THE HIGH COURT

[2023] IEHC 54

2011 No. 11114P

BETWEEN

THOMAS CARROLL

PLAINTIFF

AND

M&P SALES AND MARKETING LIMITED and SHS SALES & MARKETING LIMITED

DEFENDANTS

Judgment of Ms. Justice Eileen Roberts delivered on 3 February 2023

Introduction

1. This judgment relates to the defendants' motion seeking an order pursuant to the inherent jurisdiction of the High Court to dismiss the plaintiff's claim for inordinate and inexcusable delay. Further or in the alternative, the defendants seek an order pursuant to Order 122, rule 11 of the Rules of the Superior Courts dismissing the plaintiff's claim against the defendants for want of prosecution.

2. There was broad agreement between the parties on the legal principles governing the dismissal of applications for delay and/or want of prosecution. However, as generally arises in applications of this nature, the parties differed significantly as to whether, on the facts of this case, the relevant threshold for dismissal had been met.

3. It was clarified at the hearing of this matter on 11 January 2023 that the defendants' motion which issued in these proceedings bearing record number 2011/11114P was also intended to apply to related proceedings between the same parties bearing record number 2010/2637P (the '**2010 Proceedings**').

4. There are, in fact, eight separate sets of proceedings taken against the defendants by four individuals (including the plaintiff in this case), relating to separate agency agreements held by those individuals with the defendants. Those agency agreements were amended by agency agreements dated 20 April 2005 which were terminated by the defendants in each case by notice dated 25 August 2010 (effective from 30 November 2010). The proceedings in each case are virtually identical and relate to claims by the plaintiffs against the defendants both before and after the termination of the relevant agency arrangements.

5. The present application will therefore, in practical terms, be relevant to all eight sets of proceedings advanced against the defendants by those four separate plaintiffs, namely Thomas Carroll, Peter Brooks Sales Limited, Jeff McGrath and Richard Talbot, each of whom are represented by the same legal advisors who have progressed all the related proceedings in the same or similar timeframes. The defendants confirm (in the affidavit of Paul McDonnell sworn 6 October 2022 at paragraph 8) that only one motion to dismiss the proceedings for delay has issued in the interests of saving costs and court time and having regard to the broadly similar nature of all the proceedings and the fact that the delay is broadly similar in all of them. The present judgment in those circumstances deals only with these proceedings by Thomas Carroll, which is the single dismissal motion before this court – recognising its relevance however to the 2010 Proceedings and the other proceedings identified above.

Background

6. The plaintiff in these proceedings is a sole trader.

7. The defendants are limited liability companies engaged in the sale of a range of household food, health and beauty products.

8. Between 1992 and 2010 the plaintiff was an agent of the defendants for the purpose of selling products in certain territories allocated to him by the defendants.

9. It is stated in legal submissions that the plaintiff commenced employment as a sales representative for Swedish Match (Ireland) Limited (the predecessor of the first named defendant) in 1976. He was made redundant in 1990 and re-engaged as a self-employed commercial agent in 1991.

10. It is accepted by all parties that the plaintiff and a Mr. Noel Collins entered into an agency agreement with Swedish Match (Ireland) Limited dated 21 September 1992 and that that agreement was amended by an agency agreement dated 20 April 2005 between the plaintiff and Swedish Match (Ireland) Limited.

11. Shortly after the amended agency agreement was entered into difficulties began to emerge between the parties regarding certain commercial arrangements including, for example, whether the defendants were entitled to exclude new products from the scope of the amended agency agreement.

12. The plaintiff issued the 2010 Proceedings on 12 March 2010 seeking various declarations including that he was a commercial agent for his allocated territory under and by virtue of the provisions of Council Directive 86/653/EEC of 18 December 1986 as implemented by the European Community (Commercial Agents) Regulations 1994 and 1997 (the '**Commercial Agents Directive**'). He also sought a declaration that he was

entitled to be supplied with a full range of household products and product lines supplied by the defendants to their identified central billing customers.

13. On 25 August 2010 the defendants gave notice of the termination of the amended agency agreement with effect from 30 November 2010. Thereafter, by plenary summons dated 5 December 2011, the plaintiff issued the within proceedings (record number 2011/11114P) seeking a declaration that he was entitled to compensation calculated in accordance with Article 17 of the Commercial Agents Directive. He also sought a declaration that he was entitled to commission on commercial transactions concluded in the 12-month period after his agency terminated in so far as they fell within the terms of Article 8 of the Commercial Agents Directive.

Chronology of the steps taken to date in the proceedings

14. In order to assess the delay which has occurred in this case it is necessary to set out the timing of the steps taken by the parties in these proceedings. For ease of reference those key steps are summarised in tabular form below based on the narrative information provided to this court in the affidavits filed by the parties. The entries which are in **bold** are explanations provided by the plaintiff of activity during certain periods which did not constitute steps in the proceedings in a formal sense. It is accepted that the defendants were not on notice of that activity save in relation to certain 'without prejudice' engagement which appears to have taken place between solicitors at one point.

Proceedings 2011 No 11114P	
DATE	**ACTION**
5 December 2011	Plaintiff issues plenary summons
13 January 2012	Defendants enter Appearance

9 March 2012	Plaintiff serves statement of claim
12 July 2012	Defendants deliver their defence
17 December 2013	Plaintiff issues its request for voluntary discovery
19 December 2013	Plaintiff's notice of intention to proceed
17 February 2014	Defendants' response to plaintiff's voluntary discovery request
16 October 2014	Plaintiff's letter regarding the terms of the discovery it has sought from the defendants
18 November 2014	Defendants' letter responding to plaintiff's letter dated 16 October 2014 regarding discovery
19 March 2015	Defendants' follow-up letter seeking response to their letter dated 18 November 2014
19 March 2015	Defendants request voluntary discovery from plaintiff
15 July 2015	Plaintiff's response to defendants' discovery request
15 July 2015	Plaintiff's letter re discovery to be made by defendants
9 October 2015	Plaintiff's letter chasing affidavit of discovery from defendants
12 November 2015	Defendants' letter to plaintiff confirming they will make voluntary discovery in agreed revised terms
12 November 2015	Defendants' response to plaintiff's letter dated 15 July 2015 re discovery to be made by defendants (category 2 remains in contention)
12 November 2015	Plaintiff requests defendants' affidavit of discovery-intend to issue motion if not received within 21 days
16 February 2016	Defendants' affidavit of discovery is sworn (3 categories comprising 54 documents and a schedule)

26 February 2016	Defendants' letter to plaintiff enclosing defendants' affidavit of discovery. Also seeking response to the defendants' request for discovery to be made by the plaintiff hoping it will not be necessary to issue a motion re same.
9 May 2017	Plaintiff's letter serving notice of intention to proceed and requesting copies of defendants' discovered documents
11 May 2017	Plaintiff's notice of intention to proceed
15 May 2017	Defendants letter to plaintiff confirming they "will proceed to collate" the defendants discovered documents. Enquiring re agreeing categories of discovery by plaintiff and threatening motion for discovery if disputed category is not agreed by the plaintiff
During 2017	**Plaintiff states in replying affidavit of Frank Murray sworn 1 November 2022 that "during 2017 there were a number of meetings between the plaintiffs and Mr Des Murnane, Expert Accountant, and Junior Counsel to identify and gather the relevant information and documentation to prepare an independent expert report on losses".**
21 November 2019	Plaintiff's notice of intention to proceed
Dec 2019/January 2020	**Plaintiff states in replying affidavit of Frank Murray sworn 1 November 2022 that there were off the record telephone conversations and an exchange of 'without prejudice' correspondence between solicitors**

During 2020	**Plaintiff states in replying affidavit of Frank Murray sworn 1 November 2022 that there were further meetings between Mr Des Murnane, Mr Murray and counsel and an exchange of correspondence between the plaintiff's advisers and that senior counsel was briefed. Reference is made to a meeting in December 2020 with senior counsel at which the proposed expert witness produced his draft summary of financial claims for the plaintiff on foot of which senior counsel later provided further advice which was conveyed to the expert.**
May – Nov 2021	**Plaintiff states in replying affidavit of Frank Murray sworn 1 November 2022 that draft reports were provided by Mr Murnane (expert) and sent to senior counsel who met with the plaintiffs in all four related cases and senior counsel undertook to furnish an advice on proofs. That advice on proofs was furnished by senior counsel in July 2021 and further instructions were obtained from all four plaintiffs in the related proceedings in November 2021**.
15 December 2021	Plaintiff's letter to defendants serving notice of intention to proceed and requesting copy of defendants discovered documents (previously requested on 15 May 2017)
15 December 2021	Plaintiff's letter re outstanding disputed category of discovery to be made by the plaintiff – plaintiff offers compromise category
16 December 2021	Plaintiff's notice of intention to proceed

30 March 2022	Follow-up letter from plaintiff seeking response to his letter dated 15 December 2021
3 June 2022	Defendants' letter rejecting compromise category of discovery and repeating their previous request for discovery
14 July 2022	Plaintiff issues motions for case management (returnable to 10 October 2022). Motion seeks: (1) listing of related actions together or sequentially (2) inspection of the defendants' discovered documents (3) order for joint meeting of experts; and (4) court invitation to the parties to mediate the related actions.
6 October 2022	Defendants issue motion to dismiss for delay/want of prosecution (returnable to 28 November 2022)

15. It is clear from the above summary that the proceedings issued and were progressed promptly to defence stage between December 2011 and July 2012. A discovery request was not made by the plaintiff until 17 months after the defence had been delivered and this appears to be the first identifiable period of delay in these proceedings. The parties engaged in the negotiation of discovery terms throughout 2014 and these negotiations continued without any urgency throughout 2015 with the defendants making their own voluntary discovery request from the plaintiff in March 2015. In 2016 the defendants provided a sworn affidavit of agreed categories of discovery but did not provide the discovery documents themselves (which have still not been provided to the plaintiff). There were requests in 2017 by the plaintiff for copies of those documents to be provided. The plaintiff alleges that throughout 2017 he and his solicitors worked with an

expert witness and met counsel. No activity is identified for 2018 or up until November 2019 when the plaintiff served a further notice of intention to proceed. In 2020 and 2021 the plaintiff says he briefed senior counsel and worked with his expert witness on the preparation of draft reports. From December 2021 the matter has been more actively pursued with correspondence and the issue of the plaintiff's motion for case management and the defendants' motion for dismissal.

16. In the 2010 Proceedings, the pleadings were again promptly advanced between the period 12 March 2010 and June 2012 with a full exchange of pleadings including notices for and replies to particulars. In the 2010 Proceedings the plaintiff was more prompt in making his request for voluntary discovery, which he did on 28 September 2011, and the defendants provided a sworn affidavit of discovery on 7 February 2012 (re-sworn on 5 June 2012) together with copies of the documents referred to. Thereafter however the proceedings moved in a similar fashion to the related 2011 proceedings.

The Arguments advanced by the defendants

17. The defendants argue that there has been an inordinate delay by the plaintiff in the prosecution of these proceedings and the 2010 Proceedings. The defendants say that because the plaintiff's original agency agreement dates from 1992, this historic context makes the period of delay even more significant. The defendants also argue that the nature of the equitable relief sought by the plaintiff in this case (namely declarations) requires the plaintiff to advance these proceedings promptly.

18. The defendants say that the advices undertaken between the plaintiff and his legal advisers/experts are not steps in the proceedings and are not relevant to justifying the delays which have taken place. The defendants note, in particular, that no motion was issued by the plaintiff in respect of the defendants' discovery documents until July 2022,

being some six years after the defendant had provided its affidavit of discovery to the plaintiff.

19. The defendants also state that the delay is inexcusable and that the plaintiff has provided no actual or valid reason to explain the delay. While the defendants acknowledge that they did not furnish the discovered documents to the plaintiff, they submit that this does not constitute an excuse or justification for the delay which occurred. They say it was open at any time to the plaintiff to issue a motion for inspection and/or case management but the plaintiff failed to do so for a period of six years. The defendants argue that neither internal steps nor 'without prejudice' communications are relevant in considering any justification for delay.

20. The defendants also submit that the balance of justice in this case is against allowing the proceedings to go to full trial. They argue that the proceedings relate to events which occurred in the years 1992 to 2010. The hearing will centre on oral as well as documentary evidence.. The defendants say that the outcome of the proceedings will turn in large part on oral evidence and the recollection of witnesses in respect of events that occurred up to 30 years ago in relation to the original agency agreement and at least 12 years ago in relation to the termination of the agency arrangements. This will leave the defendants in the situation where they would be reliant on the evidence of the plaintiff as well as their own witnesses whose recollection may have faded with the passage of so much time. The defendants argue that there is both real and possible prejudice to the defendants in obtaining a fair hearing should the proceedings continue. They say that it is 10 years since the defendants delivered their defence and that no default of pleading arises in this case. As such, there is no culpable delay on the part of the defendants and the proceedings should be dismissed for delay.

The Arguments advanced by the plaintiff

21. The plaintiff concedes that a delay has occurred in advancing these proceedings. Indeed this is self-evident in that 10 years after the issue of proceedings the actions have not progressed to trial. The plaintiff argues that a number of factors are however relevant to that delay. In particular, the plaintiff relies on the argument that since 2013 the plaintiff has been seeking discovery and copies of discovered documents from the defendants. The defendants did not themselves seek voluntary discovery from the plaintiff until 19 March 2015 and, although threatening to issue a motion to compel discovery in May 2017, the defendants have never advanced their request for discovery by way of motion and the scope of that discovery remains in dispute.

22. The plaintiff points to failure on the part of the defendants to respond to correspondence in a timely fashion and to cooperate in having the matter progressed to trial.

23. The plaintiff also notes that the defendants' dismissal motion was issued (without any prior notice to the plaintiff), only four days prior to the return date for the plaintiff's motion seeking directions.

24. The plaintiff also argues that the defendants have not identified in any real or material sense any particular prejudice or unfairness or witness difficulty. The plaintiff says that while the agency relationship dates back to 1992, this dispute relates to events taking place at a later date.

25. The plaintiff argues that the interests of justice are against the dismissal of these proceedings. The plaintiff says that the delays which have taken place have been caused and contributed to by the defendants' own conduct. The plaintiff also argues that the delay is on the facts of this case neither inordinate nor inexcusable and that no substantive case of prejudice or unfairness has been made out. In those circumstances the

plaintiff argues that this court should refuse the defendants' motion and allow the proceedings to go to trial.

The legal principles applying to dismissal of proceedings on the grounds of delay and/or want of prosecution.

26. Order 122, rule 11 gives the court jurisdiction to dismiss an action for want of prosecution on the application of the defendant where there has been no proceeding for two years. In addition, the courts have an inherent jurisdiction to dismiss a claim where so required in the interests of justice.

27. The court in this case must engage in a balancing process between the rights of the parties to this litigation. As noted by Henchy J in *O'Domhnaill v. Merrick* [1984] IR 151 (at page 157), the court is required "*to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend*".

28. The Court of Appeal in *Gibbons v N6 (Construction) Ltd* [2022] IECA 112, recently reaffirmed the relevant legal principles which apply in cases of delay. Barniville J at paragraph 78 of his judgment confirmed that

> "*there are two separate but sometimes overlapping strands of jurisprudence which may be relevant when an application is brought to dismiss a case in circumstances where there has been delay in the prosecution of the case or the case relates to events which took place in the distant past*."

The first strand is that set out in the Supreme Court decision of *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, now commonly referred to as the "*Primor* Principles", which apply where there has been inordinate and inexcusable delay on the part of the plaintiff in the prosecution of its claim. The second strand arises in the

circumstances discussed by the Supreme Court in *O'Domhnaill* where, when an application to dismiss the claims is brought, a significant period of time has elapsed between the events giving rise to the proceedings and the likely trial date.

29. The parties were agreed that the relevant legal principles applicable to the present application are the *Primor* Principles.

30. The relevant principles taken from pages 475 and 476 of the reported *Primor* judgment are as follows:

> "(*a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;*
>
> *(b) it must, in the first instance, be established by the parties seeking the dismissal of proceedings for want of prosecution on the grounds 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 the 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 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 expenses 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."

31. O'Flaherty J also noted in *Primor* at page 516 that "*courts do not exist for the sake of discipline but rather to deal with the essential justice of the case before them*".

32. The *Primor* Principles have been applied by the courts many times and have been developed over time by various court decisions. In the Court of Appeal decision of *Millerick v. The Minister for Finance* [2016] IECA 206 Irvine J summarised the *Primor* Principles at paragraphs 18 and 19 of her judgment as follows: –

"*The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay*

inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

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

33. In the decision of the Court of Appeal in *Doyle v Foley* [2022] IECA 193, Costello J, commenting on the *Primor* Principles noted at para 54 of her judgment that "*this is not an exhaustive list or cumulative test but rather is a guide to a court in determining where the balance of justice lies as between the parties. Each case very much depends on its own facts.*" The court noted that while litigants have a constitutional right of access to the courts, all parties have a constitutional right to fair procedures and a timely resolution of their litigation. In addition, there is also a public interest in ensuring the timely and effective administration of justice.

34. Irvine J at paragraph 40 of her judgment in *Millerick* referred to recent decisions which emphasised "*the constitutional imperative to bring to an end the all too long standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures*".

35. A change of emphasis noting the obligations of the courts to ensure that rights and liabilities are determined within a reasonable time became apparent in certain judgments of the Supreme Court such as *Gilroy v Flynn* [2004] IESC 98, [2005] ILRM 290 and in *Comcast International Holdings Inc v Minister for Public Enterprise* [2012] IESC 50

where Clark J noted at para 3.9 that the application of the established *Primor* Principles would "*be approached on a significantly less indulgent basis than heretofore*".

36. In *Gibbons* the Court of Appeal upheld the High Court decision dismissing those proceedings. Barniville J referenced with approval the comments by the High Court at first instance in that case on the relevant case law. In particular, at para 38 (citing para 11 in the High Court judgment), he approved the comments of Butler J that there was a *"'general consensus' that while the fundamental principles have not changed since Primor, the weight to be attached to the various factors relevant to the balance of justice has been 'recalibrated to take account of the court's obligation to ensure that litigation is progressed to a conclusion with reasonable expedition*'".

37. This sentiment was also reflected in the judgment of Costello J in *Doyle* (a decision which issued three months after *Gibbons*) in which Costello J notes at paragraph 55 of her judgment that *"[i]n more recent times a stricter approach has been taken by courts dealing with delays in the conduct of litigation than in the past".*

38. Caution was sounded however in the recent Court of Appeal decision in *Cave Projects Limited v. Gilhooly* [2022] IECA 245 in which the court dismissed an appeal by the second named defendant against a decision of the High Court refusing to dismiss the proceedings against him for want of prosecution and delay on the part of the plaintiff.

39. At paragraph 37 of his judgment in *Cave*, Collins J stated as follows:

> *"[i]t is entirely appropriate that the culture of "endless indulgence" of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over- correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the Primor test is hollowed out, or applied in an overly*

mechanistic or tick- a- box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant".

40. In *Gibbons* the Court of Appeal referenced the legal test to be applied in assessing the extent of the prejudice claim required to be established by a defendant where the court has concluded that the plaintiff's delay has been inordinate and inexcusable. Barniville J at para 114 of his judgment was satisfied that the correct legal test was that "*the defendant 'need only prove moderate prejudice arising from that delay in order to succeed under the Primor test'"* (per Irvine J at para 35 of Millerick).

41. Barniville J at para 115 of his judgment in *Gibbons* agreed with the High Court's conclusion that it was not necessary for the defendant to establish that it would be unable to receive a fair trial in order to rely on the *Primor* test and he agreed that it was open to the defendant to rely on other types of prejudice and not merely prejudice in the defence of the proceedings.

42. Collins J noted however at para 36 of his judgment in *Cave* that "*the issue of prejudice is a complex and evolving one*". He also noted in the same paragraph that *"whether 'moderate prejudice' will warrant the dismissal of a given claim, or whether something more serious must be established, will depend on all of the circumstances, including the*

nature and extent of the delay involved, the nature of the claim and of the defence to it and the conduct of the defendant".

43. It is clear therefore that every case will turn on its own unique facts. The same periods of delay in different cases may demand different treatment. As Collins J noted in *Cave* (at para 36) "*a period of delay that is considered inordinate in one case may not be regarded as such in another. Factors which excuse delay in one case may be ineffective in another*".

44. The onus in every case is on the defendant to establish all three limbs of the *Primor* Principles. An order dismissing a claim is a far reaching one. That being so, Collins J in the Court of Appeal in *Cave* recognised that " *it would seem to follow that such an order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed*" (at para 36 of his judgment).

45. The nature of the plaintiff's claim may be of relevance to the court in exercising its discretion as to whether the balance of justice is in favour of or against the case proceeding. This point was made clear by Keane CJ in *Daly v Limerick Corporation* (Supreme Court, 7 March 2002).

46. Collins J in *Cave* at paragraph 36 of his judgment sets out a number of additional points in relation to dismissal applications which usefully frame the task this court has to undertake in determining the present application. He stated that *"[w]here inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim.*" He also noted that "*any 'culpable delay' on the part*

of the defendant – delay arising from procedural default on its part – will weigh against dismissal".

This court's analysis of the facts in these proceedings by reference to the relevant legal principles.

1. Was there inordinate delay in this case?

47. In most cases, applications for dismissal are brought following a lengthy period of inactivity by the plaintiff and often in circumstances where the pattern of delay has been a feature from the outset. In the present case however the plaintiff pursued this litigation promptly and there was in fact no delay of any significance in having the pleadings closed. Thereafter there were some periods where matters did not grind to a complete halt but there was certainly no urgency or diligence evident. There were also periods where no activity took place.

48. As set out more clearly in the table at paragraph 12 and in paragraph 13 of this judgment, the first period of delay commenced in July 2012 and persisted for 17 months until December 2013. During that period no steps were taken by the plaintiff to advance his discovery request against the defendant and no explanation was provided to the court for this.

49. Thereafter very slow, albeit some, progress was made between the parties in negotiating and agreeing the terms on which the plaintiff would receive discovery from the defendants. The defendants were also slow in making their own request for voluntary discovery. Between December 2013 and February 2016 when the defendants delivered their affidavit of discovery, matters proceeded very slowly but some progress on discovery was made.

50. The next identifiable period of delay appears to run from March 2016 until the plaintiff served a notice of intention to proceed and a reminder for discovery documents in May 2017. This was a period of 14 months. At that point the plaintiff was waiting on receipt of discovery documents from the defendants. The plaintiff had yet to revert on the defendants' request for discovery. There does not appear to be any explanation for this period of delay. The plaintiff could and should have provided its response to the defendants' discovery request during that period but did not do so nor did it issue a motion to inspect the discovered documents which the defendant had failed to provide. Equally of course the defendants could have issued a motion to compel discovery from the plaintiff but did not do so.

51. On 15 May 2017 the defendants wrote to the plaintiff confirming that the defendants "*will proceed to collate*" the discovery documents which the plaintiff had been requesting over that 14-month period. They did not however provide those documents and indeed have not done so to date. The plaintiff submits that this correspondence and assurance from the defendants amounted to acquiescence or behaviour akin to acquiescence which justified the plaintiff in not issuing a motion at that point but choosing instead to rely on the defendants' assurance that they were going to produce the discovery documents voluntarily. I believe there is some validity to that argument as I set out in more detail below although it does not excuse the earlier period of delay nor would it indefinitely excuse delay once it became clear that the discovery documents were not in fact forthcoming. It may however have justified the plaintiff not issuing a motion until later in 2017.

52. There was no engagement between the parties from May 2017 until the plaintiff served a further notice to produce on 21 November 2019. While the plaintiff states on affidavit that in 2017 he was engaging with experts and counsel, there was no reference to any

activity in 2018. Even allowing for a justifiable period of inactivity arising from the defendants' correspondence dated 15 May 2017, there appears to have been a delay which is unexplained for 2018 and up until November 2019. This is a period of almost two years.

53. The plaintiff did not reactivate matters within one month of the service of its notice of intention to proceed in November 2019. There was reference made to some 'without prejudice' engagement between the parties at that time although at best this appears to have occurred between December 2019 and January 2020. Thereafter throughout 2020 and for most of 2021 the plaintiff claims that he was involved with his solicitors in instructing senior counsel to prepare advice on proofs, engaging with an expert witness and coordinating meetings with the various parties involved in the related proceedings. Of course, this activity was not evident to the defendants. Throughout that period the defendants did not advance their own request for voluntary discovery nor did they provide the discovery documentation which the plaintiff had sought.

54. Insofar as the defendants are concerned there was no engagement with or visible activity by the plaintiff in advancing these proceedings from May 2017 until December 2021 other than the service of the notice of intention to proceed in November 2019 and some alleged 'without prejudice' communications in December 2019/January 2020.

55. From December 2021 onwards, the plaintiff proactively took steps to advance the proceedings commencing with correspondence regarding discovery and most significantly the issue of its motion for case management designed to enable it to comply with the requirements of practice direction HC 75. It was after that renewed activity by the plaintiff that the defendants issued the within motion for dismissal.

56. In light of the above chronology and the various periods of delay identified, I find that there has been inordinate delay by the plaintiff in pursuing these proceedings and I refer in particular to the periods of delay specifically identified.

57. In the circumstances, the question then arises as to whether that inordinate delay is excusable.

2. Was the delay excusable in this case?

58. Several different explanations were advanced by the plaintiff to justify the delays which have taken place in this case. These include (i) that the defendant was in default of its own discovery obligations and failed to provide discovered material to the plaintiff despite request and that this in turn led to a delay/inability of the plaintiff to properly brief its own experts; (ii) that the defendant failed to advance its own discovery request and did not bring its dismissal motion promptly; (iii) that the parties were engaged for a period in 'without prejudice' discussions; (iii) that several Notices of Intention to Proceed were served throughout the period and (iv) that the proceedings were relatively complex and that the plaintiff took time to brief experts and senior counsel for an advice on proofs.

59. I find as follows in relation to those stated justifications referencing assistance which can be gleaned from other cases in which similar explanations were advanced by plaintiffs.

(i) The defendant was in default of its own discovery obligations and failed to provide discovered material to the plaintiff despite request and that this in turn led to a delay/inability of the plaintiff to properly brief its own experts.

60. The plaintiff pointed to the delay by the defendant in providing its Affidavit of discovery and, more importantly, copies of the discovered documents. In order to consider this

alleged justification it is necessary to enquire whether the delay in providing the discovery documents by the defendants impacted in any way on the plaintiff's ability to progress his case.

61. The defendants provided discovery both in these proceedings and in the 2010 Proceedings. Given the overlap of discovery in both cases, it is important to consider whether the provision of discovered documentation in the 2010 Proceedings reduced the otherwise prejudicial impact to the plaintiff of the defendants failure to provide the documentation discovered in these proceedings.

62. I am satisfied, having reviewed the discovery made by the defendants in both these proceedings and the 2010 Proceedings, that there was in fact relatively minor prejudice to the plaintiff in not receiving the discovery documents in these proceedings. The affidavit of discovery filed in the 2010 Proceedings referred to 5 agreed categories of documents comprising in general terms, the agency agreement from 2005; commission rates applicable and documents concerning the new arrangements alleged to have been introduced into the operation of the agency arrangements. There were 41 documents discovered by the defendants which commenced from a date in March 2005. The affidavit of discovery filed in the present proceedings was delivered on 16 February 2016. It relates to 3 categories of discovery. In respect of one category, no documents are identified. The remaining two categories of discovery relate, firstly, to the post termination transactions for a period of 12 months. No documents are identified as responsive to that category. Instead, the defendants provided a detailed schedule of the relevant transactions which is attached to the affidavit of discovery. This information has been available to the plaintiff since February 2016 when the Affidavit of discovery was served. The second category of discovery relates to documents regarding the agency agreement, product ranges and commission rates and therefore overlaps very

significantly with some of the categories requested in the 2010 Proceedings. The defendants discovered 53 documents in the affidavit of discovery in these proceedings responsive to that category. These documents date from September 1992 when the very first version of the agency arrangements were entered into between the parties. This extended time period resulted in 12 additional documents being produced by way of discovery in these proceedings than had been discovered in the 2010 Proceedings. From March 2005 the same documents are discovered in these proceedings and in the 2010 Proceedings (copies of which have already been made available to the plaintiff).

63. Therefore, in practical terms, I believe the plaintiff had all the documents he needed for the purposes of briefing experts on the financial implications of any changes to the agency agreement since 2005 or any compensation that might be payable post termination of the agency agreement in 2010. The fact that the plaintiff appears to have briefed experts readily illustrates that he had the material needed to do so. I do not accept therefore that the non-production of these additional documents is a meaningful justification for the delay on the plaintiff's part in advancing these proceedings. I accept that the plaintiff was entitled to rely upon the terms of the letter he received from the defendants dated 15 May 2017 where the defendants confirmed that they would "*proceed to collate*" the discovery documents. This letter would in my view justify the plaintiff failing to bring a motion to inspect for a period of time on the assumption that the defendants would in fact do what they had stated. This might have justified a delay from May 2017 to a later period in 2017 but not beyond that date. For the reasons set out I do not believe that the failure to produce the discovery documents justified any further period of delay by the plaintiff.

(ii) The defendants failed to advance its own discovery request and did not advance its dismissal motion promptly

64. The plaintiff argued that the defendants failed to advance their own discovery request and indeed have still not agreed the final terms despite proposals by the plaintiff on the categories of discovery that it would agree. The plaintiff also pointed to the period of time it took the defendants to issue their motion for dismissal in this case and, in particular, how close to the hearing date for the case management motion that dismissal motion was brought.

65. I agree with the comments of Costello J in *Doyle* were she states at paragraph 70 of her judgment "*[a]s regards the rather audacious argument that in failing to issue a motion to dismiss for delay at an earlier point in time that, when the defendant does issue such a motion, the relief should be refused because the defendant also delayed, in his case, in seeking to dismiss the proceedings, is not one which I find persuasive or attractive*". I do not accept in this case that any delay in the timing of issuing the defendants' motion affords the plaintiff an excuse for the inordinate delay which occurred in the conduct of these proceedings. Nor do I believe that the defendants' delay in agreeing the discovery they were seeking justifies the delay in this case by the plaintiff.

(iii) The parties were engaged for a period in 'without prejudice' discussions

66. In *Millerick* the Court discounted the fact of 'without prejudice' negotiations to justify the delay although it should be noted that these related to negotiations in *other* proceedings.

67. In *Killeen v. O'Sullivan* [2022] IEHC 625, Simons J considered the plaintiff's attempt to justify the delay in that case by reference to efforts between the parties to compromise the proceedings. At para 28 of his judgment, Simons J noted that "*it is inappropriate for the plaintiff to make reference to 'without prejudice' discussions between the parties to the litigation. There is a public interest in the amicable resolution of legal proceedings,*

and, for this reason, the court will not allow a party to refer to 'without prejudice' negotiations lest it discourage other litigants from engaging in such negotiations. It should also be noted that the settlement negotiations referred to by the plaintiff took place as long ago as 2013 and 2017. There can be no question, therefore, of the plaintiff relying on the existence of ongoing negotiations as a reason for not progressing his proceedings in the following years".

68. In *Doyle* the plaintiff referenced settlement negotiations as part of the justification for the delay by him in advancing proceedings. Costello J at paragraph 66 of her judgment agreed that the defendant's solicitor had correctly objected to a reference to those negotiations at all, not having waived his entitlement to have those negotiations withheld from the court. The negotiations in that case amounted to one telephone call in May 2020 and three letters in June 2020 and there were no negotiations thereafter. In the circumstances Costello J agreed with the trial judge's conclusion that "*they could not excuse a further delay until 17 February 2021 progressing the proceedings*".

69. The 'without prejudice' engagement sought to be relied on by the plaintiff in the present proceedings is of a similar extent to that which occurred in *Doyle*. At best, it might justify the delay in December 2019 and January 2020 but not beyond that period. As a general proposition I believe that there may be instances where the fact of 'without prejudice' engagement could explain a period of delay – however such a position should generally be agreed between the parties, for example, when a mediation takes place. Limited 'without prejudice' engagement will generally not excuse inactivity beyond any standstill period agreed between the parties.

(iv) Several Notices to Proceed were served throughout the period

70. Counsel for the defendant in the present case submitted that the service of a notice of intention to proceed ought not to be considered by this court as relevant to the assessment of delay. In that regard I agree with Costello J in *Doyle* where at paragraph 68 of her judgment she found a basis to excuse delay for the one month notice period as prescribed by Order 122, rule 11 following the issue of the relevant notice of intention to proceed. Once the relevant one-month period has expired following service of a notice of intention to proceed there is no impediment to a plaintiff taking further steps in the proceedings. Therefore, delay beyond that period must be reckoned by a court in its overall assessment of the periods of delay. While there were several notices of intention to proceed served in this case these would not excuse any delay beyond the period of one month following their service.

(v) The proceedings were relatively complex and the plaintiff took time to brief experts and senior counsel for an advice on proofs.

71. In *Millerick* the Court of Appeal applied the *Primor* Principles and upheld the High Court decision to dismiss the proceedings noting that a claim in respect of a road traffic accident is relatively straightforward and ought to have been advanced in relatively short order.

72. In considering the specific circumstances arising in *Millerick*, Irvine J referred to, the straightforward nature of the proceedings and the fact that there was no indication of anything troublesome from an evidential perspective which might justify the delay. She also noted that the proceedings had issued very close to the expiry of the statutory limitation period where it was recognised there was a special obligation of expedition on a plaintiff to move matters forward once proceedings were commenced. In the present case the proceedings are not so straightforward. Involving as they do a claim under the

Commercial Agents Directive there will be a need for expert financial evidence of loss as well as factual evidence. The proceedings issued very promptly in the present case and were progressed to close of pleadings promptly. These factors distinguish this case from *Millerick.*

73. I accept there is some validity in the plaintiff's argument that the close of pleadings is not the end of litigation and that this often marks the start of the next stage of trial preparation which does not involve "formal" steps in the same way as the delivery of pleadings are formal steps. In assessing the overall delay a court should consider what additional trial preparation is necessary for parties to engage in following the close of pleadings and how that preparation has been advanced.

74. In *Cave,* Collins J held at para 41 of his judgment that the need to obtain an advice on proofs partly excused a particular period of delay. An advice on proofs was obtained in the present case and I accept that this would have taken some time. This may excuse some of the delay in 2021 (noting that the advice on proofs was received in July 2021) but it does not justify or explain all the delay in that year.

75. Therefore this reason may excuse some delay in 2017 when experts are said to have been engaged and it may also excuse some delay in 2021 when an advice on proofs was being sought and obtained. The impact overall however is confined to excusing delay during those periods only.

76. While there was a general reference to the covid pandemic in legal submissions, this was in effect an argument advanced by counsel on behalf of the plaintiff which was not grounded in any evidence. No evidence was proffered as to any specific impact of the pandemic on the advancement of the proceedings by the plaintiff. It is notable that throughout the pandemic the courts remained open and it was possible for parties in

proceedings of this nature to issue motions had they wished to do so. I do not find any evidence to justify delay on the plaintiff's part arising from the covid pandemic.

77. In all the circumstances, there remain unexplained and therefore inexcusable periods of inordinate delay – particularly from July 2012 to December 2013; from February 2016 to May 2017 and for 2018 up until November 2019. Between December 2013 and February 2016 there was a slow rate of progress of the proceedings and this appears to also have occurred between February 2020 and November 2021.

3. Does the balance of justice warrant the dismissal of this claim?

78. The parties were particularly at odds on the question of the balance of justice in this case.

79. The defendants argued that the inordinate and inexcusable delay on the part of the plaintiff has left the defendants in a situation whereby they would be reliant on the evidence of the plaintiff as well as their own witnesses whose recollection may well have faded and as such there is both real and possible prejudice to the defendants in obtaining a fair hearing should the proceedings continue.

80. The defendants stress that these proceedings relate to events which occurred between 2005 and 2010 and indeed they argue that the earlier period back to 1992 is also relevant. The defendants say that the trial of this action will centre on oral as well as documentary evidence in relation to the 1992 agency agreement and the 2005 agency agreement where the variances to those agreements were often oral in nature.. Because the outcome of the proceedings could turn on this oral evidence and the recollection of witnesses in respect of events that occurred as far back as 30 years ago (and certainly back 12 years ago) they say that they will be faced with an evidential difficulty that will impair their right to a fair trial.

81. The defendants say that there is no default of pleading or culpable delay of their part- although they acknowledge that the discovery documentation in these proceedings has not been provided by them to the plaintiff.

82. The defendants also stress that these proceedings are some way from a hearing date and therefore there will inevitably be a further period of delay before trial. This situation contrasts, for example, with the position in *Cave* where a hearing date had already been allocated to the proceedings by the time the dismissal motion in that case was considered by the court. While there is a motion for directions before this court to expedite the conclusion of outstanding matters, I accept that there will be a further period of time before a trial date will be obtained if the proceedings are permitted to continue.

83. The plaintiff states that it has been clear from November 2019 that they have consistently sought to progress this matter to hearing and that the defendants were aware of this but failed to respond to correspondence in a timely fashion or cooperate in having this matter progressed to trial. The plaintiff says that the defendants have made a generic claim of unfairness but in fact have not identified any particular prejudice or unfairness or witness difficulty nor evidence of any other type of prejudice, such as reputational damage. There is no suggestion that key witnesses are unavailable or that material evidence has been lost or destroyed. The plaintiff says that while the agency relationship dates back to 1991, this dispute relates to events taking place between the conclusion of an amended agreement in April 2005 and its termination in 2010. They say the defendants had ample opportunity to gather in and marshal the evidence they required to mount a defence given that the proceedings were in the first instance issued in a timely manner. They say this evidence is available and is largely documentary. Insofar as there will be a need for oral evidence the witnesses in each case will be greatly facilitated by the contemporaneous documentary material that exists.

84. The plaintiff argues that these proceedings require expert evidence in relation to losses. They say this evidence is an important part of the overall evidence which will be given at the trial of the action. Because it is largely based on documents, the plaintiff says this evidence is not impacted by any delays to date and that the defendants' expert will be able to engage with the evidence regardless of the passage of time. If there are difficulties with recollection or oral testimony, it is the plaintiff, who bears the burden of proof in this case and he can be robustly cross-examined on his evidence.

85. Counsel for the plaintiff also argued that the plaintiff is seeking remedies under the Commercial Agents Directive in circumstances where he worked as an agent of the defendants for a period of almost 20 years. During that period the plaintiff employed all his efforts towards the defendants' business. The defendants benefited financially as a result of the plaintiff's efforts in building up the defendants' business during that time. There is no suggestion that any other remedy will be available to the plaintiff if these proceedings are now struck out for want of prosecution.

86. The plaintiff also states that the defendants have not themselves progressed matters in a timely manner.

87. The arguments raised in this case frequently feature in other cases where the courts have had to consider the balance of justice. I believe that the primary consideration in every case relates to the level of prejudice that the respective parties would suffer if the matter was or was not dismissed.

88. In assessing the issue of prejudice, different considerations may apply to cases which will largely involve documentary evidence and those in which greater reliance will be placed on the oral evidence of witnesses. If a defendant can establish that key witnesses have died or that their evidence is otherwise unavailable due to the passage of time, this

is a factor which will tilt the balance towards the defendant who says that he will be unable to secure a fair trial in those circumstances. At para 105 of his judgment in *Gibbons* Barniville J rejected as unhelpful the submission that there should be a distinction between expert evidence cases and document cases on the one hand and other cases. He held that it was preferable to consider on the facts of each case the nature of the prejudice asserted by the defendant and to weigh that prejudice as part of the overall assessment of where the balance of justice lies in any given case.

89. Even where there is no specific witness prejudice identified (as in this case), as a general proposition a person's ability to recollect facts accurately becomes less reliable with the passage of time. As noted by Irvine J at para 62 in *Gorman v The Minister for Justice, Equality and Law Reform* [2015] IECA 41 "*regardless of the integrity of witnesses, it is an undeniable fact that the greater the lapse of time between the event in question and the hearing of the claim the more fragile and unreliable the evidence becomes*".

90. In *Doyle*, Costello J was satisfied that the defendant had met the relevant threshold based on general prejudice arising from the passage of time. She noted that the trial would require oral evidence from both parties given the plaintiff's case that the syndicate agreement at issue did not comprise the entire agreement reached between the parties in May 2008. In that case the parties would be required to give their evidence in respect of events which had occurred 14 years previously. There are therefore some similarities with the present case. Costello J confirmed at paragraph 74 that

> "*the quality of the evidence for both parties will be impacted with the increased risk to the fairness of the trial. While I accept that the requirement is that there be a fair trial-not a perfect one- the threshold of prejudice which the defendant is required to pass is that of moderate or marginal prejudice. This has been met in this case in my judgment*."

91. In *Doyle* the defendant, in confirming that oral evidence would be required from both parties, accepted that he was relying upon a general prejudice, as no active steps had been taken to identify any other possible witnesses and his prejudice was therefore based upon anticipated problems rather than identified ones. It was accepted by the defendant in that case that expert evidence is not quite so dependent on memory as other types of evidence.

92. In the most recent Court of Appeal authority in *Cave,* Collins J said at para 36 of his judgment:

> "*The suggestion that a defendant might succeed in having a claim against them dismissed in the absence of evidence of prejudice is a far-reaching one which raises significant issues that are perhaps best explored in a case where the point is actually pressed in argument. However, it would appear to represent a significant development of (or, perhaps more correctly, departure from) existing jurisprudence, in which, as already discussed, the issue of prejudice has been acknowledged to be central. In addition, any suggestion that proceedings might be dismissed in the absence of prejudice to the defendant would appear difficult to reconcile with the consistent emphasis in the authorities that the jurisdiction is not punitive or disciplinary in character*".

93. The Court in *Millerick* noted the availability to the plaintiff of a potential alternative remedy against the MIBI and said that the availability of same "*is something that may be factored into the Court's consideration as to where the balance of justice lies*" (at para 29, per Irvine J). Similiarly, Simons J noted in *Killeen* at para 42 of his judgment that the court can and should take into account the fact that the plaintiff "*may have an alternative means of enforcing his rights*".

The decision of this court.

94. In all the circumstances of this case I believe that the balance of justice favours allowing the plaintiff's claim to proceed, mindful of the comments of Collins J in *Cave* at para 37 that "*the dismissal of a claim is, and should be seen as, an option of last resort*".

95. In reaching this view I have had regard to the following factors in particular:

(1) While I have found that there were periods of inordinate and inexcusable delay, the proceedings were initially prosecuted promptly through to the close of pleadings. The plaintiff kept some momentum throughout the overall period and in more recent times he has displayed a clear intention and has taken active steps to prosecute the claim to trial.

(2) The defendants have failed to make out any particular prejudice arising from the periods of delay. There is no evidence, for example, that any relevant witnesses are unavailable or that the delay has resulted in the loss of documentary evidence which would otherwise have been available to the defendants. On the contrary, the evidence is that all available documentary evidence has already been gathered and discovered by the defendants. This is not a case where evidential issues arise such as in *Gibbons* where Barniville J noted (at para 118 of his judgment) the need to review design and construction records dating back almost 16 years, the likely changes in the topography of the area in the period since construction or the need to consider alternative sources and causes of the flooding the subject of those proceedings.

(3) Neither have the defendants established any other type of prejudice such as was evident in *Gibbons* (where the defendant had no ongoing purpose and had not traded for several years but was unable to be wound up because of the ongoing litigation).

(4) The agency arrangements in this case arise from agreements that were documented. There are a limited number of key documents which will assist and support any evidence which may be required to be given by witnesses through oral evidence. The plaintiff will be open to cross-examination on the reliability of any testimony he gives, particularly oral testimony that relates to a historic period.

(5) There was some contribution to or acquiescence by the defendants in the overall delay in this case - although I accept that the primary obligation is on a plaintiff to advance his own claim. In *Doyle* the defendant's solicitors complained in writing in 2018 (3 years prior to issuing their dismissal motion) regarding the prejudice to their client due to the delay on the plaintiff's part in progressing the proceedings. No such correspondence issued in these proceedings at any time prior to the issue of the within motion seeking dismissal on 6 October 2022

(6) The plaintiff in this case may have no other remedy available to him if these proceedings are dismissed against him.

(7) The nature of the plaintiff's claim is also in my view of some relevance. The plaintiff appears to have been a sales representative for the defendants' predecessors since 1976 before he became an agent in 1992 and he worked in that capacity until 2010. The vast amount of the plaintiff's working life has been tied up in some way with the defendants or their predecessors. The defendants have had the benefit of the plaintiff's work. The balance of justice appears to me to favour permitting the plaintiff to continue this action to allow him to test his claim for compensation under the Commercial Agents Directive arising from that agency.

96. However, it must be a condition of permitting this action to continue that the matter now be pursued with particular urgency. If further delays arise and additional prejudice results

for the defendants then they would be free to revisit a strike out application as a result of those further delays. With the objective of ensuring as quick a route to trial as possible I have retained seisin of the plaintiff's motion for case management/directions and I will list this motion for hearing on Tuesday 14 February at 10 am. I will also deal with any further orders as to costs or otherwise that are required to be made at that time.