

**THE HIGH COURT**

[2022] IEHC 151

**[RECORD NO. 2014 2666 P]**

**IN THE MATTER OF THE ESTATE OF FRANK HAUGHEY, LATE OF CLERMONT PARK,  
BLACKROCK, DUNDALK, CO. LOUTH AND MONASCREEBE, FAUGHART, DUNDALK, CO.  
LOUTH (FORMERLY OF 11 CAREWAMEAN ROAD, DROMINTEE, NEWRY, CO. DOWN)  
WIDOWER, DECEASED**

**BETWEEN**

**PATRICK BERGIN**

**PLAINTIFF**

**AND**

**SHANE MCGUINNESS**

**DEFENDANTS**

**Judgment of Mr. Justice Dignam delivered on the 15th day of March, 2022.**

**Introduction**

1. This is the Defendant's application to dismiss the Plaintiff's claim for want of prosecution pursuant to:
  - (a) Order 122 rule 11 of the Rules of the Superior Courts, there having been no proceedings for over seven years from the last proceeding;
  - (b) Order 27 rule 1 of the Rules of the Superior Courts, the plaintiff having failed to deliver his statement of claim within the time allowed for same
  - (c) the inherent jurisdiction of the Court on the grounds of inordinate and inexcusable delay.
2. The Defendant also seeks consequential relief to vacate a lis pendens that was registered by the Plaintiff.
3. I propose to address the application brought pursuant to the inherent jurisdiction of the court on the grounds of inordinate and inexcusable delay first and then to consider the relief sought at paragraphs (a) and (b). It seems to me that if I hold in favour of the application on any of the grounds (a) – (c) then the relief at (d), i.e. vacating the lis pendens, must follow.

**Legal Principles – Dismissal for Inordinate and Inexcusable Delay Under the Inherent Jurisdiction**

4. I was referred to a number of cases and texts during the course of submissions: *Diamrem Limited v Clare County Council* [2021] IEHC 408, *Comcast International Holdings Inc & Ors v Minister for Public Enterprise and Others* [2012] IESC 50, *McNamee v Boyce* [2017] IESC 24, *O' Riordan v Maher and Others* [2012] IEHC 274 and Section A and D of Chapter 15 of Delaney and McGrath 4th Edition, 2018.
5. The law in this area is well settled. The classic statements of the approach to be taken are still to be found in the cases of *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 and *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459. In *Primor* Hamilton CJ stated:

- "(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."*

6. That *Primor* remains the test was confirmed by the Supreme Court in *Comcast*. However, Clarke J also made clear that there should be a 'recalibration' or 'tightening up' in the application of that test.

7. Clarke J said:

"3.1 *In one sense it can be said that the overall approach is well settled. In Desmond v MGN Ltd [2009] 1 IR 737, at p.749, Macken J (who was part of the majority of this court in that case) adopted the tests which I had mentioned in Stephens v Flynn Limited[2005] IEHC 148 being:-*

- '1. ascertain whether the delay in question is inordinate and inexcusable; and*
- 2. if it is so established the court must decide where the balance of justice lies.'*

3.2 *In formulating the test in that way I had followed a long line of authority stretching back to the decisions of this Court in Rainsford v Limerick Corporation[1995] 2 ILRM 561 and Primor plc v Stokes Kennedy Crowley [1996] 2 IR 459. I did not understand Counsel on either side of these appeals to suggest that those tests were not the applicable tests. In addition I do not understand any of the recent jurisprudence in this area to question that those tests represent the appropriate questions to be considered by the court.*

...

3.3 *However, it does have to be accepted that there has been what might, at a minimum, be considered to have been a difference of emphasis apparent from certain recent judgments in both this court and in the High Court, as to the manner in which those tests should be applied and in particular whether there was to be, as I put it in Stephens v Flynn Limited, a recalibration or as others have described it, a tightening up, in the application of those tests.*

3.4 *That recent jurisprudence goes back to the judgment of Hardiman J in this court in Gilroy v Flynn [2005] 1 ILRM 290. That judgment suggested that the courts had become ever more conscious of the unfairness of, and increased possibility of injustice which attached to, allowing an action which depends on witness testimony to proceed a considerable time after the cause of action had accrued. The judgment also noted the decisions of the European Court of Human Rights ("the ECtHR"), in cases such as McMullen v Ireland (Application no. 42297/98, 29th July, 2004) [2004] ECHR 42297/98, and the obligation, independent of the actions of the parties, on the courts to ensure that civil litigation is determined within a reasonable time. Hardiman J also noted then recent changes in the Rules of the Superior courts which appear to place a greater obligation on the courts not to excuse, save in special circumstances, repeated procedural failures on the part of litigants.*

3.5 *Relying on those matters I expressed the view in Stephens v Flynn, in a passage immediately after that setting out the tests approved of by Macken J in Desmond, that:-*

*"[I]t seems to me that for the reasons set out by the Supreme Court in Gilroy the calibration of the weight to be attached to various factors in the assessment of the*

*balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly reassessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligations of expedition and against requiring the same level of prejudice as heretofore."*

3.6 *That reasoning was upheld by this court in an appeal in Stephens v Paul Flynn Limited [2008] 4 IR 31....*

...

3.8 *...I suggested an overall approach in Rodenhuis and Verloop B.V. v HDS Energy Ltd [2011] 1 IR 611 at pp.616-617, in these terms:-*

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

*As I pointed out it is correct to say that there is no jurisprudence of the [ECTHR] dealing with the circumstances in which proceedings must be dismissed for delay however, it does seem to me that if the court in a common law jurisdiction, and in the absence of case management for any particular category of case, to use the words of Hardiman J, "endlessly indulge" delay then that fact is only likely to increase delay and increase failure to comply with Ireland's Convention obligations. It seems to me that that analysis justifies the view that I expressed in [Stephens] (and which was approved of by the division of the Supreme Court which heard the appeal in that case) which was to the effect that there needed to be a tightening up or recalibration of the application of the long established principles in the delay jurisprudence, without altering the tests to be applied.*

*For those reasons it seems to me that the tightening up to which I referred in Stephens is an appropriate course of action for the courts to adopt. It does not seem to me that there is any clear authoritative view from the Supreme Court*

*which bind me to take a different view. I therefore propose to apply the test which I identified in [Stephens] and which is approved by Macken J, speaking for the majority in [Desmond], but with the tightening up to which I referred in the very next paragraph of my judgment in [Stephens]'*

3.9 *I see no reason to depart from the views which I expressed in Roddenhuis. The overall test remains the same. That has been the consistent position adopted in all the cases. However, it seems to me that the factors first identified by Hardiman J in Gilroy do require that the application of that test be approached on a significantly less indulgent basis than heretofore."*

8. Thus, the test to be applied is well-settled as that set down in *Rainsford* and *Primor* (quoted above) but with the application of that test to be approached on a significantly less indulgent basis – in terms of whether a delay was inordinate, whether it was excusable and where the balance of justice lies - than had previously been the case.
9. The Defendant in this case referred me to Twomey J's judgment in *Diamrem* but it seems to me that this judgment is an example of the application of the approach in *Comcast* and does not alter the approach set down in the authorities. Indeed Twomey J stated at paragraph 38 that the applicable law is well settled and is as stated in *Primor*. He went on to say in paragraph 51 that the court was "*conscious of its obligation to have regard to judgments of the Supreme Court and in particular to take on board the exhortation by that Court in Comcast for judges to 'tighten up' on non-compliance with time limits in litigation*" and "[T]he court is obliged by dicta such as this from the Supreme Court to ensure that laws do not fall into disrepute by "indulging" litigants in their claims that delay is not inordinate just because there may have been indulgences in the past of such delays, where by everyday norms or indeed by any standard, the delay would be regarded as inordinate."
10. There is a tendency when dealing with applications to dismiss for want of prosecution for the parties to point to previous cases where a court has decided that a particular period did or did not amount to an inordinate and inexcusable delay and was or was not saved by the balance of justice in the hope of persuading the court that the delay in the particular case should be treated the same. While such cases can on occasion provide useful comparison and perhaps guidance, each case is different and must be considered on its own facts.

### **Facts**

11. Turning then to the facts of this case in light of those principles.

### **Delay**

12. The substantive proceedings involve a challenge to a will of a Mr. Frank Haughey who died on the 13th May 2013. The will under challenge was executed on the 16th January 2012 and it is alleged that the deceased did not have testamentary capacity and was acting under duress or undue influence of the Defendant at the time he made that will. The Defendant is the executor and a beneficiary under the will. The Plaintiff is the executor and a beneficiary under an earlier will dated the 29th April 2004.

13. Mr. Haughey died on the 13th May 2013 and the Defendant extracted the grant of probate on the 4th December 2013. The chronology thereafter was as follows:
- (i) the Plaintiff issued a Plenary Summons, filed an affidavit of verification and swore an affidavit of scripts on the 21st February 2014;
  - (ii) the Plaintiff filed an affidavit of verification on the 21st February 2014;
  - (iii) the Plaintiff swore an affidavit of scripts on the 21st February 2014;
  - (iv) an appearance was entered on behalf of the Defendant by McDonough Breen, Solicitors, on the 26th February 2014;
  - (v) the Defendant swore an affidavit of scripts on the 5th March 2014;
  - (vi) the Plaintiff caused a lis pendens to be registered against the deceased's lands on the 4th April 2014;
  - (vii) the principal in the Defendant's solicitor's firm, McDonough & Breen, passed away in February 2017;
  - (viii) McDonough & Breen ceased practice in November 2018;
  - (ix) Catherine Allison & Company Solicitors were appointed by the Law Society to take over the McDonough & Breen practice;
  - (x) There was a delay with the file transfer following closure of the firm as the Defendant's costs due to McDonough & Breen had to be dealt with;
  - (xi) Catherine Allison & Company filed a Notice of Change of Solicitor on behalf of the Defendant on the 14th June 2021 and on the same date served a Notice of Intention to Proceed and wrote to the Plaintiff's solicitor calling for delivery of a Statement of Claim within 21 days;
  - (xii) The Plaintiff's solicitor, Moran & Ryan, replied by letter of the 8th July 2021 advising that they had not heard from their client since 2017 and had closed their file and were no longer acting in the matter. Moran & Ryan were still formally on record;
  - (xiii) This motion was served on Moran & Ryan on the 20th September 2021 returnable to the 15th November 2021;
  - (xiv) In light of the fact that Moran & Ryan had previously advised that they were no longer acting for the Plaintiff, the Defendant's solicitor also served the motion papers on the Defendant; first by registered post and, when that was returned as uncalled for, by way of summons server who deposited the motion and affidavit in the post box at the front of the Plaintiff's property as the property had signs that guard dogs were loose on the premises. I do not have to consider whether this service was good in circumstances where the Plaintiff appeared through solicitor

and counsel at the hearing of the motion and, indeed, swore an affidavit, delivered a Statement of Claim and issued a motion to remit the matter to the Circuit Court;

(xv) New solicitors came on record for the Plaintiff on the 15th February 2022, Moran & Ryan having brought a motion to come off record and been given liberty to come off record by Allen J on the 15th February 2022;

(xvi) The Plaintiff filed a replying affidavit to this motion on the 15th February 2022 (sworn on the 11th February 2022);

(xvii) The Plaintiff issued a Notice of Motion to remit the matter to the Circuit Court on the 15th February 2022 grounded on an affidavit of the Plaintiff's new solicitor;

(xviii) The Plaintiff delivered a Statement of Claim on the 17th February 2022.

14. As is apparent from that chronology, the last formal action by the Plaintiff in the proceedings prior to the issuance of this motion to dismiss the proceedings for want of prosecution was the registration of a *lis pendens* on the 4th April 2014. This is not to be taken as an acceptance that this amounts to a step in the proceedings but, for convenience, I will take this as the last step in the proceedings for the purpose of discussion.

#### **Delay**

15. The Plaintiff states in his replying affidavit that "*having regard to the circumstances of this case in the round, the delay that has occurred in this case is neither inordinate nor inexcusable.*" (paragraph 12). However, at the hearing, counsel on his behalf conceded that the delay was inordinate and approached the matter on the basis that the delay was partly excusable and that the balance of justice does not favour the dismissal of the matter.

16. For completeness I should say that even if counsel had not made this concession I would have readily found that the delay was inordinate. It is difficult to see any basis for contending that a delay from 4th April 2014 to 20th September 2021 (7 years and 5 months) is anything but inordinate and there is certainly no basis for finding that it is anything but inordinate in this case.

17. I must then consider whether that delay is excusable.

18. The Plaintiff pointed to three matters as excusing the delay:

(i) Between 2014 and 2017 there was "repeated engagement between the parties...with a view to attempting to dispose of the proceedings without bringing the matter to court.";

(ii) Delay of almost three years can be attributed to the fact that the Defendant failed to engage a new firm of solicitors following the death of Mr. Conor Breen in February 2017;

(iii) the global pandemic which “generally brought things to a standstill in early 2020.”

### **Engagement between the parties**

19. Engagement between the parties with a view to attempting to dispose of the proceedings is offered as an excuse for the period from 2014 to 2017.
20. The resolution of proceedings by agreement has distinct advantages for the parties themselves and for the legal system in general which in turn has benefits for other litigants and therefore society and the economy. It is unnecessary to enumerate those advantages here. Parties should therefore be afforded a reasonable opportunity and, indeed, encouraged to seek to resolve their differences without also having to take steps in the proceedings which will have the result of increasing costs. The possibility of a resolution should not be unduly impeded by a concern on the part of the plaintiff that if they explore settlement they risk being found guilty of a want of prosecution. However, there are limits to this and indeed an overly generous approach by the courts to settlement efforts risks precisely what Clarke J in *Comcast* (and Twomey J in *Diamrem*) warned against. Furthermore, any delay or postponement in the prosecution of the proceedings to explore settlement, particularly for anything but a short period, should be by agreement.
21. Each case is different so it is impossible to prescribe what would be a reasonable, allowable or excusable time period for such engagements. However, it is very difficult to envisage how in the general run of things anything more than a very short period – a short few months (indeed in very many cases a matter of weeks or even days might be more appropriate) – could excuse a failure to formally progress the proceedings. There may, of course, be particularly complex cases in which settlement attempts, even with genuine effort on all sides, may take a longer period of time. The possible resolution of this particular case did not have any such complexities. It involves just two parties and very net issues (from the point of view of attempts to resolve it by agreement). Even allowing for the fact that there is another beneficiary under the later will it is a not a complex matter.
22. Such an extended period in a case, absent something very particular, would suggest one of the following or a combination of them: (i) the plaintiff was not pushing on with the engagements; (ii) neither the plaintiff nor the defendant were pushing on with those engagements and, even though the engagements were genuine, they were being approach laconically; or (iii) the defendant was not doing so. In either of the first two scenarios the plaintiff would be directly responsible (wholly in the case of the first and partly in the case of the second). In the case of the first he could not excuse his delay in the prosecution of the proceedings by his own inaction in relation to settlement efforts. The same applies in the case of the second though regard would have to be had for delay on the part of the defendant as litigation is a two way street. In the case of the third (and the second to an extent) there would still be an obligation on the plaintiff at a certain point in time where, if the defendant is not properly or expeditiously engaging in the settlement efforts, the plaintiff must get on with prosecuting the case. Of course, even if a plaintiff gets on with the case, attempts at resolution can still continue.



23. There is no evidence as to the run of the engagements between the parties in this case.
24. Thus, while genuine engagement (and I must accept that the engagements were genuine because there is no suggestion to the contrary) does excuse part of the period, it could not, absent something very particular, of which there is no evidence, excuse a period of three years or, indeed, anything more than a few short months at the very most.
25. It must also be noted that there is no evidence of any understanding or agreement between the parties that the Plaintiff would postpone prosecuting the proceedings while a resolution was being explored.

**Death of Mr. Breen**

26. The Plaintiff says in paragraph 6 of his affidavit:

*"I say (and as is averred to at paragraphs 5 and 6 of the Defendant's affidavit), delay amounting to a period of almost three years can be attributed to the fact that the Defendant himself had failed to engage a new firm of solicitors following the passing of his previous solicitor, the late Mr. Conor Breen, in February 2017."*

27. The courts have described litigation as a two-way street. A defendant must take steps to move the proceedings on and cannot simply sit on its hands and point to delay on the part of the plaintiff.
28. In this case allowance must be made for some delay being caused by the loss of the Defendant's solicitor. However, the Plaintiff seems to be offering this as an entire excuse for his inaction and for the delay between 2017 and 2020. While a degree of forbearance on the part of the Plaintiff was entirely right and proper in the circumstances and one could not criticise the Plaintiff for not prosecuting the matter for a short period of time following Mr. Breen's death, what is striking is that there were no steps at all taken by the Plaintiff at any stage in the three years between 2017 and 2020, or indeed after Catherine Allison & Company started acting for the Defendant. No procedural steps were taken by him and at no stage did he or his solicitors write to McDonough & Breen or, indeed, to the Defendant personally (if the Plaintiff believed that the Defendant was no longer represented) in relation to moving the proceedings on. Perhaps even more striking is that according to the letter from Moran & Ryan, the Plaintiff's former solicitors, dated the 8th July 2021 and exhibited at SMcG1, the last contact between the Plaintiff and Moran & Ryan was in 2017. Given that Moran & Ryan brought a motion to come off record in February 2021 it must be presumed that they put considerable effort into getting instructions at least between June 2021 when Catherine Allison & Company wrote to them) and February 2022. Part of the responsibility for this period of delay has to lie with the Defendant but in light of the Plaintiff's complete inaction he cannot say that he has no responsibility for this period.
29. In all of those circumstances, the death of Mr. Breen excuses a short period of the three years between 2017 and 2020 and the responsibility for the rest of that period must be shared between the Defendant and the Plaintiff but in circumstances where nothing at all

was done by the Plaintiff and where the Plaintiff was not even in contact with his own solicitors this does not offer anything other than a partial excuse for this three year delay.

### **Global pandemic**

30. There is no doubt that the global Covid-19 pandemic and the associated public health restrictions had an impact across society and the economy. It caused delays in all areas, including the provision of legal services, and it impacted on the ability of public services to deliver their service. However, very many sectors of society, including solicitors' offices and indeed the Central Office of the High Court, found ways to deliver their services to their clients and to the public notwithstanding the public health restrictions and guidance. These may have been less convenient than in normal times but still allowed for the progression of proceedings. The Plaintiff relies on the global pandemic (and the fact that it "generally brought things to a standstill in early 2020") in a general sense and does not point to any particular step which he wished to take and was delayed in taking by the impact of the pandemic. It seems to me that this can offer some excuse for a short period until measures were put in place by solicitors' offices and indeed the Central Office but no more than that. It is also noteworthy that the Plaintiff did nothing until late 2021 so, even allowing for the pandemic restrictions causing some delay, the pandemic cannot be an excuse for the complete failure of the Plaintiff to take any steps for the whole 18 months between March 2020 and September 2021 when the motion was issued.
31. It is relevant that the Defendant's solicitor wrote to the Plaintiff's solicitor (who were then still on record) and the Plaintiff personally in the period June – September 2021 and received no substantive response. Nor did the Plaintiff take any steps on foot of these contacts, such as serve a Notice of Intention to Proceed or deliver a Statement of Claim. It was only five months after service of this motion that any steps were taken by the Plaintiff.
32. Thus, it seems to me that the Plaintiff has given only partial excuses for parts of the period of seven years between the institution of proceedings and the registration of the *lis pendens* and the issuing of this motion and in those circumstances I must conclude that the delay is both inordinate and inexcusable.

### **Balance of Justice**

33. I must therefore consider whether on the facts the balance of justice is in favour of or against the case proceeding.
34. As noted above, Hamilton CJ in *Primor* very helpfully set out a number of matters which may guide the assessment of where the balance of justice lies. I have already referred to some of them in the discussion above – the fact that litigation is a two way street and the conduct of the Defendant must also be taken into account.
35. It seems to me that when assessing where the balance of justice lies I have to bear two general guiding principles in mind: (i) the Supreme Court's statements that the previous indulgent attitude to litigation should not continue and (ii) the jurisdiction to dismiss for want of prosecution is not a punitive jurisdiction but rather exists to ensure fairness to the

parties and to ensure that there can be a fair trial. Murphy J said in *Hogan v Jones* [1994] 1 ILRM 512:

*"The draconian penalty of dismissing proceedings as against a particular defendant in circumstances which will wholly defeat that claim of the plaintiff is not an order which is made with a view to punishing a party for his dilatoriness in proceeding with the action or for his failure to meet some artificial regime. The order is made only where it is necessary to protect the legitimate interests of the party sued and in particular his constitutional right to a trial in accordance with fair procedures."*

36. Indeed, O'Flaherty J had said in *Primor* that *"courts do not exist for the sake of discipline but rather to deal with the essential justice of the case before them."*
37. Thus, when assessing where the balance of justice lies the Court is seeking to balance the rights of the parties and, in respect of the Defendant, is seeking to protect his legitimate interests and in particular his right to a fair trial. It is clear from as early as *Rainsford* and *Primor* that the Court must have regard to any prejudice caused to the Defendant by the delay. Forms of prejudice may include business prejudice, damage to reputation caused by the existence of the proceedings, and exceptional anxiety caused by the proceedings. Clarke J in *Comcast* also identified compliance with the European Convention on Human Rights as a relevant consideration. Thus, relevant forms of prejudice are not limited to prejudice affecting the actual conduct of the trial. However, it is equally clear that risk to a fair trial remains a central factor in considering whether the court should extinguish the Plaintiff's right to maintain the proceedings. The importance of this consideration was recognised in *Primor*. In the matters which Hamilton CJ identified as being relevant to the balance of justice he felt it appropriate, having cited prejudice, to then specifically cite prejudice in the conduct of the case. He had earlier stated *"before these considerations can arise, it must be established that there was inordinate and inexcusable delay which would cause or be likely to cause prejudice to the defendant in the conduct of his defence to the proceedings and this undoubtedly depends on the particular circumstances of each case."* More recently, Birmingham J said in *O' Riordan* that *"Central to determining where the balance of justice lies is to determine whether and to what extent the ability of the defendants to defend the case has been impaired."* Denham CJ noted in her judgment in *Comcast* that the application of the balance of justice limb of *Primor* was described by Laffoy J in *Dunne v ESB* [1999] IEHC 199 at 16 as:

*"Essentially, in applying the criteria identified by Hamilton CJ by reference to which the Court should exercise its discretion, two questions arise in this case, namely, whether the Defendant is prejudiced by the delay and, in particular, whether there is a substantial risk that it is not possible to have a fair trial because of the delay, and whether there was anything in the conduct of the Defendant which militates against granting the relief sought."*

38. Having regard to these guiding principles and all of the matters set out by Hamilton CJ it seems to me that the balance of justice slightly favours permitting the proceedings to continue notwithstanding the delay.

39. There is no doubt that the delay is of a nature to suggest that the proceedings should be dismissed. A charitable view of the Plaintiff's approach to these proceedings is that it has been laconic. In fact, having issued the proceedings, he has done nothing to move them on for a period of 7 years. Denham CJ said in *McNamee*:

*"69. While the jurisdiction of any court to dismiss proceedings for want of prosecution requires the Court to be satisfied that there has been inordinate and inexcusable delay, it is also clear that particularly lengthy delay without adequate explanation can also be a factor which can properly be taken into account in assessing where the balance of justice lies..."*

40. Regard must also be had to the fact that the delay in the prosecution of the proceedings and therefore the delay in their determination has frustrated the administration of the deceased's estate. This is a form of general prejudice.
41. I am also conscious of the fact that the Plaintiff registered a *lis pendens*. No authority was opened to me that the registration of a *lis pendens* imposes an obligation on the party who registered it to move the underlying proceedings on with greater expedition than normal (in the same way, for example, that a party who has obtained an injunction must prosecute their proceedings with particular expedition). However, subject to further argument in an appropriate case, it seems to me that this must be a factor which I can take into account as it acts as a form of prejudice to the Defendant.
42. However, also relevant to a consideration of prejudice and the balance of justice is the fact that the Defendant must also bear some responsibility for parts of the delay. It must also be borne in mind that the Defendant, until June 2021, did not avail of any of the mechanisms under the Rules to have the Plaintiff move the proceedings on. Indeed, the Defendant could have applied to have the *lis pendens* removed but did not do so. As Clarke J said in *Comcast* (referring to McKechnie J's judgment):

*"...as McKechnie J points out, that fact places obligations on defendants as well. The Rules of Court provide various mechanisms which allow a defendant, who is concerned by the slow pace of litigation, to seek to have the process accelerated. A defendant who does not avail of those procedures is, in my view, in a different position from a defendant who has sought to speed up the process but has been frustrated in that endeavour by a failure on the part of the relevant plaintiff to respond reasonably."*

43. This Defendant is one who did not avail of the procedures in the Rules. He did nothing to accelerate the proceedings between 2014 and 2017 when he had a solicitor actively representing him and did nothing between 2017 and 2021 – though some account has to be taken of the fact that Mr. Breen's death must have caused something of a hiatus.
44. Thus, all of the responsibility for the delay and any consequential prejudice can not be placed at the feet of the Plaintiff and the Defendant's inaction must be factored into the consideration of the balance of justice.

45. As noted above, it is clear that a risk to a fair trial remains a central consideration in assessing where the balance of justice lies. The Defendant in this case has not claimed any prejudice in his defence of the proceedings and has not claimed that there is a risk of an unfair trial. He has not said that there is any witness who is no longer available due to the delay and he has not identified any witness whose memory of the events surrounding the underlying dispute has been particularly prejudiced by the passage of time. The Defendant does not even claim that his own memory has diminished, and has certainly not claimed that it has diminished to such an extent that any trial would be unfair.
46. This absence of any averment of prejudice to the Defendant in the conduct of the proceedings is striking. I think it is fair to say that the grounding affidavits in very many applications to dismiss for want of prosecution contain a general averment to the effect that given the passage of time a fading memory is likely to prejudice their defence (this is so common that Birmingham J described it in *O'Riordan* as "little more than formulaic") but Mr. McGuinness does not even claim that much. Of course, the courts have acknowledged that there must be a general prejudice with the passage of time. For example, as was put by Twomey J in *Diamrem*:
- "This Court does not require specific evidence from witnesses for it to conclude that the memory of witnesses in relation to events which occurred years ago will dim and therefore that any delay (and in particular an inordinate and inexcusable delay) will constitute a prejudice, and this at least the modest prejudice to which Irvine J refers to in Leech as being sufficient for the dismissal of the proceedings."*
47. Irvine J had said in *Leech v Independent Newspapers (Ireland) Limited [2017] IECA 8* "even modest prejudice may tip the scales of justice in favour of a defendant when it comes to a consideration of the balance of justice."
48. Nonetheless, one would expect that if the Defendant had any concerns about this type of general prejudice he would refer to it in his grounding affidavit and I must conclude from its absence that the Defendant does not have such concerns.
49. In any event, it seems to me that this general type of prejudice is mitigated in this particular case by the fact that many of the witnesses will be assisted by contemporaneous documents. For example, it seems likely that Mr. McDonough, the solicitor who assisted the deceased in the preparation of the disputed will, Mr. Connolly, a solicitor who had acted as the deceased's solicitor for a long number of years, and the deceased's General Practitioner, who raised a concern about the deceased's capacity around the relevant time, will all be called to give evidence and appear likely to be the key witnesses. As professionals it seems very likely (and there has been no evidence to the contrary) that they will have attendance and consultation notes as well as correspondence to assist them. Indeed, an attendance note prepared by Mr. McDonough was exhibited at 'PB1' to Mr. Bergin's replying affidavit, as was a letter from Mr. Connolly, the deceased's solicitor of twenty years.

50. I do not at all accept that this is a pure “documents case” in the sense that it will turn or largely turn on the construction of documents as was suggested by the Plaintiff. However, it does seem to me that the documents, which I must presume to be available in the absence of any evidence to the contrary, will be of very significant assistance to mitigate the general potentially prejudicial effect of the passage of time.
51. In *Comcast Clarke J* said:
- “6.2 In all cases where the court has to consider the balance of justice the extent of any prejudice to the defendant caused by delay needs to be assessed. In that context it is important to note that the Minister did not put forward any claim to specific prejudice in the form of absent witnesses or missing documentation. The Minister sought solely to rely on the undoubted general prejudice that may arise when any proceedings are conducted a very long time after the events under scrutiny. It was in that context that Gilligan J characterised the State’s prejudice as moderate.*
- 6.3 While one should not become overly enmeshed in terminology on degree such as “mild”, “moderate”, “severe” or “extreme”, I would, respectfully, disagree with Gilligan J and would instead characterise the prejudice established on behalf of the Minister in this case as being mild. At least so far as many of the issues which are likely to arise in these proceedings at trial are concerned, this case can be regarded as a so-called “documents” case, where there are contemporary records of much of the matters which were required it is, of course, the case that this is not a pure “documents” case where the issues turn on the construction of documents and where oral testimony is likely to be of the marginal relevant in such cases prejudice caused by delay will be non-existent or extremely remote. However, the availability of contemporary records will, in my view, at least so far as a lot of the issues minimise any risk of prejudice.”*
52. Thus, the position is that I must presume (even in the absence of any claim by the Defendant to that effect) that there is some potential prejudice caused by the passage of time but I am satisfied that this prejudice is mitigated to a very large extent by reliance not having to be placed solely on individuals’ memory. Key witnesses will have the benefit of contemporaneous documents. The Defendant has not pointed to any specific factors which would prejudice a fair trial such as the non-availability of the testimony of key witnesses.
53. While that could not be determinative as I must have regard to other types of prejudice also, considerations of a fair trial are central to the assessment of the balance of justice. In all of those circumstances, where some responsibility for parts of the delay must be shared by the Defendant and where there is little or no risk to a fair trial– no general or specific risk to same is even claimed by the Defendant - I conclude that the balance of justice just about favours permitting the proceedings to continue notwithstanding the Plaintiff’s inordinate and inexcusable delay. It would seem to me that this should be subject to strict conditions and directions as to the future prosecution of the case. However, in circumstances where the Plaintiff has already issued a motion to have the

matter remitted to the Circuit Court and therefore the matter might become subject to the jurisdiction of that court it seems inappropriate that I should make such directions at this stage. However, in the event that the matter is not remitted to the Circuit Court the matter should be brought back before the Court for directions as to its future prosecution.

### **Other Relief**

54. In relation to the other reliefs sought it seems to me that Clarke's J's comments in *Comcast* are apposite. At paragraph 5.24 he said:

*"It seems to me that O.27 r.1 and 1A are primarily designed as a method of speeding up proceedings even though the form of the order which may ultimately be sought, is to dismiss for want of prosecution. That situation is analogous to that which now pertains under O. 27 r. 8 where, in the cases to which that rule applies, the plaintiff is required to write a similar letter extending time for defence prior to initiating a motion for judgement in default defence. While the ultimate order which would be sought in the absence of the defence being filed within the extended period granted by the letter is an order for judgment nonetheless the primary purpose of the order is to provide a mechanism whereby the filing of a defence may be speeded up rather than the proceedings brought to an end."*

55. These comments can also be applied to Order 122 rule 11.

56. In any event, both of these provisions confer a discretion on the Court and it seems to me that, in exercising that discretion, I am obliged to have regard to the balance of justice because the Rules of Court exist to regulate court business in the interests of justice and of ensuring that proceedings are conducted fairly in a manner which vindicates the rights of litigants.

57. I am of the view, for the reasons set out above, that, notwithstanding the delay in the proceedings and the Plaintiff's failure to deliver a Statement of Claim in accordance with Order 27 and to take a step in the proceedings in accordance with Order 122, the balance of justice slightly favours allowing the proceedings to continue. Furthermore, as noted by Clarke J, the purpose of Order 27 rule 1 (and, it seems to me, of Order 122 rule 11 to a certain extent) is to compel the taking of the relevant procedural step (or, as Clarke J put it, to 'speed up' that step) and that purpose has been achieved by the delivery of the Statement of Claim by the Plaintiff.

58. In all of those circumstances, I am of the view that the relief at paragraphs (a) and (b) should not be granted.

59. The Defendant also seeks an Order pursuant to section 123 of the Land and Conveyancing Law Reform Act 2009 vacating the *lis pendens* which was registered by the Plaintiff. Of course, a standalone application for the vacation of a *lis pendens* may be brought. However, in the circumstances of this case I am satisfied that this relief was sought as an ancillary relief to the primary reliefs at paragraph (a) – (c). There was no separate argument as to whether I should exercise the jurisdiction to vacate the *lis pendens*

separately from and independent of those primary reliefs. In those circumstances, having declined relief under those paragraphs, I also refuse relief under paragraph (d) of the Notice of Motion.

60. I think it is important to emphasise, as noted above, that my assessment of the balance of justice was reasonably finely-balanced and in the event, that there is any further delay on the part of the Defendant the assessment of the balance of justice may well be different.