund, and the defence asserts that this statement was "at all times true and accurate". The defendants deny that the second named defendant assumed personal responsibility to advise the plaintiffs in relation to their monies, or that he represented that they would be best served by investing in the fund.

12. It is sufficient to say that the first and second named defendants deny all of the material allegations against them, and set out their position in the defence in a proactive way rather than simply deny the matters pleaded against them. In relation to the claim at para. 3 of the reliefs in the statement of claim as set out above, the first and second named defendants plead as follows:

> "18. Having issued proceedings claiming fraudulent misrepresentation, deceit and dishonest breach of trust, the plaintiffs have provided no particulars in the statement of claim in relation to any of those claims as required inter alia by O. 19, r. 5(2) of the Rules of the Superior Courts, such that those claims and allegations should now be withdrawn or struck out, and the first and second named defendants reserve their right to bring an application to this honourable court in that regard.

13. It is very clear from the pleadings that there is conflict between the plaintiffs on the one hand and the first and second named defendants on the other in relation to virtually all aspects of their relationship, and in particular from 2007 onwards. The first and second named defendants dispute the basis on which it is alleged that they dealt with the plaintiffs and their obligations, if any, arising out of these dealings. One must conclude from the pleadings that the parties will require to adduce evidence as to the nature and extent of the dealings between them at least from 2007 onwards, and that such evidence will be crucial to the court's determination as to whether or not the duties and obligations claimed in the statement of claim were in fact owed by the first and second named defendants to the plaintiffs.

The Proceedings

14. The plaintiffs claim that they have suffered loss as a result of the actions of the various defendants, and duly issued a plenary summons on 20th October, 2014. This has given rise to a plea in the defence of the first and second named defendants that the plaintiffs' claim is statute-barred. The plenary summons was not in fact served on the first and second named defendants until 19th October, 2015, the last day before the summons would have lapsed.

15. An appearance was not filed by the first and second named defendants until 23rd November, 2016. This followed a motion on behalf of the plaintiffs issued on 26th October, 2016 for judgment in default of appearance. The first and second named defendants' solicitors explained the defendants' inactivity in this regard by stating that, in April 2016, after receiving correspondence from the plaintiffs' solicitors requesting that the defendants enter an appearance, he carried out a search on the Courts Service Website which indicated that an order had been made on 11th April, 2016, the nature of which was described on the website as "AMEND SUMMONS". The solicitor inferred that such an amended summons would have to be delivered to his clients and decided that he should wait until the amended summons was served. Notwithstanding this explanation, the plaintiffs assert that what they say is a considerable delay of over a year in entering an appearance should weigh against any delay alleged against them.

16. In any event, a statement of claim was delivered on 18th March, 2016, apparently in response to a motion from one of the other defendants, and a resulting order of this court on 1st February, 2016. The first and second named defendants delivered a defence on 10th July, 2017, and simultaneously issued a detailed notice for particulars. There was no response to this notice, and the first and second named defendants issued a motion to compel delivery of replies to the notice. By order of 26th February, 2018, this Court ordered the plaintiffs to reply to the notice within four weeks. Ultimately, the plaintiffs served replies to particulars on 26th April, 2018.

17. The first and second named defendants point out that the replies to particulars of 26th April, 2018 followed three reminders in August, October and November 2017, following which the first and second named defendants issued a motion, returnable for 26th February, 2018, to compel replies to particulars. That motion was struck out on consent and an order of this Court was made giving a further four weeks to reply. When the

plaintiffs did not comply with this deadline, the solicitors for the first and second named defendants wrote again threatening a further motion. After some email correspondence between the respective solicitors, the replies were then delivered on 26th April, 2018.

18. It is worth pointing out that, while certain documentation was furnished with the said particulars, the replies could charitably be described as "minimalist", with most of the replies stating that the matters of which particulars were sought were "matters of evidence", with the implication that the plaintiffs were therefore not obliged to reply to the queries. In particular, detailed particulars were raised by the first and second named defendants in relation to… "the allegations of fraudulent misrepresentation, deceit and breach of trust made in the plenary summons, but not particularised in the statement of claim…" and various specific queries were raised in this regard. Notwithstanding this, the plaintiffs simply replied that… "these particulars are a matter for evidence".

19. The first and second named defendants took the view – in my opinion correctly – that these replies were completely inadequate, and this led to a further comprehensive notice for further and better particulars from the solicitors for the first and second named defendants on 15th May, 2018.

20. No further step as between the plaintiffs and the first and second named defendants was taken until the present notice of motion issued on 28th January, 2019.

Delay

21. In their written submissions, the first and second named defendants "…having regard in particular to the significant pre-commencement delay…", state that there has been inordinate delay for the period including:

    (i) The period from the issue of the plenary summons on 20th October, 2014 until service of that summons on 19th October, 2015;

    (ii) The period from the issue of a Notice for Particulars by the first and second named defendants on 10th July, 2017 until 26th April, 2018 … "notwithstanding three reminders, a motion, a failure to comply with an order giving the plaintiff time to reply and a further four reminders…"; and

    (iii) The period from 26th April, 2018 until the issue of the present application on 29th January, 2019.

22. It was urged upon the court that there was very considerable delay on the part of the plaintiffs prior to these proceedings, and the first and second named defendants plead at paragraph 1 of their defence that the proceedings are in fact statute barred. Counsel for the first and second named defendants argued that it was clear from the matters pleaded in the statement of claim that the plaintiff alleged that any breach of duty or obligation by the first and second named defendants to the plaintiffs occurred in late 2007, when the second named defendant… "actively encouraged the plaintiffs to invest in the Rowan 4 Fund. The decision to recommend a seven year closed leveraged property fund in particular to the second named plaintiff was inappropriate given his age, future earning

capacity and risk profile" [para. 13]. Complaint was also made by the plaintiffs of the fact that the second named defendant informed the plaintiff that he was the "lead investor" in respect of the fund, and it was alleged at para. 14 of the statement of claim that… "the second named defendant assumed personal responsibility to advise the plaintiffs fully, adequately and honestly in relation to their monies…". In these circumstances, and given that the particulars at para. 33 of the statement of claim appear to allege failures on the part of the first and second named defendants from the point of entering into the investment in question, the first and second named defendants submitted that, without prejudice to their plea that the proceedings are in any event, statute-barred, the period from the entry into the investment until the issue of the plenary summons – a period of 6 to 7 years – should be considered by this court as bearing on, and highly relevant to, the question of whether any delay on the part of the plaintiff was inordinate.

23. The plaintiffs on the other hand contend that there was no delay in bringing the claim. In an affidavit of 7th May, 2019 by John W. Carroll on behalf of the plaintiffs, Mr. Carroll avers as follows:

> "4. The plaintiffs respective pension investments in the pension product matured in or about April, 2014 and June 2014. There has been absolutely no delay prior to bringing the claim, which was brought soon after the product matured. Due to a lacuna in the statute of limitation, there is no date of knowledge extension for financial claims but the first and second named defendants have not brought any application in relation to limitation…"

24. While the statute of limitations issue is not one for determination in this motion, it was submitted by counsel for the plaintiffs that, far from being statute barred, the plaintiffs were not in a position to commence the proceedings until after the investments matured. In discussing whether this was a correct analysis in the context of the statute of limitations in *Gallagher v. ACC Bank plc., trading as ACC Bank* [2012] 2 IR 620, O'Donnell J. in the Supreme Court commented as follows: (at 662):

> > "Since a claim cannot be initiated until a cause of action has accrued, then at least in theory a plaintiff runs the risk of being non-suited if it were determined that the cause of action had not accrued at the time the claim commenced. The plaintiff in addition to the risks of starting a claim too late, would now also face a real risk of having started the claim too early, and would not know for sure until the case was determined. That would turn the process of initiation of claims into a form of litigation Russian roulette, and is a conclusion which I would only accept if driven to it by a clearly expressed legislative choice, or by settled precedent."

25. Counsel for the first and second named defendants submitted that, whether or not the claim was statute barred, the fact that the proceedings had been initiated so long after the facts giving rise to the cause of action should result in the plaintiffs' case being regarded as one involving a "late start". In those circumstances, the first and second named defendants relied on the dicta of Irvine J. in *Millerick v. Minister for Finance* [2016] IECA 206 at para. 21 as follows:

> "In assessing whether the High Court judge correctly classified the delay in the present case as inordinate it is relevant to note that the proceedings were issued very close to the expiry of the limitation period prescribed for claims of this nature. In such circumstances there is a special obligation of expedition on a plaintiff to move matters forward once proceedings are commenced."

26. Counsel for the first and second named defendants also referred to similar dicta by Irvine J. in *Gorman v. Minister for Justice* [2015] IECA 41, and the dicta of O'Malley J. in the Supreme Court case of *Clare Manor Hotel Limited v. The Right Honourable Lord Mayor & Ors.* [2018] IESC 41, at para. 82, in which O'Malley J. stated:

> "…where there has been significant pre-commencement delay, it is particularly incumbent on the plaintiff to progress the matter with expedition…".

27. The plaintiffs also allege delay on the part of the first and second named defendants. They point to the fact that, having served the plenary summons on 19th October, 2015, they did not receive a memorandum of appearance on behalf of the first and second named defendants until 23rd November, 2016. As I have set out above, the solicitor for the first and second named defendants sought to explain this delay by a misunderstanding as to whether or not the first and second defendants were to be served with an amended summons. There does however appear to have been considerable delay on the part of the first and second named defendants in furnishing a defence, which was not delivered until 10th July, 2017, the statement of claim having been delivered on 18th March, 2016. The plaintiffs also contend, for the reasons set out above, that the pre-proceedings delay should not be taken into account at all, as they assert that no cause of action accrued until after the investments matured, and that the proceedings were issued relatively promptly after this event.

The Law

28. There was no dispute between the parties as to the law applicable to an application to dismiss for want of prosecution, and indeed the principles are well settled. The appropriate test was set out by the Supreme Court in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459, and has been applied in numerous cases since then. The test was succinctly summarised by the Court of Appeal in *Millerick* as follows:

> "18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay."

Was the delay inordinate?

29. It was submitted on behalf of the first and second named defendants that, in considering whether or not the plaintiffs' delays are inordinate, I should consider the plaintiffs' case as one involving significant pre-commencement delay. As the first and second named defendants put in their written submission "…the present case is one involving a 'late start' on the part of the plaintiffs, having regard to the fact that the proceedings issued more than six years after their investment was made, which the first and second named defendants submit was after the limitation period had expired".

30. As set out above, the plaintiffs not only deny that their claim is statute barred, but do not accept that there was any significant pre-commencement delay, due to what they say was the necessity to wait until the investment had matured before a cause of action was complete.

31. The effect of a "late start" was considered by Murphy J. in *Hogan v. Jones* [1994] 1 ILRM 512. In that case, Murphy J. approved and applied a principle set out by Lord Diplock in *Birkett v. James* [1977] 2 AER 801 at p. 805 as follows:

> "It follows a fortiori from what I have already said in relation to the effects of statutes of limitation on the power of the Court to dismiss actions for want of prosecution, that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading of recollections of his potential witnesses, their death or their untraceability. To justify the dismissal of an action for want of prosecution the delay relied on must relate to the time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued".

32. In adopting this statement in *Stevens v. Paul Flynn Limited* [2005] IEHC 148, Clarke J. (as he then was) commented that delay in the commencement of proceedings is "…is a factor [which] may colour what happens later".

33. The issue of whether or not the plaintiffs' claim is statute barred is not before the court on the present motion. However, whether or not the plaintiffs' claim is statute barred, the fact remains that the claims of the plaintiffs rely heavily on representations allegedly made and advices given to them by the second named defendants in late 2007, and indeed the nature of the relationship which subsisted between the parties prior to that period. Whether or not there has been pre-commencement delay or a "late start", I am

of the view that the fact that the events on which the plaintiffs rely took place in excess of six years prior to the issue of the plenary summons places the same onus of expedition on the plaintiffs as if the proceedings had been issued very close to the expiry of the limitation period.

34. In the present case, the first and second named defendants complain of a delay of a year between the issue of the plenary summons and its service on those defendants, and the delays between July 2017 and April 2018 and then between May 2018 and the issue of the present motion on 28th January, 2019. These periods amount cumulatively to some 29 months. I consider this delay to be inordinate, particularly given what I consider to be an onus on the plaintiffs to prosecute the proceedings promptly and expeditiously for the reasons set out above.

35. In particular, I would consider this to be a case where, having made the decision to issue proceedings, and given the passage of time from the events on which the plaintiffs' claims are based, the plaintiffs should have ensured that they were in a position to deliver a statement of claim to the defendants as soon as possible, and preferably contemporaneously with delivery of the plenary summons. Instead, the plaintiffs' solicitor wrote a detailed letter on 21st October, 2014 to each of the defendants querying various of their dealings with the Rowan 4 investment. The letters were framed as "O'Byrne letters", i.e. letters intimating that the plaintiffs would rely on s.78 of the Courts of Justice Act 1936 in the event that the plaintiffs were unsuccessful.

36. The first and second named defendants replied by letter of 11th December, 2014 robustly denying liability and inviting the plaintiffs to withdraw their allegations. At this stage, there could be no doubt of the attitude of the first and second named defendants to the proceedings, and a statement of claim should have been delivered very promptly thereafter. Unfortunately, while there was a further letter from the plaintiffs' solicitors to each of the defendants or their solicitors on 13th May, 2015, the plenary summons was not served on the first and second named defendants until 19th October, 2015, and the statement of claim was not delivered until 18th March, 2016.

37. In relation to the delays in replying to particulars, I am also of the view that, in all the circumstances, the plaintiffs should have been in a position to reply promptly and meaningfully to the notice for particulars issued on behalf of the first and second named defendants on 10th July, 2017. The replies, furnished on 26th April, 2018 in response to an order of 26th February, 2018 of this Court compelling the delivery of replies, were clearly inadequate and lead to a prompt request on 15th May, 2018 for further and better particulars. While some time would have been required to formulate a full and proper reply to the notice for particulars of 10th July, 2017, the cumulative delay – from July 2017 to April 2018, and from May 2018 to the end of January 2019 – of approximately 17 months, in circumstances where there was an onus on the plaintiffs to expedite the proceedings, was clearly inordinate in itself.

38. When one takes into account the delay in serving the plenary summons, it is clear in my view that the cumulative delay by the plaintiffs in prosecuting the proceedings is inordinate. It then falls to the court to decide whether such a delay is inexcusable.

Is the delay inexcusable?

39. The plaintiffs seek to excuse the delays in a number of ways. As we have seen, Mr. Carroll's affidavit of 7th May, 2019 on behalf of the plaintiffs asserts firstly that there was in fact no delay in initiating the claim, as it was initiated "soon after the product matured" [Para. 4]. Mr. Carroll goes on to refer to the detailed letters sent on 21st October, 2014, the day after the issue of the plenary summons, to all the defendants, and to the subsequent detailed letters written to each of the defendants or their solicitors on 13th May, 2015. The first named defendant replied by letter of 11th December, 2014, signed by the second named defendant, but these defendants do not appear to have responded to the letter of 13th May, 2015 sent to them.

40. Mr. Carroll's affidavit then refers to there being, after delivery of the statement of claim, in March, 2016, and "exchange of a very significant volume of motions and requests and replies to particulars between the defendants and …the action is now at requests for discovery stage". [Para. 7]. The claim against the sixth named defendant was discontinued on 3rd February, 2016, as its assets had been transferred to the seventh named defendant. Mr. Carroll avers that, following negotiations with its solicitors, the claim against the seventh named defendant was compromised and discontinued on 7th January, 2017. The proceedings were not in fact served on the 5th named defendant, as the plaintiffs had decided not to proceed against that defendant.

41. It appears therefore that the claim is now being pursued only against the first four defendants. No pleadings at all were delivered to the fifth named defendant, and the case against the sixth named defendant was discontinued against that entity before delivery of the statement of claim on the other defendants. There also does not appear to have been any significant engagement by the plaintiffs with the seventh named defendants after delivery of the statement of claim in March 2016, other than the aforementioned negotiations as a result of which the proceedings against that defendant were discontinued.

42. In addition to the plaintiffs' dealings with the first and second named defendants, the third named defendant delivered a 25-page notice for particulars on 4th May, 2016. Replies to these particulars were delivered in response on 27th January, 2017. The third named defendant delivered a defence on 31st March, 2017.

43. As regards the fourth named defendant, there was a difficulty with service on that defendant which necessitated an application by the plaintiffs to this Court for the renewal of the summons and the issue of a concurrent plenary summons for service on the fourth named defendant. An order was made in this regard by the High Court (Moriarty J.) on 11th April, 2016. The fourth named defendant then applied to set aside that order. This resulted in a judgment being delivered by the High Court (McDermott J.) on 9th December, 2016, in which the fourth named defendant's application was refused. There

was then a motion for judgment in default of appearance from the plaintiffs against the fourth named defendant which came before the court on 22nd May, 2017. After an appearance had been entered by that defendant, the plaintiffs issued a motion for judgment in default of defence which came before the court on 10th December, 2018, at which point the solicitors for the fourth named defendant requested time to deliver a defence. The fourth named defendant subsequently delivered a defence on 22nd January, 2019.

44. In summary, issues relating to particulars and the delivery of a defence as regards the third and fourth named defendants were agitated between the delivery of the statement of claim in March, 2016, and December, 2018 when the plaintiffs' motion for judgment against the fourth named defendant came before this Court. The period between March 2016 and December 2016 seems to have been taken up initially with the fourth named defendant's unsuccessful attempt to set aside the order of 11th April, 2016 renewing the summons. This issue was not resolved until the judgment and order of McDermott J. on 9th December, 2016. While Mr. Carroll asserts in his affidavit that an appearance was entered by the fourth named defendant "only after" the return date of a motion for judgment in default of appearance on 22nd May, 2017, an exhibit to his affidavit detailing a chronology of events states that the appearance was entered on 23rd March, 2017. Even accepting that the appearance may in fact have been lodged shortly after and presumably in response to the motion, the plaintiffs give no explanation as to why no motion for judgment in default of defence against the fourth named defendant was issued until 17th October, 2018, over a year later.

45. In all the circumstances, I do not accept that the delays of the plaintiffs as against the first and second named defendants are justified by events in the proceedings involving the other defendants. Responsibility for the delays between the delivery of the statement of claim (March 2016) and the delivery of its defence by the fourth named defendant (January 2019) cannot be attributed solely to the plaintiffs. Nonetheless, they were responsible for substantial delay during that period. While it may be argued by the plaintiffs that they were engaged in progressing the litigation against all defendants and that this necessarily involved a slower rate of progress than if there were proceedings against the first and second named defendants alone, it is asserted by the first and second named defendants – and not denied by the plaintiffs – that not until receipt of Mr. Carroll's affidavit in the present motion were they apprised of the matters involving prosecution of the claims against the various other defendants which the plaintiffs say contributed to the delay in progressing matters against the first and second named defendants.

46. It seems to me that, in circumstances where plaintiffs are under an onus due to a "late start" to prosecute proceedings promptly and without further delay, there is a concomitant onus on the plaintiffs to apprise the defendants of any difficulties which are causing further delay, so that the defendants are assured of the plaintiffs' intention to proceed with their claims, and are not left in the dark as to whether or not the plaintiffs will press on with the matter. A plaintiff who has fully apprised a defendant of delays

involving other defendants is, apart from anything else, in a much better position to argue that the defendant who has been informed of the reasons for the delay and does not object to or complain about such delays, has effectively acquiesced in the delay and cannot subsequently complain about it. On the other hand, where there is unexplained delay on the part of a plaintiff whose proceedings have already commenced with a "late start" a defendant may be able to argue with some force that it was entitled to assume that the plaintiff had thought better of going ahead, and that it is prejudiced in the preparation of its defence by the unexplained delay.

47. Mr. Carroll asserts at para. 18 of his affidavit that "…the plaintiffs found it time-consuming to obtain comprehensive expert reports in this matter and …great time and effort was required in order to obtain same". However, no further details of the plaintiffs' efforts in this regard are given, nor is any explanation offered as to why expert reports were not obtained prior to the issue of proceedings, even if the investment had not matured.

48. In all the circumstances, I do not accept that the matters put forward by the plaintiffs as causing delay excuse their own inaction in that regard. I find therefore that the delays of the plaintiff are both inordinate and inexcusable, and in the circumstances it falls to the court to decide whether the balance of justice requires the proceedings to be dismissed.

The balance of justice

49. In deciding whether or not the balance of justice is in favour of dismissal or permitting the plaintiffs' action to proceed, 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. [in Primor] should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just." [Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 IR 510, 518.]

50. While all relevant matters must be taken into account, two issues invariably arise: firstly, whether the defendant was prejudiced by the plaintiffs' delay; and secondly, whether there was anything in the defendant's conduct which militated against granting the reliefs sought.

51. The first and second named defendants assert that the issues between the parties which fall to be decided by the court will require both documentary and oral evidence. They say that the evidence of witnesses with knowledge of events leading up to the investment by the plaintiffs in 2008 which has given rise to the plaintiffs' claim is vital to the presentation of the first and second named defendants' defence. They assert that they have been prejudiced by reason of the lapse of time and delay in the manner in which the claim has been prosecuted.

52. The second named defendant asserts that he suffers particular prejudice due to the fact that an allegation of professional negligence is hanging over him for a lengthy period of

time. He relies on the Court of Appeal decision in *Farrell v. Arborlane Limited* [2016] IECA 224, in which the Court of Appeal confirmed that such a scenario can establish prejudice and justify the dismissal of a claim for want of prosecution. *Farrell* was cited with approval by Baker J. in her decision in *O'Leary v. Turner & Ors*. [2018] IEHC 7, in which she stated:

> "…the present proceedings are inter partes professional negligence proceedings of a type that ought, in a general way, be processed with expedition because of the likely reputational damage or other prejudice that may be suffered by a defendant to a stale action…"

53. The first and second named defendants also submit that the prejudice which they say arises in the present case is "significantly amplified" by the fact that the plaintiffs have alleged fraud against them. While the plaintiffs' allegations in this regard appeared to be withdrawn in Mr. Carroll's affidavit, counsel for the plaintiffs clarified during the hearing that the potential claim for fraudulent and/or negligent misrepresentation by the second named defendant remain an issue in the proceedings, and the plaintiffs sought to resist the alternative application by the first and second named defendants to strike out those claims.

54. The plaintiffs reject the notion that there is any prejudice to the first and second named defendants such as would justify the dismissal of the proceedings. Counsel for the plaintiffs submitted that the proceedings were initiated in a timely manner for the reasons set out above, and that there has been no undue delay in prosecuting the action. It was submitted that the first and second named defendants are unable to point to any particular prejudice which will impair their ability to defend the case, such as the unavailability of a witness or relevant documentation.

55. In my view, the first and second named defendants have demonstrated that they are prejudiced in their defence of the matter. Over five years have elapsed since the proceedings commenced, and approximately twelve years since the plaintiffs entered into the investment on the basis of what they allege were advices and representations by the second named defendant. It is clear that oral evidence will be required as to the dealings between the plaintiffs on the one hand, and the second named defendant on the other, as to the parameters of their relationship and the duties and obligations which arose from it. Their "late start" would have created difficulties for the first and second named defendants in this regard. These difficulties have now been compounded by the inordinate and inexcusable delay of the plaintiffs in getting the matter on to trial.

56. I am also persuaded by the submission of the first and second named defendants that they suffer not insignificant prejudice by virtue of allegations of professional negligence and fraud being made against them by the plaintiffs. In such circumstances, I am of the view that the first and second named defendants are all the more entitled to expect expedition from the plaintiffs, given the nature of the allegations.

57. While the absence of a very specific prejudice such as the unavailability of a witness may cause the prejudice suffered by the first and second named defendants to fall within the "moderate" category referred to by Clarke J. (as he then was) in *Stephens v. Paul Flynn Limited,* recent jurisprudence suggests that such prejudice may justify the dismissal of the proceedings. In *Millerick*, Irvine J. suggested that "in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings." O'Flaherty J. in *Primor* suggested that, once it is established that delay has been inordinate and inexcusable, "…the matter of prejudice seems to follow almost inexorably". This statement was quoted with approval by Quirke J. in *O'Connor v. John Player & Sons Limited* [2004] IEHC 99, in which the court concluded that the plaintiffs' claim should be dismissed even though the defendants had not identified any specific prejudice which would be suffered by them as a result of the plaintiffs' delay.

58. In assessing whether or not the first and second named defendants are entitled to have the claims against them dismissed, their own conduct in the proceedings must be examined by the court. In this regard, the plaintiffs refer to what they assert are substantial delays on the part of the first and second named defendants in taking various steps in the proceedings. In particular, the plaintiffs assert that the first and second named defendants delayed for approximately a year in entering their appearance, and filed the appearance on 23rd November, 2016 only as a result of a motion on behalf of the plaintiffs for judgment in default of appearance. The plaintiffs also complain of the delay in procuring a defence from the first and second named defendants. In this regard, a statement of claim was delivered on 18th March, 2016, but the first and second named defendants did not deliver their defence until 10th July, 2017. The plaintiffs assert that the first and second named defendants have contributed substantially to the delays in the proceedings to date.

59. As I have outlined above, the first and second named defendants explain the delay in entering the appearance as arising from a misunderstanding as a result of which they expected the delivery by the plaintiffs of an amended summons, which was in fact intended for the fourth named defendant. The first and second named defendants do not attempt to justify the delay in delivering the defence, other than to assert in written submissions that "…that period was not unduly long when viewed in the context of the progress of the proceedings".

60. Delay on the defendant's part is certainly a factor which must be taken into account in deciding where the balance of justice lies. The weight to be attached to such a factor was examined by the Court of Appeal in *Millerick*. Irvine J. referred to the decision of Fennelly J. in *Anglo Irish Beef Processors Limited* and the distinction drawn in that case between culpable delay on the part of a defendant and mere inaction. Irvine J. refers to the conclusion of Fennelly J. "…that it is the plaintiff who bears the primary responsibility for prosecuting the action expeditiously and that lesser blame should be apportioned to a defendant where they have been guilty of mere inactivity as opposed to actual delay."

61. Having reviewed the authorities, Irvine J. stated as follows:

"36. It is clear from the authorities that the conduct of both parties to proceedings has to be examined in considering an application of this kind. Having said that, the judgment of Fennelly J. in *Anglo Irish Beef Processors Limited* makes clear that it is the conduct of the litigation by the plaintiff, that is the primary focus of attention. A defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant that constitutes acquiescence in the delay, his silence or inactivity is not material. It is obviously not a consideration on the first question as to whether the delay is inordinate and inexcusable. The only way it can arise therefore is in the balance of justice. The question at that point is whether the defendant caused or contributed to the plaintiffs' delay or in some manner gave the plaintiff to understand or lead him to believe that the defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the plaintiff. This understanding of the law is also consistent with the later authorities of the Supreme Court and the High Court.

37. In my view, the Minister in the present case cannot be deemed culpable for mere inactivity. After all, it is the plaintiff who commences legal proceedings and draws the defendant into the legal process. No defendant wants to be embroiled in litigation with all of its potential adverse consequences, be they financial, reputational or otherwise. In many cases the plaintiff has no valid claim and they may be no mark for any award of costs that a defendant may obtain following a successful defence of the proceedings. Often times, a defendant's personal or professional reputation may be badly scarred regardless of having mounted a successful defence to a claim.

38. Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings that might otherwise wither and die advance to trial?

39. For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words a simple failure on the part of a defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would likely give some reassurance to a plaintiff that they intend defending the claim, as

might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."

62. The plaintiffs complain of two delays – the failure to enter an appearance, and the failure to deliver a defence. In relation to the former, the evidence of Mr. Liam Collins, solicitor for the first and second named defendants, is that the plaintiffs' solicitors sent letters dated 11th March, 2016 – shortly before the delivery of the statement of claim on 18th March, 2016 - to the first and second named defendants requesting that they enter an appearance. Shortly after that, the correspondence was passed to Mr. Collins, who carried out the search on the Courts Service website which lead to his misunderstanding that an amended summons remained to be served on his clients. He appears to have realised his error when the plaintiffs served a motion for judgment in default of appearance on his clients, and duly entered the appearance on 23rd November, 2016 in response to the motion. While obviously it would have been preferable if Mr. Collins had raised the issue of the amended summons with the plaintiffs' solicitors when he conducted the search, I do not believe that the delay in entering the appearance was "culpable" in the sense in which that phrase is used in the jurisprudence, nor do I accept that the delay constituted acquiescence on the part of the first and second named defendants to the delays for which the plaintiffs had been responsible up to that point.

63. The second delay in delivering the defence is more problematic from the first and second named defendants' point of view. They do not attempt to excuse the delay, other than to assert that it was "…not unduly long when viewed in the context of the progress of the proceedings." Being a failure to deliver pleadings, in my view this delay falls squarely into the category of "culpable delay". The question to be resolved is the extent to which this failure on the first and second named defendants' part should weigh in assessing the balance of justice against the inordinate and inexcusable delay of the plaintiffs.

64. As Irvine J. suggested in the passage from *Millerick* quoted above, one must analyse the defendant's conduct to see whether the inactivity on their part was "…accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would likely give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay…" [Para. 39].

65. While there was lengthy inactivity on the part of the first and second named defendants between March 2016 and July 2017, there is no evidence or even assertion that this lead the plaintiffs to believe that the first and second named defendants acquiesced in the delay. There was no correspondence or notice for particulars emanating from the first and second named defendants which might have lead the plaintiffs to believe that the first and second named defendants had decided not to press the point in relation to delay, and had thereby acquiesced in it. It certainly took the first and second named defendants much longer than it should have to deliver their defence. It may well be that the sort of considerations outlined at para. 38 of the judgment of Irvine J. in *Millerick* referred to above were contemplated, and that the first and second named defendants considered

that the lack of expedition of the plaintiff's case suggested that the case might not ultimately proceed to trial.

66. While one can speculate as to the first and second named defendant's motives, the fact is that they took no action in the proceedings until compelled to do so by the plaintiffs' motion for judgment returnable on 22nd May, 2017. They then delivered on 10th July, 2017 a full defence setting out their position in detail, and a lengthy notice for particulars. It seems to me that the first and second named defendants at that point accepted that their "heads down" approach had not worked. As we have seen, delivery of the defence and notice for particulars was followed by lengthy delays on the part of the plaintiffs which have lead ultimately to the present application.

67. Far from acquiescing in the plaintiffs' delay, the first and second named defendants submit that, given the delays between July 2017 and January 2019, the wholly inadequate replies to particulars (and in particular the reply to the legitimate queries in relation to the fraudulent misrepresentation claim referred to at para. 18 above) and the initial delay in serving the plenary summons, the balance of justice warrants the dismissal of the plaintiffs' claim. There is no suggestion of acquiescence or culpable delay on the part of the first and second named defendants since delivery of the defence in July 2017. The first and second named defendants are entitled to be concerned at the rate of progress of this litigation, and the manner in which the prejudice, which in my view, they are undoubtedly suffering is being compounded by ongoing delays. In all the circumstances, I do not believe that the delays for which the first and second named defendants are responsible signify acquiescence to the inordinate and inexcusable delay of the plaintiffs, or that they should disentitle the first and second named defendants to the relief they seek.

68. I should say also that, as Irvine J. commented in *Millerick* "…recent decisions of the Superior Courts emphasise the constitutional imperative to bring to an end the all too long standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures." Irvine J. went on to quote with approval the dicta of Hogan J. in Quinn v. Faulkner T/A Faulkner's Garage & Anor. [2011] IEHC 103 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: see, e.g., the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Ltd*. [2010] IEHC 465."

69. In all the circumstances, I am satisfied that the balance of justice lies in favour of acceding to the application of the first and second named defendants to dismiss the plaintiffs' proceedings as against those defendants for delay and want of prosecution.

Conclusion

70. As I am of the view that the delays on the part of the plaintiffs of which the first and second named defendants complain are inordinate and inexcusable, and that the balance of justice favours dismissal of the plaintiffs' claim, I must accede to the application of the first and second named defendants in that regard.

71. Accordingly, it is unnecessary for me to consider the reliefs sought at para. 2 of the notice of motion seeking to strike out certain of the plaintiffs' claims.