THE HIGH COURT

[2021] IEHC 323

[RECORD NO. 2017 3067]

BETWEEN

IRISH WATER

PLAINTIFF

AND

HYPERTRUST LTD., DESMOND REDDY, BRIAN REDDY AND O'ROURKE WELL DRILLING LTD.

DEFENDANTS

JUDGMENT of Ms. Justice Creedon delivered on the 15th day of April 2021;

Background

1. This matter came before this Court by way of Notice of Motion wherein the first named defendant is seeking inter alia the following reliefs: -

   (a) An order pursuant to the inherent jurisdiction of the High Court dismissing the claim of the plaintiff as against the first named defendant on the basis of inordinate and inexcusable delay;

   (b) An order pursuant to O. 122, r. 11 of the Rules of the Superior Courts, dismissing the claim of the plaintiff as against the first named defendant for want of prosecution, there having been no valid proceedings herein for more than two years;

   (c) An order pursuant to O. 27, r. 1 of the Rules of the Superior Courts, dismissing the Claim of the plaintiff as against the first named defendant for want of prosecution by reason of the failure on the part of the plaintiff to deliver a valid Statement of Claim;

   (d) If necessary, an order pursuant to O. 124, r. 1 and/or O. 122, r. 11 of the Rules of the Superior Courts 1986 and/or the inherent jurisdiction of the High Court striking out the Statement of Claim dated the 31st January 2019 by reason of the failure on the part of the plaintiff to serve a notice of intention to proceed.

2. The plaintiff is a semi – state company established under the Water Services Act 2013, having its registered offices at Colvill House, 24-26 Talbot Street, Dublin 1. The plaintiff is responsible for water services within the State including inter alia, the public water mains at Brewery Road Stillorgan Co. Dublin which consists of a 1200 millimetre steel pipeline constructed approximately 7 to 10 metres deep, with sections under private property for which wayleaves were obtained by Dun Laoghaire Rathdown County Council.

3. The first named defendant is a limited liability company having its registered office at Leopardstown Inn, Brewery Road, Stillorgan Co. Dublin and at all material times hereto operated a licenced premises known as "the Leopardstown Inn". The second and third named defendants were at all material times directors of the first named defendant and involved in the management of the Leopardstown Inn. The fourth named defendant is a well drilling contractor having its registered office at Hughes Blake, Clonhaston, Enniscorthy. Co. Wexford.

4. By indenture dated the 7th February, 2000, the second and third named defendants purchased from the first named defendant the plot of ground situated at Brewery Road adjoining the premises known as the Leopardstown Inn. At all material times there was an undeveloped narrow strip of land between Brewery Road and Carysfort Maretimo stream, access to which was from the car park of the Leopardstown Inn. The water mains ran through the aforesaid properties. In or around January or February 2014 the first, second and/or third named defendant entered into an agreement with the fourth named defendant to engage in drilling a borehole(s) on the land owned by the second and third named defendant to source a private water supply for the benefit of the defendants in particular in respect of the operation of the Leopardstown Inn.

5. Pursuant to said agreement, on or about the 10th of February 2014, on the lands of the second and third named defendant acting on the direction and/or instruction of the first, second and/or third named defendant and whilst also exercising its own professional skill and judgment, the fourth named defendant used a specialised drilling rig for the purposes of drilling the said boreholes. Using the said drill rig the fourth named defendant drilled a six – inch borehole to a depth of approximately 9 to 10 metres, when as a result, the drill struck and breached the water mains below, causing water to gush from the pipeline.

6. The background to these proceedings and their procedural history is detailed extensively in the following affidavits: -

   (a) The first affidavit of Mr. Stephen Cooney, director of Hypertrust, sworn on behalf of the first named defendant on 6th May 2020;

   (b) The first affidavit of Mr. Paul Fisher, solicitor in the firm Corrigan and Corrigan, on record for the plaintiff, sworn on the 2nd June 2020;

   (c) The second affidavit of Mr. Stephen Cooney, sworn on behalf of the first named defendant on the 10th September 2020 and;

   (d) The second affidavit of Mr. Paul Fisher, sworn on behalf of the plaintiff on the 22nd September, 2020.

Application of the first named defendant

7. The first named defendant opened its application with a brief outline of the substantive claim. They confirmed that the incident giving rise to these proceedings occurred on the 10th February, 2014 and that on the 22nd October, 2014, examinership proceedings in respect of the first named defendant were commenced in the High Court. On the 10th February, 2015, an order of the High Court was made confirming a scheme of arrangement of the first named defendant in the examinership proceedings. On the 18th May, 2015, the plaintiff initiated proceedings by way of Plenary Summons against the first named defendants arising from the incident (the previous proceedings).

8. The Plenary Summons in the previous proceedings expired without being served on the 18th May, 2016. On the 10th February, 2017, a Notice of Discontinuance was filed in

respect of the previous proceedings. On the 4th April, 2017, the plaintiff initiated the current proceedings by way of Plenary Summons.

9. The first named defendant, then opened the law and in particular the threshold which must be met in order to succeed in an application for dismissal of proceedings on the basis of inordinate and excusable delay in the prosecution of proceedings. The first named defendant opened the case of *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459 in which Hamilton C.J. provided a detailed exposition of the tests to be applied. He stated at p.475-476: -

"(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".

10. The first named defendant also opened a number of recent authorities which it argued have an impact on the *Primor* decision. They opened the case of *Comcast International Holdings Incorporated v. Minister for Public Enterprise* [2012] IESC 50 (Unreported, Supreme Court 17th October 2012), in which Clarke J. (as he then was) considered a number of authorities concerning the obligation of the State to ensure that civil proceedings were determined with reasonable efficiency and having done so he commented at para 3.9 as follows: -

> *"It seems to me that (these factors) do require that the application of that test be approached on a significantly less indulgent basis than heretofore".*

11. They also opened the cases of *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 (Unreported, Court of Appeal, 19th February 2015), *Gorman v. Minister for Justice Equality and Law Reform* [2015] IECA 41(Unreported, Court of Appeal, 3rd March 2015), and *William Connolly & Sons Ltd. v. Torc Grain and Feed Ltd*. [2015] IECA 280 (Unreported, Court of Appeal, 30th November 2015) as authorities for the proposition that pre - commencement delay can be taken into account when assessing the merits of an application to dismiss proceedings on the basis of delay in their prosecution. They also opened the case of *Millerick v. Minister for Finance* [2016] IECA (Unreported, Court of Appeal, 11th July 2016), in which Irvine J. (as she then was) set out in some detail why a defendant should not be penalised for failing to prompt a plaintiff to prosecute his or her claim with greater alacrity.

12. Returning to the test in the *Primor* decision, and in particular the first part of the test, the first named defendant addressed the Court on inordinate and inexcusable delay and in that regard they referred the Court to the High Court decision of T*esco Ireland Ltd. v. McNeill* [2014] IEHC 367, wherein Barrett J. confirmed that "*no universal benchmark exists*" for assessing delay. They further opened the High Court decision of *Corcoran v. McArdle* [2009] IEHC 265, where the failure to progress proceedings for a period of 27 months was regarded as inordinate. Similarly, in the Court of Appeal decision in *Governor and Company of the Bank of Ireland v. Kelly* [2017] IECA 288, delay amounting to a total of two and a half years was assessed by Peart J. in the following manner at para 37: -

> *"The two-and-a-half-year delay to which I have referred is in my view a period of delay that requires explanation and justification under the Primor principles. In other words, it needs to be excusable under the second limb of the test".*

13. They also referred to the more recent High Court decision of *Pugh v. PGM Financial Services Limited* [2020] IEHC 49, wherein a cumulative period of 29 months was considered inordinate and argued that on the facts of this case it could fairly be suggested that cumulative periods of delay exceeding two years in duration would ordinarily be regarded as inordinate.

14. Staying with the test of inordinate and inexcusable delay, the first named defendant made reference to the cases of *Governor and Company of Bank of Ireland v. Kelly* [2017] IECA 288 and to the judgment of Kearns J. in *Stephens v. Paul Flynn Ltd*.[2008] 4 I.R. 31 in which he stated at p.37: -

> *"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"*

15. The first named defendant argued that the plaintiff has failed through the affidavits sworn by its solicitor, to offer any cogent or credible explanation for the overwhelming majority of the time which has elapsed since both the incident and since the previous proceedings issued. They set out periods of time for which they argued no explanation exists and which they said include but are no means limited to the following: -

    (a) The period between the date of the incident being the 10th February 2014 and the commencement of the previous proceedings on the 18th May, 2015, a period of more than fifteen months' duration;

    (b) The period between the commencement of the previous proceedings on the 18th of May, 2015 and the expiry of the Plenary Summons in the previous proceedings on the 18th May, 2016, a period of twelve months' duration;

    (c) The period between the final attempt to serve the second and third named defendants on the 10th July, 2017 and the application for substituted service on the 29th January, 2018, a period of more than six months' duration, and;

    (d) The period between the identification by the solicitors for the first named defendant of the fundamental flaw in the purported delivery of the Statement of Claim on the 11th February 2019, and the valid delivery of the Statement of Claim on the 3rd July, 2020, a period of just under seventeen month's duration.

16. The first named defendant submitted that the delay at issue is manifestly inordinate given that at the time of this hearing, almost exactly six years will have passed since the date of the incident, it will be five and a half years since the previous proceedings were initiated and more than three years since these proceedings were commenced. They state that in spite of these facts, the Statement of Claim was only validly delivered on the 3rd July, 2020, approximately two months after this dismissal application issued.

17. The first named defendant argued that the first proceedings served on the 18th of May, 2015, were not progressed and that when the Notice of Discontinuance was filed on the 10th of February, 2017, the Plenary Summons in the first proceedings had already expired. They argued further that the reason for these proceedings, which are identical, was to avoid an application to the High Court seeking the renewal of the Plenary

Summons and having to explain the elapse of two years since the initiation of the First proceedings.

18. The first defendant argued further that the plaintiff took no further action until it served a Statement of Claim dated the 31st January, 2019, on the 6th of February 2019 without complying with order 122, rule 11 of the SCR as it had failed to file and deliver a Notice of Intention to Proceed and further for the same reason it was not entitled to seek delivery of the first named defendants defence on the 5th March 2020 or threaten a motion in default thereof.

19. The first named defendant argued further that there is no legitimate reason why the proceedings have not been prosecuted as the claim is straightforward and has no hidden complexity and that since the plaintiff is a sophisticated organ of State, it should be well within its capability to progress a claim with the requisite degree of alacrity.

20. The first named defendant reminded the Court that sight should not be lost of the fact that the claim of the plaintiff is one which was addressed previously by the High Court in the context of the examinership in the scheme of arrangement. They argued that it is unsatisfactory that the terms of the scheme of arrangement should not yet have been implemented and they submitted that the very essence of examinership is that the stakeholders involved (the relevant company, its creditors, third party guarantors etc,) should have certainty in relation to their positions from the conclusion of the examinership process.

21. In that regard, they opened the decision in *Re: Tivway Ltd. (In Examination)* [2010] 3 IR 49, and argued that the fact of examinership proceedings and the resulting scheme of arrangement operate to heighten the obligation of the plaintiff to progress these proceedings in an efficient manner.

Balance of Justice

22. The first named defendant then addressed the second limb of the Primor test and examined the issue of the balance of justice. They opened the case of *Rogers v. Michelin Tyre plc*. [2005] IEHC 294, and the judgment of Clarke J. (as he then was) where he stated at p.12:

> *"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".*

23. The first named defendant argued that a court is entitled to strike out proceedings by reason of undue delay, even where no specific prejudice to the defendant has been shown and referred to the authority of *Byrne v. Minister for Defence* [2005] 1 IR 577 and *Donnellan v. Westport Textiles Ltd*. [2011] IEHC 11 as authorities for this proposition. They referred again to the case of *Millerick* and to the judgment of Irvine J. and argued

that where inordinate and inexcusable delay is established, there is no necessity to demonstrate serious unfairness such as an ability to obtain a fair trial. In that regard, Irvine J. stated at para 32 as follows: -

> *"A further point needs to be made concerning the approach of the court to the third leg of the Primor test. It is clear from the relevant authorities that in the presence of an inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. That is not to say however that in the absence of proof of prejudice the proceedings will not be dismissed".*

24. In this regard the first named defendant pointed to the prejudice that it has suffered and continues to suffer by reason of the delay in the prosecution of these proceedings and gave the examples identified in the affidavits of Mr. Cooney to include the following: -

    (a) The change of management of the first named defendant with effect from the 2nd February 2015;

    (b) The deterioration in relations between the first named defendant and the second and third named defendants culminating in the commencement of the Reddy proceedings on the 9th July 2015;

    (c) The destruction of documentation pertaining to the affairs of the first named defendant by the second and third named defendants;

    (d) The decision by the first named defendants' insurers to decline cover for the incident;

    (e) The impaired financial circumstances of the first named defendant, and;

    (f) The general decline in recollections over a period approaching seven years in duration.

25. By contrast, they argued that should these proceedings as against the first named defendant be dismissed, the plaintiff would still be left with an effective remedy for any losses arising from the incident as against the second to fourth named defendants. In addition, they say having regard to the scheme of arrangement whereby the plaintiff will only be in a position to recoup 27% dividend from the first named defendant, the plaintiff will inevitably be required to look to the other defendants for recovery even if it is fully successful. They further argued that given that the first named defendant is a state body, there is no evidence before the High Court to the effect that its inability to succeed as against the First named Defendant would have significant impact on its operations.

Plaintiff Respondent's case

26. The plaintiff accepted the primacy of the principles established in P*rimor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 and referenced the more recent Supreme Court case of *Mangan (APUM) v. Dockeray* [2020] IESC 67 where McKechnie J. giving judgment for the court, restated those principles at paras. 104- 105 and proceeded at paras. 109 and

110 to make a number of further points which the plaintiffs said are of some import in the context of this application, as follows: -

"109. In addition, it is worth repeating a few points which have consistently been made in the case law: -

i) The ultimate outcome of a delay/prejudice issue must invariably depend on the particular circumstances of any given situation: "Every case is different. Factual resemblances are only of limited value".

ii) In cases where the court is essentially concerned with delay post the commencement of proceedings, it will view the obligation of expedition much more strictly where there has been a considerable delay pre-commencement.

iii) Delay and certainly culpable delay on the part of a defendant may constitute countervailing circumstances which militates against a dismissal.

iv) The existence of significant and irremediable prejudice to a defendant would usually feature strongly, for example the unavailability of witnesses, the fallibility of memory recall and the like. The absence of medical records, notes and scans likewise, but where such are available, the converse may apply.

v) This latter point may be of very considerable significance, particularly in medical negligence cases as most treating doctors and certainly all consulted experts, will rely on such information for their evidence. (McBrearty at pg.48)

110. Finally, the following passage in the judgment of Cross J., in Calvart v. Stollznow [1980] 2 N.S.W.L.R. 749, which was approved by Murphy in Hogan v. Jones [1994] 1 I.L.R.M. 512, should be noted:

> *"Considerations of justice transcend all other considerations in these matters. Of course justice is best done if on action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice."*

27. In response to the submission on behalf of the first named defendant that the case of *Comcast International Holdings Ltd. v. Minister for Public Enterprise* [2012] IESC 50 and the obiter comments of Clarke J. (as he then was) suggests that there is now greater rigour being applied to the *Primor* principles, the plaintiff referred the Court to the judgment of McKechnie J. in the same case where he gave extensive treatment to that suggestion and pointed the court to his comments at paras 30-33: -

> *"I therefore see no reason at least at this stage for any formal reassessment of how Primor should be applied. Nor insofar as I am aware has it been suggested that the three limb approach established in such cases should be substantially altered or that in any matter or factor heretofore relevant should be omitted from future consideration. In fact, it should immediately be said that Clarke J. in Rogers*

acknowledged that his suggested shift of emphasis did not envisage any change in the matters to be considered but rather involved an adjustment within the existing practice. Even so, in my view when both inordinate and excusable 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 this 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 an unjust one.

In expressing this opinion 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".

28. In addressing the first named defendant's submission that pre – commencement delay can be taken into account when assessing the merits of an application to dismiss the proceedings on the basis of the delay of their prosecution, the plaintiff pointed the Court to the following: -

    (a) That a significantly different test applies to applications relating to pre – commencement delay namely that the defendant must demonstrate a real or substantial risk to a fair trial;

    (b) That pre – commencement delay is reckonable only for the purposes of determining whether post – commencement delay is inordinate and excusable;

    (c) That cases establishing a particular duty to proceed with due expedition relate to claims which are commenced at or near the end of the statutory limitation period, whereas these proceedings were commenced three years prior to the expiration of the limitation period.

29. Responding further to the submission of the first named defendant that a defendant will not be penalised for failing to prompt a plaintiff for prosecuting his or her claim with greater alacrity, the plaintiff argued that it is clear from the extracted quote from *Millerick v. Minister for Finance* [2016] IECA 206 that conduct in the nature of acquiescence can be validly considered to the detriment of the defendant. The plaintiff pointed to three matters which are relevant in this regard: -

(a) The period between June 2017 (when the first named defendant's solicitor entered an appearance) and November 2017 (when the entry of that appearance was notified to the plaintiff's solicitors) and the unwarranted criticism regarding the issuing of warning letters in the intervening period;

(b) The failure to object to (or even acknowledge) the service of a revised schedule of special damages dated the 13th of February 2019 if it was intended to maintain the technical objection to the service of the Statement of Claim and;

(c) The issuing of this motion on the 11th of May 2020 without warning or confirmation that the technical objection to service of the Statement of Claim was being maintained.

30. In responding to the issue of inordinate delay, the plaintiff argued that the averments and submissions on behalf of the first named defendant treat the effluxion of time as delay *ipso facto* without actually referring to any period of inactivity on the part of the plaintiff. They said that generally, the complaint instead appeared to be that the index incident occurred in 2014.

31. They pointed out to the Court that it was important to restate that this application is concerned with post - commencement delay and that the proceedings were commenced by Plenary Summons dated the 4th April, 2017, and the progression of matters thereafter is fully and comprehensively accounted for in the first replying affidavit of Mr. Fisher. To the extent that pre – commencement delay is relevant (or even present), they said that the authorities make it clear that it is only of relevance in determination of whether any period of delay is inordinate.

32. In addressing excusability, the plaintiff argued that on any reading of the first replying affidavit the proceedings were being actively progressed throughout the entire period. They stated that it is accepted that the plaintiff did not progress the proceedings against each defendant concurrently and that, for example, the issue of O'Rourke's appearance was dealt with before an application for substituted service was made in respect of the Reddys.

33. They further argued that this application is concerned with culpable delay which must often deal with long periods of inactivity, disinterest, and inadvertence. They argued further that the prosecution of proceedings against a single defendant, or, singly represented defendants is qualitatively different from the prosecution of proceedings against multiple defendants. They pointed out that these proceedings entail four defendants with three sets of representation, each of whom are sued in different interrelated capacities.

34. Responding to the argument that some additional duty or special considerations should arise because of the particular status of Irish Water, they argued that a similar argument was advanced in the context of discovery applications in *Tobin v. Minister for Defence* [2019] IESC 57 and that in that regard, Clarke C.J. held at para. 9.8: -

"While it is not necessary, therefore, to deal with the argument which centres on the position of the State as requested party, I should say that I do not consider that the State is, in proceedings such as this, in a different position to any other requested party. It has sometimes been suggested that, in public law proceedings, there is an obligation on the State or its agencies to place before the Court full information on decisions or measures which are challenged. But this is an ordinary civil action brought by an employee against his employer where the employer just happens to be the State. The taxpayer, who must fund any discovery obligations placed upon the State, is just as entitled to be protected against a disproportionate burden as any other party".

35. Addressing the first named defendant's suggestion that the plaintiff is under some special obligation regarding the prosecution of these proceedings arising from its status as a contingent creditor, they say that this proposition is not supported by any authority and the proposition that an obligation on a plaintiff to prosecute diligently is variable by reference to the financial circumstances of a defendant would have a far – reaching and unworkable effect on the conduct of civil litigation.

36. In addressing the balance of justice, the plaintiff said that if the Court is required to assess the balance of justice, it would involve the extinguishing of a claim against a solvent defendant in respect of whom there is a stateable case and cogent evidence regarding liability. In addressing any possible prejudice the plaintiff said that the consideration of prejudice is not only material, but often determinative, in such an exercise. The plaintiff again referred to the Supreme Court case of Mangan *(APUM) v. Dockery* and the judgment of McKechnie J. at para. 109 referred to above, where it was said: -

" . . . . significant and irremediable prejudice to a defendant would usually feature strongly, for example the unavailability of witnesses, the fallibility of memory recall and the like".

37. The plaintiff argued that the first named defendant has not identified any witnesses whose recollections are adversely affected. Additionally, they also stated that none of the essential facts grounding the plaintiff's claim appear to be in dispute as the first named defendant has never indicated there is any dispute of fact and that the main point of dispute concerning the first named defendant's liability is its claim that the land on which the drilling occurred was not owned by it.

38. The plaintiff argued that it should go without saying that any prejudice must be casually related to the delay in question and that a plaintiff could hardly be held responsible for any impairment to a defendant that arises for other reasons. Through this lens, the plaintiff said that the delay asserted by the first named defendants in their outline submissions is revealed to be illusionary and that the majority of the asserted prejudice clearly pre-dates any period of delay that could be relied upon, namely:

(a) The change in management of Hyper Trust on 17th of February 2015;

(b) the deterioration of relations between Hyper Trust and the Reddys;

(c) the alleged destruction of documents by the Reddys;

(d) the declinature of insurance cover.

39. The plaintiff further distinguished the reason given by the insurer for declining cover being that the drilling fell outside the business description and activities (which the plaintiff says would always have been relied upon) from a case where cover is declined because of belated notification and referred to *Mangan (APUM) v Dockeray* [2020] IESC 67 and judgment of McKechnie J.

40. In their submissions, the plaintiff further asserted that the contention that Irish Water must demonstrate a significant impact on its operations by virtue of the potential extinguishing of recourse for several thousand euros' damage is wholly misconceived.

41. They said that all that remains is the first named defendant's assertion that the relative consequences for each party favour the dismissal of the proceedings. As regards the plaintiff, it was said that there would be three defendants remaining, who, by virtue of the scheme of arrangement, would need to be pursued for recovery in any event. The plaintiff said that this contention ignores several key factors:

(a) There is no guarantee that those defendants would be held liable for the damage caused;

(b) There is no guarantee that those defendants would be in a position to meet an award of damages (or part thereof);

(c) The first named defendant is a solvent corporate entity that has by virtue of the inclusion of the plaintiff as a contingent creditor in the examinership had ample time to make provision for at least the relevant proportion of value of the claim.

42. In response to the first named defendant's argument regarding "impaired financial circumstances" the plaintiff asserted in its legal submissions that it was difficult to see how this amounted to anything more than an *ad misericordiam* plea, which has no role in the determination of these proceedings as no substance was given to this allegation other than a contention on affidavit of projected trading losses in 2020.

43. In their written submissions, the plaintiff also stated that it was clear that from the first named defendant's perspective, the granting of this application would be of no material advantage. They stated that in *Mangan (APUM) v Dockeray* [2020] IESC 67 a key factor considered by McKechnie J. related to the intra – defendant issues at para 146:-

> *Further, it should be noted that, even if these applications were successful, both the Second and Third named Defendants would remain in the action pursuant to the notice of contribution and indemnity issued on behalf of Dr. Dockeray. In these*

circumstances. I do not feel it is justified to terminate these proceedings without hearing on the merits at this point in time."

44. The plaintiff further stated that while they are not aware of the intra-defendant claims it is noted that Mr Cooney, at para. 21 of his first affidavit, referred to such a claim by the Reddys being anticipated. Therefore, the plaintiff asserted that the granting of this motion is extremely unlikely to bring an end to the first named defendant's continued involvement.

Concluding Argument

45. A discrete legal issue arose at the conclusion of the oral arguments in respect of the test prescribed by *Primor V Stokes Kennedy Crowley* [1996] 2 I.R. 459 and in particular the second limb of the test, which is even in circumstances where the delay has been both inordinate and inexcusable, the Court must exercise a judgement on whether, on the facts the balance of justice is in favour of or against the proceeding of the case;

46. Supplemental written submissions were made to the Court by both sides after the conclusion of the hearing. The Court does not intend to traverse those submissions in their entirety in this judgment. In their supplemental submissions the first named defendant argued that it is well established that, in assessing whether the balance of justice favours the dismissal of proceedings, the High Court can have regard to prejudice arising prior to the commencement of the relevant proceedings and in that regard opened the High Court case of *Stephens v. Paul Flynn Limited* [2005]IEHC 148 [Unreported High Court, 28 April 2005] and the dictum of Clarke J. (as he then was) where he said:

> *"Finally, in that regard I have considered the prejudice on the basis of the delay from the time of the incidents giving rise to the proceedings rather than solely in respect of the period from the commencement of the proceedings to date. While I agree that the court is confined, in determining whether a delay has been inordinate, to the period subsequent to the commencement of proceedings I am of the view that in assessing the balance of justice the court has a wider discretion and can take into account prejudice which may be cumulatively attributable to a delay both prior to and subsequent to the commencement of proceedings."*

47. In their supplemental submissions the plaintiff argued that the first named defendant cannot rely upon pre-commencement prejudice that is not attributable to, or caused by, any alleged delay. The plaintiff opened the case of *Mangan (APUM) v. Dockeray* [2020] IESC 67, and said that McKechnie J. adopted the correct approach to an assertion of pre-commencement prejudice (in that case, lack of insurance cover) at para 142:

> *"At its highest, it is suggested that since 2006, it has no indemnity for one off cases. However apart from that being utterly surprising, if Mount Carmel wishes to maintain its stated position relative to any aspect of this action, the same should be affirmatively sworn to and supported by appropriate documentation; in the absence of both it is difficult to see how such could be accepted. Even however, if one proceeds on that basis, it would mean that the hospital is in no worse a situation*

today than it was at that time. No application to dismiss on the grounds of delay or prejudice could conceivably have succeeded in or about 2006. Accordingly, I do not accept this as a point sufficient to merit a dismissal of the action."

48. The plaintiff argued that the first named defendant sought to rely upon prejudice arising from its change in ownership and destruction of documents in January/February 2015, approximately 12 months after the events giving rise to these proceedings; a period that could never be reasonably considered to constitute delay. The plaintiff argued that applying the approach in *Mangan*, the submission effectively claims that, an application to dismiss these proceedings could conceivably have succeeded in 2015.

Discussion and Decision

49. As set out in paragraph 6 supra the background to the proceedings and the procedural history is set out in detail in the affidavits of the first named defendant and plaintiff and are not in dispute between the parties save for the difference in import and consequence attributed by the opposing parties to the facts. The Court does not intend to traverse all of the facts as set out in the various affidavits in this judgment.

50. Nine days after the incident, on the 19th of February 2014, the property claims adjusters appointed by the plaintiff wrote to the second and third named defendants formally notifying them of the plaintiff's intention to recover its losses arising from the incident and on the same date the plaintiff wrote to the first named defendant in relation to the intended repair works.

51. There was further correspondence between the parties over the course of 2014 in respect *inter alia* of repair works and access pertaining thereto and ultimately an Examiner was appointed to first named defendant by the High Court on the 19th of November, 2014. By letter dated the 15th of January, 2015, solicitors for the plaintiff confirmed to the accountants representing the first named defendant the estimated losses arising from the incident and requesting formal notice of all matters arising in the examinership of first named defendant. By order dated the 10th of February 2015 the High Court approved a scheme of arrangement.

52. On the 30th of April 2015 the plaintiff's solicitors sent O'Byrne letters to all of the defendants and by letter dated the 6th of May, 2015, the first named defendant denied liability and confirmed the inclusion of the plaintiff as a contingent creditor and in the event of liability attaching to the first named defendant that the plaintiff would be entitled only to a dividend payment of 12% together with a further 27% of the proceeds of sale of first named defendant's shares in a named company.

53. The Plenary Summons in respect of the previous proceedings issued on the 18th of May 2015. In his affidavit of the 2nd of June 2020 Mr Paul Fisher averred on behalf of the plaintiff that the recoverable loss to Irish Water did not crystallise until the conclusion of the works, the accounting process and the final report of the appointed property claims consultant was received on the 11th of July 2016. At that point the first Plenary Summons

had expired and to avoid incurring further cost a decision was taken to discontinue and reissue the proceedings as the statutory time limit was six years.

54. The current proceedings were commenced by Plenary Summons dated the 4th of April 2017 and by registered letters dated the 1st of June 2017 Solicitors for the plaintiff wrote to all the defendants serving the Plenary Summons.

55. It seems that the first named defendants entered an appearance on the 6th of June 2017 but solicitors for the plaintiffs were not notified and did not receive a copy and accordingly sent warning letters to Hyper Trust calling on them to enter an appearance and warning of a motion for judgment in default of appearance on the 27th of July 2017 and 26th of October 2017.

56. In the meantime, by letters dated the 27th of July 2017, 25th September 2017 and 27th of October 2017 solicitors for the plaintiff warned the fourth named defendant; O Rourke Well Drilling Ltd. for an Appearance and ultimately by letter dated the 18th of December 2017 O' Rourke's confirmed entry of Appearance and provided a copy.

57. Difficulties had also arisen in effecting service on the second and third named defendants with five unsuccessful attempts between the 6th of June, 2017, and the 10th of July, 2017, and ultimately an order for substituted service was granted by the High Court on the 29th of January, 2018. The second and third named defendants (the Reddys) entered an Appearance on the 2 May 2018 and confirmed the position by letter dated the 18th of May 2018.

58. At that stage the Statement of Claim was ready to be settled but further advises were received in May, 2018, that expert engineering evidence should be obtained in relation to the liability of O' Rourke's in light of Order 20 Rule 12 RSC. This was sought and obtained in September 2018. All defendants were advised that the Statement of Claim was with senior counsel for settling by letters dated 7th of November 2018 and no response was received form any of the defendants and no complaint made by the first named defendant regarding Notice of Intention to Proceed.

59. The Statement of Claim was served on all the defendants by letters dated the 31st of January 2019 and a reply was received from the first named defendant dated the 11th of February 2019 saying that delivery of the Statement of Claim was premature on the basis of non-compliance with Order 122 rule 11 RSC. The plaintiff acknowledged that this letter was not averted to by them and a revised schedule of special damages to correct an omission in the Statement Of Claim was served on solicitors for all defendants by letters dated the 13th February 2019. No response to this correspondence was received from any of the defendants to include the first named defendant who did not restate the technical objection.

60. Following this the Reddys served a Notice of Motion on the 29 April 2019 seeking leave to issue and serve third party proceedings on two named parties who they said had been engaged as water diviners prior to the incident and an order of the High Court was made

on the 24th June, 2019, granting leave. Solicitors for the plaintiff said they were unaware if the other defendants were made aware of this motion. On the 15th August, 2019, the Reddys issued a further motion seeking to enlarge the time to serve the Third Party Notice which was notified to Irish Water on the 21st August, 2019, and they indicated no objection by letter dated the 2nd September, 2019.

61. The plaintiff sought an update from the Reddys on the 11th November, 2019, and the Reddys confirmed by letter dated the 18th of November, 2019 that the Master of the High Court had made an order granting a 12-week extension in respect of service of the Third Party Notice on the 7th of November, 2019.

62. The plaintiff sought a further update from the Reddys on the 5th March, 2020, and on the same date sent letters to all defendants warning them in respect of defences. On the 9th March, 2020, the Reddys confirmed that they had made an *ex parte* application seeking substituted service and a further extension of time which had been granted by Order of the High Court on the 24th February, 2020, and service had been effected on the 6th March, 2020.

63. The last correspondence sent by the Plaintiff to the first named defendant was on the 13th February, 2019, enclosing the Statement of Claim to which no response was received from the first named defendant. This Notice of Motion was issued by the first named defendant on the 7th May, 2020, and served by way of email on the 11th May, 2020. Irish Water averred that it was then considered out of an abundance of caution, appropriate to serve a Notice of Intention to Proceed on all parties which was done on the 29th May, 2020.

Inordinate and inexcusable delay

64. As set out at para. 9 supra, the threshold which must be met in order to succeed in an application for dismissal of proceedings on the basis of inordinate and inexcusable delay is set out in the case of *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459 in which Hamilton C. J. provided a detailed exposition of the test to be applied. He stated at p. 475 – 476: -

> *"(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".*

65. As was stated in the opened case of *Tesco Ireland Ltd. v. McNeill* [2014] IEHC 367, Barrett J. confirmed that there is "no universal benchmark" for assessing the delay in terms of time which was further confirmed by McKechnie J. in the case of *Mangan (APUM) v. Dockery* [2020] IESC 67: -

> *"The ultimate outcome of a delay/prejudice issue must invariably depend on the particular circumstances of any given situation, every case is different, factual resemblances are only of limited value".*

In the same judgment McKechnie J. went on to say: -

> *"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 influential would set it".*

66. The Court does not intend to traverse all the case law which has been set out in some detail earlier in this judgment. It is clear from the case law opened to the Court that there is no set period that is accepted as constituting inordinate and inexcusable delay and that each case depends on its own facts and circumstances which fall to be considered by the court under the test set out in "*Primor*".

67. The first named defendant in making its application under the first limb of the test pointed to four specific periods of delay set out at paragraph 15 *supra*. Before considering those periods specifically the Court will first look at the period between when the current proceedings were instituted by way of plenary summonses dated the 4th April, 2017, and the issuing of this motion on the 7th May, 2020, seeking to dismiss the proceedings on grounds of delay.

68. The Court must decide in the first instance whether the period between when the current proceedings were instituted by way of Plenary Summonses dated the 4th April, 2017, and the issuing of this motion on the 7th May, 2020, seeking to dismiss the proceedings on grounds of delay, being a period of just over three years is inordinate and inexcusable in the circumstances of this case.

69. Current proceedings were commenced by way of Plenary Summons dated the 4th of April 2017 which was served on each of the defendants by registered letters dated the 1st June 2017. The latter half of 2017 into early 2018 has been accounted for by the plaintiff by outlining its efforts to procure appearances from all defendants as set out above. While the attempt to serve the Reddys occurred between June and July of 2017 and the order for substituted service was not obtained from the High Court until the 29th of January 2018, the intervening period was not a period of inactivity and has been accounted for in its affidavits as a period when it was engaging with the other defendants and simultaneously carrying out further instructions and investigations in relation to the ownership of the lands and other matters relevant to the statement of claim. While an entry of appearance was in fact received from the first named defendant on the 6th June 2017, an appearance was not received from the fourth named defendant until the 18th of December 2017 and from the second and third named defendant until the 2nd of May, 2018.

70. The further period between April 2018 and February 2019 in respect of the finalisation and the service of the Statement of Claim has been further accounted for as set out

above by the plaintiff. The plaintiff stated that expert engineering opinion was advised and sought in April, 2018, was not received until September, 2018, at which point the defendants were informed that service of the Statement of Claim should be expected shortly, to which no response was received. When the Statement of Claim was ultimately served on the 31st of January 2019, solicitors for the first named defendant indicated that it was premature and raised the issue of O. 122, r. 11 RSC as outlined above. The subsequent period between the service of the Statement of Claim and the issuing of the within motion was concerned with the service of third party proceedings by the second and third defendant which were not ultimately affected until the 6th of March 2020, at which point the second and third named defendant sought time for the delivery of a defence. A further 21 days was agreed from the 11th of March, 2020. On the 7th of May, 2020, this motion issued.

71. In assessing the time between the issuing of these proceedings on the 4th of April 2017 and the issuing of the within motion on the 7th May 2020 no long periods of inaction, disinterest or delay have been identified. In identifying specific periods of delay the first named defendant pointed to the period between the final attempt to serve the second and third named defendants on the 10th of July 2017 and the application for substituted service on the 29th of January 2018, a period of more than six months' duration. The affidavit of Mr. Fisher accounts for this period as a time when there was ongoing engagement with the first and fourth named defendants, resulting in the fourth named defendants finally entering an appearance on the 18th December 2017. It was also a period when further instructions and investigations were required in relation to the ownership of lands, the original installation of the water mains, the parties to be sued and quantification of recoverable losses to assist in the finalisation of the statement of claim. The 29th January, 2018, is the date on which the High Court made its order for substituted service, not the date the application was made. In all of the circumstances, this time is not unreasonable

72. The first named defendant also specifically identified the period between the identification by the solicitor for the first named defendant of the fundamental flaw in the purported delivery of the Statement of Claim on the 11th of February 2019, and the valid delivery of the Statement of Claim on the 3rd of July 2020, a period of just under 17 months' duration. As set out earlier, the first named defendant having received the Statement of Claim by letter dated the 11th of February 2019 replied asserting that the delivery was premature on the basis of noncompliance with O. 122, r. 11 of the RSC. The plaintiff conceded that it did not advert to this objection and that by three letters dated the 13th of February 2019 each of the solicitors for the defendants were served with a revised schedule of special damages to correct an omission from the special damages claimed in the Statement of Claim and that no response was received to this correspondence and that in particular, the solicitors for the first named defendant did not restate its technical objection. It was only after this objection was restated in this Notice of Motion that the plaintiff, in an abundance of caution, served a Notice of Intention to Proceed and a Statement of Claim. In all of the circumstances the Court does not find this period of time to be a period for which there is no explanation or justification.

73. Third Party proceedings were commenced by the second and third named Defendants (Reddy's) on 29th April, 2019. Irish Water did not oppose these proceedings, but difficulties were encountered by the second and third named defendants in progressing these proceedings. The plaintiff did seek updates but ultimately service of these Third-Party proceedings were not effected until the 6th March, 2020. The within motion issued on the 7th May, 2020.

74. The first named defendants argued that this case is straight forward and has no hidden complexities. While the legal issues relevant to the main action have not been opened fully to the Court, the multiplicity of defendants and the approach taken by them has certainly impacted the progress of the proceedings.

75. The plaintiffs have dealt with the defendants separately and whilst they did flag the expected delay in serving the Statement of Claim with all defendants, it does not seem that there was any contact between the plaintiff and the first named defendant during the period which the second and third named defendants were progressing their third party proceedings. The plaintiffs (Irish Water) did however seek updates from the second and third named defendants during that period.

76. The Court does not consider that in the period between the issuing of the current Plenary Summons and the issuing of the within motion there is any identifiable period of inactivity, disinterest or inadvertence which requires explanation or justification under the *Primor* principles. In reaching that conclusion the Court has considered the applicants argument that the examinership or its status as a semi state company places a heightened obligation on the plaintiff above that which is required of it under the *Primor* principles and disagrees with both propositions. The Court agrees with the plaintiff that the obligation on the plaintiff to proceed diligently is not variable by reference to the financial circumstances of the defendant and with regard to its status as a semi state company notes the comments of Clarke C.J. in *Tobin* at para 9.8 set out at para 34 above that in proceedings such as this the state are not in a different position to any other requested party.

77. The period highlighted by the first defendant between the date of the incident being the 10th of February 2014 and the commencement of the previous proceedings on the 18th of May 2015 is reasonable and even when looked at in the overall context of the progression of these proceedings does not advance the first named defendants argument of inordinate and inexcusable delay.

Balance of Justice

78. In those circumstances the Court does not need to address the second limb of the *Primor* Test being the balance of justice and which is set out in full at paragraph 9 above. However, for completeness it will address the arguments raised. In arguing prejudice the Applicant identified six examples set out at paragraph 24 above.

79. In addressing the Court on pre -commencement delay the plaintiff argued that the Court can have regard to prejudice arising prior to the commencement of the proceedings. The

Court does not consider that any of the matters raised amount to prejudice as contemplated by the *Primor* principles or raise any risk of an unfair trial.

80. As has been set out above, the first named defendant became the subject of an examinership by virtue of a High Court order dated the 22nd of October 2014. And while subsequent to this there has been a change in management and a deterioration of relations between the first named defendant and the second and third named defendants and an alleged destruction of documents by the second and third named defendants, nothing identified by the first named defendant points to prejudice which would warrant a dismissal.

81. With regard to the declinature of insurance cover, this arises on the basis of the original incident falling outside the business description and activities of the company rather than for any issues of late notification and accordingly the Court is satisfied it does not fall to be considered under the issue of delay and prejudice.

82. The Court is further satisfied there is no authority for the suggestion that the plaintiff is under some special obligation regarding the prosecution of these proceedings arising from its status as a contingent creditor and further that in general terms the plaintiff is entitled to pursue its claim and is under no obligation to demonstrate a significant impact on its operations in order to do so.

83. The Court is satisfied that the first named defendant has not identified any issues which would adversely affect its entitlement to a fair trial. This is particularly so in the light of the fact that the first named defendants have never indicated that there is any dispute of fact and that the main point of dispute concerning the first named defendant's liability is its claim that the land on which the drilling occurred was not owned by it. No specific issues have been identified to support the first named defendants contention that it is prejudiced by a general decline in recollections.

84. The statement of Cross J. in *Clavert v. Stollznow* [1980] 2 N.S.W.L.R.749 was approved by Mc Kechnie J in *Mangan (APUM) v. Dockery* [2020] IESC 67 at para 110: -

> *"Considerations of justice transcend all other considerations in these matters. Of course justice is best done if an action is brought on whilst the memory of the witnesses is fresh but surely imperfect justice is better than no justice".*

85. In circumstances where the Court can identify no prejudice under the second limb of the test , it would seem justice is best done by the action proceeding.

86. Accordingly, the court is satisfied that there has been no inordinate and inexcusable delay under the first limb of *Primor* such as would warrant a dismissal of the proceedings and secondly although in those circumstances it is not required to consider the balance of justice under the second limb of the test, is satisfied on the facts as outlined there is no prejudice such that would warrant a dismissal, and in all of the circumstances refuses all of the reliefs sought.

87. The Court reserves the issue of costs to the hearing of the action.