

**THE HIGH COURT**

[2022] IEHC 300  
[2011 No. 9435P.]

**BETWEEN**

**STEPHEN MCCANN**

**PLAINTIFF**

**AND**

**MICHAEL SMURFIT**

**DEFENDANT**

**JUDGMENT of Mr. Justice Allen delivered on the 20th day of May, 2022**

**Introduction**

1. This is a motion on behalf of the defendant for an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay in the prosecution of the action.
2. By his action, which was commenced by plenary summons issued on 20th October, 2011, the plaintiff claims declarations that pursuant to an agreement made with the defendant in or about July, 2008 he was the beneficial owner of 10% of the share capital of Pony Express Limited; that he is entitled to 10% of the net proceeds of sale of Pony Express Limited; that the defendant holds the equivalent of 10% of the proceeds of sale of Pony Express Limited in trust for the benefit of the plaintiff; damages for breach of contract, negligence and breach of duty; and an account of all sums due by the defendant to the plaintiff in respect of the sale of Pony Express Limited.
3. The pleadings were closed in June, 2013.
4. The relevant chronology is as follows:

20th October, 2011	Plenary summons
26th October, 2011	Appearance
22nd February, 2012	Statement of claim
19th September, 2012	Motion for judgment in default of defence
30th November, 2012	Notice for particulars
25th March, 2013	Replies to particulars
24th June, 2013	Motion for judgment in default of defence
25th June, 2013	Defence
30th April, 2018	Notice of change of plaintiff's solicitor
3rd January, 2020	Notice of intention to proceed

28th February, 2020	Notice of change of defendant's solicitor
24th November, 2020	Motion to amend statement of claim
22nd March, 2021	Order permitting amendment of statement of claim
11th June, 2021	Motion to dismiss for delay

**The history of the proceedings**

5. The plaintiff's claim, as set out in the statement of claim as originally delivered, is reasonably straightforward. The plaintiff was, he says, in July, 2008, the general manager of Pony Express Limited, a company in which the defendant was a shareholder. His case is that when he indicated that he was going to leave the company to join a competitor and in order to induce him to remain, the defendant agreed, in addition to a pay increase, to provide him with the equivalent of 10% of the value of the company and a 10% share of the annual profits of the company, to be paid on the sale of the company. The plaintiff claims that the company was sold in July, 2009 for a consideration unknown to him, whereupon he became entitled to his share of the company and profits: which despite numerous demands the defendant has failed and refused to pay.
6. The defence, which was eventually delivered on 25th June, 2013, is more than a mere traverse. It is admitted that the plaintiff was, in July, 2008, employed by Pony Express Limited: but as operations manager rather than general manager. It is admitted that the plaintiff indicated to the defendant at some stage that he was considering leaving his employment with the company but it is denied that he indicated that he was joining a competitor and it is denied that the defendant agreed to provide him with a pay increase or the equivalent of 10% of the value of the company or a 10% share of the annual profits.
7. The defence goes on to plead that although the plaintiff remained in the employment of the company after it was sold in or around July, 2009 he did not take issue with the sale or make any claim in respect of it until February, 2010.
8. The defence pleads that "the plaintiff has continuously erred in his description of the alleged agreement" and points to six allegedly different iterations of the claim.
9. In a text message sent to the defendant on 25th February, 2010 the plaintiff asserted that he was entitled to "10% ... in the event of the business being sold." In a letter of 22nd June, 2010 referred to in the replies to particulars – which letter was allegedly sent by the plaintiff to the defendant but receipt of which the defendant denied – the claim made was that the defendant "gave [the plaintiff] 10% share in Pony Express and told [the plaintiff that he] would be entitled to 10% of the sale price of Pony Express in the event of the business being sold." That reference to 10% of the sale price, it is said, can only mean 10% of the gross sale proceeds. In a letter from the plaintiff's solicitors to the defendant's solicitors of 22nd November, 2010 the claim was said to be for "10 percent share of the sale proceeds of that business." In a later solicitor's letter of 11th February,

2011 the claim made was for "10% of the sale price ... and 10% of the annualised profits". In the general indorsement of claim the plaintiff claimed a declaration that he was "the beneficial owner of 10% of the share capital of" the company and that he was "entitled to 10% of the net proceeds of sale" of the company. And in the statement of claim the plaintiff – it is said – referred for the first time to a pay increase and made a claim in respect of "the equivalent of 10% of the value of the company."

10. The defence goes on to plead that the defendant would not in any event have had authority to enter the alleged agreement as there was another shareholder in the company.
11. An unusual feature of this case is that after the case was revived on 3rd January, 2020 and before the motion now before the court was issued on 11th June, 2021, the statement of claim was amended by leave of the court by order made on 22nd March, 2021.
12. The correspondence as exhibited on the motion is rather jumbled and I am not sure that I have all of it but I am satisfied that I have enough of it to get a clear picture of what was going on.
13. The notice of intention to proceed was served by the plaintiff's new solicitors, Century Law, under cover of a letter of 3rd January, 2020 on the solicitors then on record for the defendant, Doherty Ryan & Associates. At the same time Century Law sent to the defendant's then solicitors a copy of a form of draft amended statement of claim. It was said that the plaintiff proposed to amend his statement of claim in the terms of the enclosed draft "in the interests of clarity" and the defendant's then solicitors were asked whether there was consent to the proposed amendments.
14. The plaintiff's solicitor's correspondence was passed by Doherty Ryan & Associates, solicitors, to the defendant's current solicitors, Eoghan P. Clear, who, by letter dated 23rd January, 2020 wrote that they understood that they were to be instructed in the matter and were dealing with the formalities of client engagement and asked for time to do so. On 14th February, 2020 Eoghan P. Clear wrote to Century Law that the papers which they had received from the defendant's previous solicitors were incomplete and asked for copies of various documents. Formal notice of change of solicitor on behalf of the defendant was served on 28th February, 2020.
15. By letter dated 11th August, 2020 the defendant's solicitors, referring to "recent correspondence" indicated that the defendant was not consenting to the proposed amendment of the statement of claim, particularly in circumstances where – it was said – part of the proposed amendments sought to introduce a new cause of action which was statute barred.
16. On 24th November, 2020 a motion was issued on behalf of the plaintiff seeking leave to amend the statement of claim. I pause here to say that the defendant's solicitor's criticism that the plaintiff delayed for nine months between 3rd January, 2020, when he

gave notice of intention to proceed, and 24th November, 2020 when he issued his motion to amend (apart from being arithmetically incorrect) appears to me to be unfair. The defendant's new solicitors asked for time to take instructions and were afforded time. It was not until 11th August, 2020 that they finally replied to the plaintiff's solicitor's letter of 3rd January, 2020. Moreover, it appears that the defendant's solicitors thereafter took upwards of three months to address the motion to amend.

17. The plaintiff's motion for leave to amend was initially returnable for 15th March, 2021. On 5th March, 2021 the defendant's solicitor wrote to the plaintiff's solicitor. She asserted that the proceedings had been grossly delayed by the plaintiff; that it was then thirteen years since the date of accrual of the alleged cause of action on foot of an alleged oral agreement; and that ten years had elapsed since the summons had issued and eight years since the defence had been delivered. She suggested that the plaintiff wished to engage in a swearing match which would not be heard until at least fifteen years after the alleged events. The plaintiff was called upon to withdraw or discontinue the action within seven days, failing which an application would be made to strike it out for want of prosecution and inordinate and inexcusable delay.
18. When, by letter dated 11th March, 2021 the plaintiff's solicitor confirmed that the plaintiff would not be withdrawing the action, the defendant's solicitor swore an affidavit on the motion to amend, seeking liberty to issue a motion to dismiss returnable for 15th March, 2021. The affidavit showed that the defendant was prepared to acquiesce in the proposed amendments, save that which it was said would introduce a new cause of action. The draft proposed amended statement of claim was revised to delete so much as the defendant took objection to and on 22nd March, 2021 an order was made by the High Court (Twomey J.), by consent, giving leave to the plaintiff to amend his statement of claim in the terms of the revised draft annexed to the order and giving leave to the defendant to bring a motion to dismiss the claim returnable for 28th June, 2021.
19. The order of Twomey J. directed the defendant to deliver his amended defence in accordance with the Rules of the Superior Courts, the time to run from the delivery of the amended statement of claim. It appears, however, that the plaintiff did not deliver the amended statement of claim. The defendant certainly did not deliver any form of amended defence but by letter dated 7th May, 2021 the plaintiff's solicitor made a request for voluntary discovery and – the defendant's solicitor having taken the position that the motion to dismiss should be dealt with before any question of discovery – followed up promptly by a motion for discovery issued on 1st June, 2021.
20. The permitted amendments of the statement of claim were not insignificant. The alleged promise of "a pay increase and the equivalent of 10% of the value of the company and a 10% share of the annual profits of the company to be paid on the sale of the company" was replaced with an alleged promise of "(a) a ten percent (10%) shareholding in the company (and, by implicit extension, ten percent (10%) of the net proceeds of sale in the event of the company being sold, (b) that the plaintiff would receive ten percent (10%) of the company's annual dividends; (c) that the plaintiff would receive a wage increase, and

(d) that the plaintiff would receive a company vehicle of the plaintiff's choosing."

According to the amended statement of claim, in or about August, 2008, pursuant to the agreement, the plaintiff obtained a 2007 Range Rover but approximately ten weeks later the defendant, in breach of the agreement, instructed the plaintiff to return the vehicle to obtain a less expensive alternative vehicle.

21. I pause here to observe that the claim in relation to the car appears to me to have been a new claim which somehow survived the defendant's objection to any amendment which would add a new cause of action.

**The evidence on the motion**

22. The defendant's motion is grounded on the affidavit of his present solicitor, Ms. Valerie Markey of Eoghan P. Clear, solicitors, who – it will have been seen from the chronology – first came on record on 28th February, 2020 after notice of intention to proceed had been served by the plaintiff's new solicitor on 3rd January, 2020. Ms. Markey suggests that there has been gross delay on the part of the plaintiff which renders it impossible for a fair trial of the dispute. She suggests that the plaintiff has provided various iterations of the alleged oral agreement. She asserts that from 25th June, 2013, when the defence was delivered, there was no contact from the plaintiff or his legal representatives for a period of almost seven years.
23. Having previously outlined the chronology of the litigation, Ms. Markey pointed to the lapse of time between the date of the alleged agreement and the date of issue of the summons, and then to the intervals between each of the steps taken until the defence was delivered. The time taken by the plaintiff for each of the steps which he took is characterised as "delay". The time taken by the defendant for each of the steps he took is "accepted". I am not going to dwell on this. If the statement of claim and the replies to particulars might have been delivered sooner than they were, I find that the responsibility for most of the delay between the issue of the summons and the delivery of the defence rests with the defendant.
24. What happened – or did not happen – thereafter is another day's work. The objective fact of the matter is that as far as the defendant could see nothing happened in the six and a half years after the defence was delivered until notice of intention to proceed was given on 3rd January, 2020. I have already outlined what happened between then and the order giving leave to amend the statement of claim, and between then and the issue of the motion now before the court.
25. I have already dealt with the defendant's criticism of the alleged delay in issuing the motion to amend. It was not culpable delay and it would, in any event, have been cancelled out by the defendant's delay between the time his new solicitors came on record on 28th February, 2020 and the time they wrote their warning letter on 5th March, 2021. Adding up all of the alleged periods of delay, Ms. Markey calculates a combined period of culpable and unexplained delay on the part of the plaintiff of 97 months. In my view the relevant period is just short of 80 months. If the unexplained delay is

significantly less than is asserted on behalf of the defendant, it is nevertheless a very long time.

26. As to prejudice and the risk of injustice to the defendant, Ms. Markey suggests that the prejudice that would be suffered by the defendant in defending the claim is that the plaintiff has sought to amend "an already historical, unsubstantiated and continually altered claim." She suggests that there is no documentary evidence of the alleged oral agreement and that the case could only proceed on the basis of oral testimony alone. She suggests that there is an inherent unfairness and an increased possibility of injustice in the reliance on the testimony of witnesses after such a considerable period of time has elapsed. She asserts that the delay has given rise to actual and specific prejudice and points to the several iterations of the alleged agreement, most recently in the draft amended statement of claim of 22nd March, 2021.
27. The first affidavit filed on behalf of the plaintiff in response to the motion was sworn on his behalf by his solicitor, Mr. Seán Foley.
28. Mr. Foley started – not unreasonably – by pointing to the fact that it took two motions for judgment before the defendant delivered his defence. He contested the suggestion of pre-commencement delay but acknowledged that the relevant time period commenced at the date of the alleged wrongful acts and continued until the anticipated date of trial. Mr. Foley suggested, without giving any detail, that before issuing his plenary summons the plaintiff "attempted to negotiate with the defendant through numerous telephone calls, meetings and correspondence."
29. Mr. Foley suggested that the first period of delay – up to the delivery of the defence – should not be taken to be inordinate or, if it was, that it was excusable.
30. As to the second period of delay – between the delivery of the defence and the service of the notice of intention to proceed – said to have been "floridly described ... as 'a period of almost seven years'", Mr. Foley deposed that this "is not an accurate picture of events as the plaintiff did rely and in no way ever prevented his previous solicitors from progressing the proceedings and was entitled therefore to believe his solicitor when he was informed by them that matters were in hand." He – that is Mr. Foley – asserted that the plaintiff was not personally responsible for the inaction of his solicitors and only later learning that no further or additional progress had been made by his previous legal advisors, he took action by promptly engaging his present solicitors, that is, Mr. Foley. It was not contested that the delay in this second period had been inordinate but it was contested that it was inexcusable. It was urged that the extent of a litigant's personal blameworthiness was a factor to be taken into consideration. Mr. Foley deposed that it was clear that the plaintiff was not personally culpable but that the fault lay vicariously at the door of his legal advisors.
31. Mr. Foley pointed to the fact that in the time between the delivery of the defence and the service of notice of intention to proceed the defendant had not moved to have the action dismissed and he pointed to the defendant's solicitor's letter of 11th August, 2020

(refusing consent to the proposed amendment of the statement of claim) as a positive step from which – he contended – the plaintiff was entitled to reasonably infer that the defendant remained willing to meet the case on its merits. Mr. Foley suggested that the “dilatatory conduct” on the part of the defendant’s solicitors in responding to the request for consent to the proposed amendment was such as to induce the plaintiff to incur further expense and that it gave rise to further delay. He emphasised that there was no complaint of delay in the defendant’s solicitor’s letter of 11th August, 2020 and that first threat of an application to dismiss the action for delay was made by their letter of 5th March, 2021. All of this, it was suggested, showed a consistent degree of acquiescence and that the court must inevitably conclude that the motion should fail.

32. Mr. Foley correctly recognised that the corner stone of the application to dismiss was the fact that the resolution of the dispute would turn on oral evidence but suggested that the object of the motion for discovery which had been filed on behalf of the plaintiff was “to obtain further and additional documentary evidence all of which I further say should be available and within the defendant’s power, possession and procurement.” He went on to suggest that the defendant’s argument that the case would turn on oral evidence ignored the plaintiff’s assertions in the statement of claim and replies to particulars in relation to additional pay and a new car and the transcriptions of text messages. Mr. Foley observed that the parties were alive and in good health and that there was no evidence that the defendant’s recollection of the alleged events might not be as clear as it would have been if there had been no delay. He asserted – without identifying what it was – that there is very solid evidence of written records which the plaintiff has to hand and further and additional records which were anticipated from the plaintiff’s motion for discovery.
33. The plaintiff’s solicitor asserted that there was no serious risk of injustice and that the proceedings were far advanced and ready for trial.
34. Mr. Foley’s affidavit ran to twelve pages. It contained a good deal of argument and repetition. While I think that it is fair to say that the thrust of the case made was that the defendant had not demonstrated a serious risk of an unfair trial, about a page of the affidavit was devoted to the period between the delivery of the defence and the service of notice of intention to proceed. If there was not much meat on the argument, the bones of it were that the plaintiff had been let down by his former solicitors. The suggestion was that the plaintiff was unaware of the inaction in his case, relied on his former solicitors, and on learning of the lack of progress promptly engaged his current solicitors.
35. On 21st September, 2021 a supplemental affidavit of the plaintiff himself was filed in opposition to the motion. From this, and from the documents exhibited by the plaintiff, a rather different picture emerged.
36. The plaintiff’s declared purpose in swearing his affidavit was to respond, in particular, to the defendant’s complaint that there had been no contact from the plaintiff or his solicitors between 25th June, 2013 and 3rd January, 2020 and that he had, in that period, been guilty of culpable delay.

37. The solicitors who initially acted on behalf of the plaintiff were Donal M. Gahan, Ritchie & Co. The plaintiff, having dealt briefly with the time between the date of the alleged agreement and the delivery of the defence, deposed that:- "In or about July, 2013 it appeared to me that I had not received any update from Mr. Ritchie solicitor only initial assurances that 'all was in hand' and I say that at this time I was reasonably entitled to accept that assurance. Unfortunately, as more and more time passed without any update to my queries or evidential documentary proof to back up their assurances on the progress of this matter, I was forced to adopt a more aggressive manner which involved for a period of eight months repeated telephone calls, leaving messages urging and reminding Mr. Ritchie to contact me but all of my attempts were largely ignored and disregarded." He went on to say that in or about July, 2014 he engaged Gary Irwin solicitors to assist him with both continuing with the proceedings and getting a copy of his file – which he says he got very promptly after he informed Mr. Ritchie of his intention to report the matter to the Law Society of Ireland.
38. The plaintiff deposed that there was "a litany of correspondence" in relation to the release of his file to Gary Irwin, solicitors. He exhibited three e-mails: the first sent to him on 2nd July, 2014 by Ms. Niamh Kelly of Gary Irwin, attaching a letter from Mr. Ritchie; the second his response to Ms. Kelly sent on 16th July, 2014; and the third sent by him on 16th October, 2014 to Mr. Ritchie.
39. The plaintiff's e-mail of 16th July, 2014 shows that he had been asked to pay, and had promised to pay, to Donal M. Gahan, Ritchie & Co. some fees on account of this litigation and other fees in respect of work previously done on another matter. The e-mail shows that the plaintiff was calling to Mr. Ritchie's office without an appointment; that he contested the time that was said to have been spent on his file; and that he was dissatisfied with the fee estimate he had been given if his then solicitors were to progress the case for him. In his e-mail of 16th July, 2014 the plaintiff asked Ms. Kelly to relay to Mr. Ritchie a promise to make two payments within 14 days. The e-mail of 16th October, 2014 shows that the plaintiff was then asking Mr. Ritchie for a bill, to include counsel's fees, but does not suggest that the promised payments had been made. What it does show is that Mr. Ritchie had previously sent the original pleadings to "Gary", presumably Mr. Irwin.
40. The precise detail is unimportant. The e-mails clearly show that the impediment to progress in July, 2014 was that the plaintiff would not or could not pay his fees and that the plaintiff was well aware of this at the time. They give the lie to the suggestion in the affidavit of Mr. Foley filed on this motion that the plaintiff was misled by his solicitors that the litigation was being progressed. They also clearly show that whatever impediment there may have been to progress after October, 2014 it was not the plaintiff's original solicitors.
41. The suggestion in Mr. Foley's affidavit that when the plaintiff learned of the lack of progress with his case he promptly engaged his present solicitor is also at variance with the plaintiff's own affidavit, as well as the exhibits.



42. The plaintiff deposed that while Mr. Irwin agreed to act as his solicitor he did not file notice of change of solicitor because, he says, Mr. Irwin's office already had a heavy workload. He exhibited a letter from Gary Irwin of 9th February, 2015 enclosing the pleadings and a bill of costs and advising him that the file was ready for collection at any time.
43. The plaintiff suggests that the involvement, such as it was, of Gary Irwin, delayed his case for approximately another year. This is demonstrably wrong. Whatever Mr. Irwin's office did or did not agree to do – and I am bound to say that the plaintiff is an unreliable historian – the objective fact of the matter is that he got the file, or at least the pleadings, on 9th October, 2014 and that the file was made ready for collection by him on 9th February, 2015.
44. The plaintiff in his affidavit noted, with respect to his previous solicitors, "for clarification purposes not essentially as a relevant factor" that the limitation period had passed and that he did not have an effective remedy against his erstwhile solicitors for professional negligence: immediately adding: "In this regard the referencing of them does not impune (sic.) any accusations of professional negligence in this interlocutory motion." I am uncertain what this is supposed to mean but it brings to mind Mr. Pope's letter to Dr. Arbuthnot.
45. The plaintiff does not say whether he paid Mr. Irwin's bill or collected his file but he must, at least, have collected his file for his affidavit shows, and a copy letter dated 16th February, 2015 which he has exhibited, confirms, that on 16th February, 2015 he consulted Mr. Cian O'Cathain of Vincent & Beatty, solicitors. On 16th February, 2015 the plaintiff was provided with a letter of engagement and on the following day with a s. 68 letter, that is a letter giving an estimate of fees as required by s. 68 of the Solicitors (Amendment) Act, 1994. On the plaintiff's evidence, his case was laid fully before senior counsel by a case to advise dated 20th February, 2015 and counsel reverted with an advice on proofs on 27th February, 2015. Unsurprisingly, no criticism is made of Mr. O'Cathain or of senior counsel. No explanation is offered as to why Vincent & Beatty were not instructed to serve notice of change of solicitor or to comply with counsel's advice on proofs or why, otherwise, the action was not progressed in 2015.
46. The plaintiff in his affidavit on this motion jumps from 27th February, 2015 to "in or about May, 2018", when he instructed his present solicitor.
47. The plaintiff says that he was asked by his present solicitor to search for and obtain various further and additional papers, which he did. He does not say what papers he was asked to search for or how long it took him to do it. He says that he permitted Mr. Foley to engage senior and junior counsel who were in a position to advise him with respect to amending the statement of claim and seeking discovery, but not when. He says that "immediately on the advice of Mr. Foley and said eminent counsel" he instructed Mr. Foley to file a notice of intention to proceed, which Mr. Foley did on 3rd January, 2020. He did not address the filing and service – or not – of the notice of change of solicitor on 30th April, 2018.

48. The plaintiff asserts that the nineteen months between July, 2013 and 27th February, 2015 is not inordinate and is excusable. He asserts that the cause of the delay was "the laxity of [his] previous solicitors whom [he] did instruct and urge to progress matters". He is so bold as to assert that the averment in the affidavit of Ms. Markey that there was "no positive step" between July, 2013 and 3rd January, 2020 "falsifies the situation and is entirely incorrect".
49. Perhaps it is a matter of perspective or point of view but I find that the averment by Ms. Markey that no positive step was taken between the delivery of the defence and the service of notice of intention to proceed was perfectly justified. If the plaintiff could not afford to pay Mr. Ritchie's fees, he has not said so. If I take the plaintiff's averment that he incurred enormous expense as meaning that he paid his fees, the delay is not explained by an inability to pay fees. Even if he did not pay his fees, I can only take the averment that he incurred enormous expense as meaning that he had no difficulty in securing legal services on credit. Which or whether, whatever was being done to progress the case – and on the plaintiff's account it was not being progressed – there was no sign on the defendant's side that it was being progressed or that the plaintiff intended to progress it.
50. In response to the affidavits filed on behalf of the plaintiff a further affidavit was filed on behalf of the defendant, this time sworn by Ms. Gillian Scully, another solicitor in Clear Solicitors. Mr. Foley, at para. 41 of his affidavit sworn on 6th September, 2021, had referred to and exhibited a form of "reply to defence". The document was marked as "Delivered this [blank] day of [blank] 2019" and was addressed to Doherty, Ryan & Associates. There was a vague suggestion that this might have amounted to a positive step and this rather took on a life of its own. Ms. Scully, by reference to the file which she had taken over and her own file, and having consulted Mr. Ryan, was adamant that no reply had been delivered. She noted that a High Court search showed that notice of change of solicitors had been filed on behalf of the plaintiff in April, 2018 but said that there was no record of service of any such notice on Doherty Ryan's file.
51. The motion was first listed for hearing on 21st January, 2022 but that hearing was aborted when it transpired that the papers which had been put before the court were incomplete. Specifically, the plaintiff's affidavit of 21st September, 2021 had not been included and the defendant's counsel had not seen it. It was then contemplated that a further affidavit might be filed on behalf of the defendant in response to the affidavit of the plaintiff, and Ms. Scully's affidavit was filed on 31st January, 2022.
52. On 4th March, 2022 a second supplemental affidavit of Mr. Seán Foley was filed – without leave – which commenced with a fairly intemperate criticism that Ms. Scully had gone further than had been envisaged and permitted. It was suggested that Ms. Scully was abusing process by giving the evidence which she had as to delivery of the reply which had been exhibited by Mr. Foley in his first affidavit and as to service of the notice of change of solicitor. That was wholly unwarranted. It is true that the reference in Mr. Foley's first affidavit to the delivery of a reply to defence had not been contradicted at the

time of the first hearing but there was no restriction on the scope of any further affidavit. That apart, Ms. Scully's evidence that the reply had not been delivered was ultimately shown to be correct.

53. Mr. Foley in his second replying affidavit did not positively aver that the form of reply referred to in his first affidavit had been delivered, or when, but protested that what he had said in his earlier affidavit had not previously been contradicted.
54. As to service of the notice of change of solicitor, Mr. Foley averred that it had been sent twice to Doherty Ryan on 8th May, 2018 by e-mail, time stamped 11:22 and 11:32 and he exhibited copies of the e-mails. By the way, the Rules of the Superior Courts appear to have first provided for the service of documents by e-mail in 2017, and then only by consent to an identified e-mail address. It is not suggested that there was consent in this case. The e-mails exhibited show that the notice of change of solicitors was sent at 11:32 on 8th May, 2018 to info@dohertyryan.com, that is to Doherty Ryan & Associates, the defendant's solicitors, and at 11:22 to info@dmg.ie, that is, Donal M. Gahan, Ritchie & Co., the solicitors theretofore on record for the plaintiff. It was not, as asserted, sent twice to Doherty Ryan. The covering letters attached to the e-mails suggest that the letters and notice were intended to have been sent by hand or post as well, and Mr. Foley confirmed that they were not.
55. On the hearing of the motion Mr. Foley was not in a position to produce a copy of any letter serving the reply and acknowledged that if it had been served it would have been accompanied by a letter and that he would have had a copy of the letter on his file. It was effectively conceded that the reply had, after all, not been delivered. If it had not been conceded I would have so found.
56. It does appear that the notice of change of solicitor was sent to the general e-mail address of the defendant's solicitors on 8th May, 2018 and did not find its way to their file which had been dormant for coming up to five years and was not followed up for 20 months. The notice of change of solicitors filed on 30th April, 2018 was not validly served. I confidently find that Ms. Markey, although incorrect in her averment that there was no contact from the plaintiff in the period between July, 2013 and 3rd January, 2020, was correct to say that no positive step was taken by the plaintiff in respect of the action in that period.

### **The arguments**

57. Helpful written submissions were filed by both parties. Less helpfully, both sides filed books of dozens of authorities, the vast majority of which were not referred to either in the written submissions or in oral argument. Not for the first time, if a fraction of the industry and energy which has been applied to the motion had been applied to the action, the issue now before the court would never have arisen.
58. The *locus classicus* of the law in relation to the dismissal of proceedings for want of prosecution is *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The principles

summarised in the judgment of Hamilton C.J. are so well known that it is not necessary or useful to set them out.

59. The defendant relies particularly on the judgment of the Court of Appeal in *Granahan T/A CG Roofing and General Builders v. Mercury Engineering* [2015] IECA 58. Irvine J. (as she then was) started by setting out the principles laid down by Primor and continued:-

*"9. There are innumerable other decisions of much more recent vintage which consider these principles and which express disquiet about the courts' heretofore excessive indulgence when dealing with stale claims and which advise of the need for much greater consideration to be given to the courts' own constitutional obligations and compliance with Ireland's obligations under Article 6.1 of the European Convention on Human Rights. An example of this type of approach to delay is to be found in the decision of Hardiman J. in Gilroy v. Flynn [2005] 1 I.R.L.M. 290 where at pp. 293 - 294 he stated as follows:-*

*'[T]he courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. ...[F]ollowing such cases as McMullan v. Ireland [ECHR 422 97/98. 29th July, 2004] and the European Convention on Human Rights Act, 2003, the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.'*

*10. In his judgments in Stephens v. Paul Flynn Ltd. [2005] IEHC 148 and Rodenhuis & Verloop BV v. HDS Energy Ltd. [2011] 1. I.R. 611, the latter decision being one relied on by the High Court judge in reaching his conclusions in the present case, Clarke J. also questioned whether there should be a recalibration of the criteria by reference to which the actions of the parties might be judged. He stated that while the overall test and applicable principles remain the same, the application of those principles might require some tightening up to avoid excessive indulgence. At para. 11 of his judgment he advised as follows:-*

*'It seems to me, therefore, that it is necessary, in a system where the initiative is left largely up to the parties to progress proceedings, for the courts 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 be consistent with compliance with Ireland's obligations under the European Convention on Human Rights.'"*

60. Reference was made also to the judgment of the Court of Appeal in *Flynn v. Minister for Justice* [2017] IECA 178, in which Irvine J. adopted, with one modification, the

restatement of the principles by Barrett J. in the High Court. The defendant places particular reliance on three of the sixteen principles there set out, which are:-

*"(8) In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.*

*(9) Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.*

*(10) All else being equal, persons against whom serious allegations are made that affect their professional standing should not have to wait over a decade before being afforded opportunity to clear their name."*

61. This, it is submitted, is a case of culpable delay. The defendant, it is said, is a well-known businessman whose probity and reliability has been impugned by the allegation that he has failed to honour an agreement. Counsel recalled the observation of O'Flaherty J. in *Primor* that "once delay which is inordinate and inexcusable is established then the matter of prejudice would seem to follow almost inexorably."
62. More because it is a recent example of the application of the well-established principles than because it established anything new, reference was made to the judgment of Meenan J. in *Cabot Financial (Ireland) Limited v. Heffernan* [2021] IEHC 823.
63. The plaintiff submits that the defendant was at all times on notice of the contractual allegations made against him.
64. Leaving aside the fact that the plaintiff's case is that he first asserted an entitlement to a share in the proceeds of sale of the company in February, 2010 seven or eight months after the sale and shortly after he had been made redundant by the purchaser, it seems to me that this cannot be said to be a case in which the defendant was on notice from the outset of the claim which he would have to meet. The deletions from and additions made to the statement of claim show that the case has changed. At the very earliest the defendant was notified of the case he would now have to face when the proposed amended statement of claim was sent to his former solicitors on 3rd January, 2020.
65. As to the alleged delay in commencing the proceedings, the plaintiff submits that there was none and that in any event the action was brought well within time. Pre-commencement delay, it is said, is a factor to which consideration may be given in assessing post-commencement delay. Reference was made to *McBrearty (a.p.u.m.) v. North Western Health Board* [2010] IESC 27.
66. The plaintiff submits that the "post-commencement period" should be looked at in three parts: the first from the date of issue of the summons on 20th October, 2011 until 31st

July, 2013 (which was the date on which the plaintiff's second motion for judgment was struck out); the second from 31st July, 2013 until 30th April, 2018 (when the notice of change of solicitor was filed); and the third from 5th February, 2019 to the present.

67. I accept that there was no culpable delay on the part of the plaintiff between the date of issue of the summons and the date of delivery of the defence. If there may be something to be said for taking the relevant cut-off date as the date on which the motion for judgment was formally disposed of, rather than the date on which the defence was delivered, it is only really tweaking at the edges.
68. I am not persuaded that the date of filing of the notice of change of solicitor is of much significance. It was not validly served and if it had been it would have conveyed only that the plaintiff had instructed new solicitors, not necessarily that he intended to proceed with the action.
69. The plaintiff submits that he was disadvantaged and therefore not personally responsible for the inaction of his legal advisers. I find that this is not made out in fact. What the plaintiff has said in the body of his affidavit is contradicted by the contemporary correspondence which he has exhibited. I see no justification for seeking to blame the plaintiff's previous solicitors.
70. The plaintiff's analysis of the periods of delay airbrushes out the period between 30th April, 2018 and 5th February, 2019.
71. There was some discussion in argument as to the significance of 5th February, 2019. In the plaintiff's written submissions this was referenced as "Delivered replies to particulars". This, it was explained, was a mistake and should have read "Delivered reply". There was reference in Mr. Foley's affidavit to a reply but it was not unambiguously said that the reply had been delivered and the form of reply exhibited was dated only 2019. Ms. Scully was adamant that there was no reply on the file her office took over from Doherty Ryan. Mr. Foley acknowledged that the reply would not have been delivered without a covering letter and that he did not have a copy of any covering letter. The date of 5th February, 2019 in the written submission appears to have been chosen as a date on or about when the reply might have been delivered, if it had been delivered. I confidently find that the form of reply was not delivered. It follows that 5th February, 2019 is of no significance and that no issue arises as to what the defendant could or should or might have done if a reply had been delivered. The existence of the draft reply, however, goes to show that between the time the plaintiff instructed his present solicitors and the service of notice on intention to proceed – unknown to the defendant – some consideration was being given to how the action might be progressed.
72. The plaintiff, focussing on the time after notice of change of solicitor was filed, would have the court afford great weight to the fact that the defendant did not move to have the action dismissed. That was one of the factors identified in *Primor* but the weight that is to be attached to it has since dwindled to the point that it nowadays hardly counts for anything. I do not accept that the e-mail attaching a copy of the notice of change of

solicitor, which was not followed up, should have prompted the defendant's then solicitors to look for their long dormant file, still less to bring a motion to dismiss the action. Incidentally, apart from the suggestion that junior and senior counsel were instructed at some point, there is no real explanation of what, if anything, was happening on the plaintiff's side between the filing of notice of change of solicitor and the service of notice of intention to proceed. At some time in 2018 or early 2019 a form of draft reply was prepared and at some time between then and early 2020 a revised draft statement of claim was prepared. If, as the plaintiff has deposed, the notice of intention to proceed was served "immediately on the advice of Mr. Foley and eminent counsel", there is no explanation for the delay in the giving of that advice.

73. As to prejudice, the plaintiff submits that apart from what is said to be the sweeping generalisation that it is inevitable that memory may diminish over time, there is no evidence of any infirmity of recollection that may prove fatal for the defendant. It is submitted that prejudice by reason of infirmity of recollection is only a possibility which might be a justifiable factor if the nature of the substantive proceedings was more complex and raised multiple issues. It is submitted that while this may not be a pure documents case it is a documents case. It is submitted that the plaintiff's case is supported by contemporaneous documents demonstrating actions taken by the plaintiff in reliance on the representations made by the defendant but there is no indication of what those alleged documents may be.
74. It is submitted that the court might place the plaintiff in "yellow card territory" by using vigorous case management, specifically by making an unless order for delivery of the defendant's defence. I do not understand how it might be thought that an unless order against the defendant might serve as a warning to the plaintiff. No less to the point, it was accepted that the plaintiff has not yet delivered the amended statement of claim.

#### **Analysis of the period of delay**

75. The defendant's argument identifies three distinct periods of delay. First, the delay between the date of accrual of the cause of action and the date of issue of the summons and statement of claim. Second, the period between the delivery of the defence and the service of notice of intention to proceed. And third, the delay between the service of notice of intention to proceed and the issuing of the motion to amend.
76. In the case of an action brought within time, I do not understand the law to impose an obligation of the plaintiff to account for the time which has elapsed between the date of the matters complained of and the date of issue of the summons. There are exceptional cases in which such delay may be a consideration but I do not believe this to be one of them. The defence – when it was eventually delivered – roundly rejected the claim but there was no plea at that time of inordinate or inexcusable delay. What the authorities do clearly establish is that a plaintiff who delays – or allows time to pass – before issuing his summons is under an enhanced obligation to ensure that the action progresses. It is common case that in considering whether there has been delay on the part of the plaintiff the court should consider the period starting with the accrual of the cause of action. On this motion, the time which has elapsed since the alleged agreement is in the mix, as it

were, but I do not believe that the time taken to issue the summons calls for special explanation or can properly be described as a period in which there was gross delay on the part of the plaintiff.

77. I have already addressed the period between the service of notice of intention to proceed and the issuing of the motion to amend the statement of claim. When, in January, 2020 the plaintiff sought to revive an action which for all practical purposes had lain dormant for six and a half years, the defendant's solicitors asked for time. That was a perfectly reasonable request and was acceded to. It was, in my view, correctly described by the plaintiff as an armistice. The plaintiff is not properly to be criticised for failing to move before the defendant's new solicitors had responded to the request for agreement to the proposed amendments. The delay between the defendant's solicitors answer to the proposed amendment and the issuing of the motion was not terribly significant and it was, in my view, offset by what I think can fairly be said to have been the delay on the part of the defendant's solicitors in declaring their position. While fourteen months passed between 3rd January, 2020 and 5th March, 2021, the defendant's solicitors cannot fairly be said to have delayed for all of that time. It seems to me that there is no reason why the letter which was written on 5th March, 2021 could not have been written on or about 11th August, 2020 so that such delay as there was on either side was cancelled out by that on the other.
78. I find that the manner in which the motion to amend was dealt with by the defendant to have been very peculiar. In the first place there was a significant enough delay in responding to it. When the response came the defendant more or less acquiesced in the amendment while at the same time declaring his intention to apply to have the action dismissed for delay. While I accept that the motion to amend – the costs of which were, by consent, ordered to be costs in the cause – has added to the costs, I am not persuaded that the plaintiff was induced to incur those costs by the defendant's letter of 11th August, 2020. In the ordinary way, the costs of a motion to amend which was disposed of in the Monday motion list would have been for the plaintiff's account.
79. I am quite satisfied that the defendant has no responsibility for the fact that the plaintiff incurred the costs of the motion for discovery. In the first place, the request for voluntary discovery was premature because the amended statement of claim had not been delivered. Secondly, the plaintiff was well aware at the time of the request and of the issuing of the motion that the defendant intended to apply to have the action dismissed.
80. As to the delay between the delivery of the defence and the service of notice of intention to proceed, the defendant's written submission focussed on the general rule that, although the personal blameworthiness of the plaintiff is a matter to which consideration can be given by the court in the exercise of its discretion, responsibility for progressing the case rests with the plaintiff. For the reasons already given, I find that the case sought to be made in Mr. Foley's affidavit and in the body of the plaintiff's affidavit that the plaintiff's former solicitors had culpably failed to progress the case was contradicted



by the plaintiff's own evidence: not by what he asserted but by the contemporaneous documents to which he referred.

81. As to the fact that during this long period of delay the defendant did not move to have the action dismissed, it is established by the recent authorities that a mere failure to apply to have an action dismissed is not to be regarded as a culpable act of acquiescence. See for example *Flynn v. Minister for Justice and Anglo Irish Beef Processors Ltd. v. Montgomery* [2002] 3 I.R. 510. The sending by e-mail of the notice of change of solicitor did not amount to service and even if it had, it would have made no difference.
82. I am satisfied that the plaintiff has been shown to have been guilty of inordinate and inexcusable delay in the prosecution of the action for a period of six and a half years. The question, then, is whether the balance of justice favours permitting the action to proceed.

### **Balance of justice**

83. I accept the submission on behalf of the defendant that this is a case which must – or at least would likely – turn, in the end, on the resolution of a conflict of oral evidence. Implicit in the evidence of Mr. Foley that the object of the discovery motion is to obtain further and additional documentary evidence in relation to the alleged agreement is a suggestion that there is such documentary evidence but there is no indication of what it might be. Similarly, there is no indication of what documentary evidence is thought to be in the possession, power or procurement of the defendant which would support the assertion that the defendant has, or can obtain, such evidence.
84. On the other hand, the premise of the motion for discovery is that disclosure of the documents sought is necessary for the fair disposal of the action. It has always been recognised by the authorities – and it is not contested by the plaintiff – that memory fades over time. No less, in a well run as well as in a badly run office, the prospect that documents will be available will diminish over time. If I take the relevant date as the date of the request for voluntary discovery rather than the date of issue of the motion, the position is that on 7th May, 2021 the plaintiff first requested discovery of all documents in connection with the sale of Pony Express Limited, including, specifically, all communications between the former secretary of the company and the purchasers. On the face of the request it is not clear to me that the documents are such as would likely be, or ever to have been, in the possession or power of a shareholder, as opposed to the company itself. That apart – and putting it at its lowest – it seems to me that there must be a risk that documents generated up to nearly thirteen years prior to the request might have been lost or destroyed. If those documents are – as on the plaintiff's case they are – necessary for the fair disposal of the action, the risk that they may not be available is a risk of an unfair trial.
85. I do not accept that the e-mails or letters of claim relied on by the plaintiff constitute evidence of any agreement but something may turn on what texts and letters were sent and when. If the transcript of the texts has not been expressly contested, neither has it been agreed. There is, and was from the outset, a dispute as to whether a letter of 22nd June, 2010 which was said to have been sent was received. The prospect of establishing,

at this remove, what was sent and received and what, if any, reaction there may or may not have been to communications alleged to have been sent, must be extremely poor.

86. The case made on behalf of the defendant is that by reason of the delay in the prosecution of the action there is a serious risk of prejudice and injustice to the defendant and that a fair trial will be impossible. Ms. Markey asserted that the delay in prosecuting the action coupled with the absence of documentary evidence gives rise to "actual and specific prejudice on the part of the defendant."
87. The alleged promise the subject of these proceedings is said to have been made orally by the defendant to the plaintiff. The approximate date in the statement of claim of "in or about July, 2008" was tied down in the replies to particulars as "in or about the 12th July, 2008." In the affidavit of Ms. Markey the claim is said to arise out of an alleged agreement but I do not believe it is pedantic to observe that the original statement of claim makes no reference to an agreement between the parties. What is pleaded is a promise and an alleged failure to deliver on the promise. The plaintiff does not say that he accepted the offer and agreed to remain with the company, or for how long. In the replies to particulars the plaintiff elaborated slightly on the promise but again does not say that he accepted it. Rather what is said is that on foot of the defendant's representations he went to a motor dealer and chose a car. With the replies to particulars – in response to a request for any proof, to include, if any, letters, e-mails, notes messages (textual or otherwise), minutes and/or attendances evidencing an alleged contract and/or agreement – the plaintiff's solicitors provided a transcript of text messages commencing on 8th February, 2008 and concluding on 25th February, 2008. There is no indication as to when or by whom this transcript was made but it was provided on 25th March, 2013. In reply to a request for an explanation as to why the action had only been instituted some three years after Pony Express Limited had been sold, the plaintiff replied that he at all times understood that the defendant was going to honour the terms of the agreement reached. By reference to the statement of claim and the texts and letters relied on by the plaintiff, I think that it is fair to say that the defendant has a case to make that the plaintiff has not been entirely consistent.
88. Given that the plaintiff went to the trouble and expense of obtaining leave to amend his statement of claim, I do not believe that it can be gainsaid that he changed his case coming up to thirteen years after the event. What had been a promise to pay money upon or in the event of the sale of the company was changed to an alleged agreement between the plaintiff and the defendant, and the if and when promise of money became a promise of shares, a promise of a share in the proceeds of sale in the event of a sale, and a promise of dividends in the meantime. In the mix is a promise of a pay rise – said to have been provided – and carte blanche for a motor car – which was later capped.
89. I do not believe that the assertion of specific prejudice is supported by any evidence. While it is by no means beyond the bounds of possibility that there may have been – or that there may be – witnesses as to matters said or done before, at the time of, or after, the alleged promise or agreement who might have relevant and admissible evidence

which might go to show that one or other recollection was more or less likely to be accurate, no such witness has been identified. By contrast with some of the decided cases, no one has been identified who has retired or died. The defendant does not point to the loss of tangible evidence or papers. I do not know how Mr. Foley was in a position to give evidence as to the state of health of the defendant but his evidence that Mr. Smurfit is in good health is uncontradicted.

90. As to general prejudice, however, I believe that it is sufficient to point to the passage of time and the established culpable delay on the part of the plaintiff in prosecuting his action.
91. In *Rogers v. Michelin Tyre plc* [2005] IEHC 294 Clarke J. considered the issue of prejudice which, he said, on the authorities, is a factor to which significant weight needs to be attributed. One element of the claim in that case was a claim based on representations which, I think, covers a case such as this which may turn on what was said in the course of a telephone conversation. Starting at para. 28 of the judgment, Clarke J. said:-

*"Prejudice*

*28. This leads to the issue of prejudice which, on all the authorities, is a factor to which significant weight needs to be attributed.*

*29. Under this heading it is necessary to consider separately the different aspects of the plaintiffs claim.*

*The Misrepresentation Claim*

*30. Insofar as the plaintiff makes a claim based on representations then it would appear, from the pleadings, that any such representations were made at the meeting on 15th September 1995. On the evidence it would appear that that meeting was attended by a Mr. Pat Leonard and a Mr. Colm Baker on behalf of Michelin. It is not suggested that either of those two witnesses will not be available. However it is suggested that they are now both retired (for in excess of three and four years respectively) and will be required to give evidence concerning a meeting which, from their perspective, was relatively routine and which will have occurred at least ten years prior to any likely date of trial. In that context my attention is drawn to the comment of Finlay Geoghegan J. in *Manning v. Benson and Hedges Limited* [2005] 1 I.L.R.M.190 to the effect that:*

*'Delays of four to five years as a matter of probability will reduce the potential of such persons to give meaningful assistance or act as a witness'.*

*31. Obviously the extent to which a comment such as the above may be true will depend on the nature of the evidence which is likely to be given and other relevant circumstances. In this case the plaintiff has criticised the defendants for failing to put before the court any evidence as to the specific manner in which the relevant witnesses might find themselves impaired in giving evidence. I do not find that the*

*absence of such evidence is a matter for which the defendants can properly be criticised. A defendant, in bringing an application such as the one now before the court, will be faced with a dilemma. The defendant is entitled to rely on what might reasonably be called general prejudice, that is to say the prejudice which could reasonably be expected to occur in any case of the type concerned and having regard to the delay involved. A defendant will also be entitled, if it wishes, to put before the court any special or additional prejudice. If it does so, it will necessarily have to draw the court's attention by means of evidence to a specific or additional prejudice which has occurred by reason of the absence of a witness, the difficulty of a witness in being able to give full evidence, the absence of documents or any other material fact. Clearly if a defendant does bring to the court's attention any such special prejudice the court must take that fact into account. However it would also be naïve to ignore the fact that by so doing the defendant will draw the plaintiff's attention to the difficulty which the defendant would incur in properly defending the proceedings in the event that their application for a dismissal is unsuccessful. In those circumstances it seems to me that it is perfectly appropriate for a defendant (if it wishes) to rely simply on general prejudice."*

92. By reference to the replies to particulars, the plaintiff's claim is based on a telephone call. The claim is mostly in respect of 10% of the shares in the company or 10% of the proceeds of sale of the company, with or without the equivalent of profits or dividends in the meantime, but the complaint in respect of the company car, which in the replies to particulars appeared to be part of the narrative, appears to have been escalated in the amended statement of claim to a claim for loss: albeit that no figure has been put on it.
93. The dilemma for the defendant in bringing the application was that any positive averment of the impact or likely impact of the delay on his ability to defend the action would have been turned against him if the motion were to fail. If, superficially, the trial of the action was likely to be a "swearing match", it seems to me that the proper preparation for trial and the cross-examination on each side was going to be a great deal more sophisticated than the assertion on the one side and the denial on the other of what was said to have been said on the telephone. The two allegedly broken promises were two of three allegedly made at the same time and it seems to me that the reliability of recollection on either side would likely depend on precisely when and in what circumstances the plaintiff got his pay rise and precisely what happened in relation to the Range Rover, as well as all that was and was not said about shares in the company or the proceeds of any sale of the company. The defendant was not, and is not alleged to have been, a director of the company. It is not immediately obvious what role a shareholder – and it is not said whether the defendant was a majority or minority shareholder – would have had in negotiating terms and conditions. In truth there appears to be some uncertainty in the plaintiff's claim as to the defendant's role. Prima facie the plaintiff's salary was a matter between him and the company, his employer, but any promise of a share in the proceeds of sale of shares could only be made by the shareholder or shareholders. On the pleadings, it is common case that the plaintiff told the defendant at some stage that he was considering leaving the company but in the event he did not, until he was made

redundant by the new owners. It seems to me that the preparation for trial, on both sides, would likely have entailed a consideration of what evidence could be obtained from the directors (before and after the sale of the company) and possibly from the motor dealer from whom the Range Rover was obtained and to whom it was soon enough afterwards returned.

94. On the evidence, the plaintiff sat on his case for upwards of three years between 27th February, 2015, when he had senior counsel's advice on proofs, and about April, 2018, when he instructed Mr. Foley. By reference to the contemporary correspondence, a good deal of the eighteen months or so between the delivery of the defence and his engagement with Vincent & Beatty can be accounted for by the fact that he would not agree or pay the fees asked by Donal M. Gahan, Ritchie & Co., if they were to continue to act for him. It is not made clear what was happening in the twenty one months or so between the time the plaintiff first consulted Mr. Foley and the service of notice of intention to proceed on 3rd January, 2020. If the delay cannot – and it cannot – be accounted for by a lack of resources, the irresistible inference is that the pace of the litigation has been dictated by the waxing and waning interest of the plaintiff in pursuing it. This is a case of culpable delay on the part of the plaintiff personally.
95. I take into account the delay on the part of the defendant between 24th November, 2020, when the plaintiff issued his motion to amend, and 5th March, 2021 when the defendant first unequivocally declared his position that the action ought not be permitted to proceed but I take the view that that delay was minor by comparison with the inordinate and wholly inexcusable delay which had gone before. I am bound to say that I am puzzled by the agreement which was reached on the motion to amend but it was clear that the defendant's acquiescence on the motion to amend was without prejudice to the motion he intended to issue to have the action dismissed. The defendant's delay in moving to have the action dismissed is not to be equated with encouragement to the plaintiff to move it forward.
96. The fact that the defendant did not, at the time he refused consent to the proposed amendment of the statement of claim on 11th August, 2020, clearly give notice of his intention to apply to have the action dismissed is something that might very well have gone to the costs of the motion to amend but it is not of such significance as to affect the balance of justice as to the continuation of the action.
97. I take no account of the fact that the amended statement of claim was not formally delivered when it ought to have been. This was poor practice and meant that the plaintiff's motion for discovery was technically premature. That said, the response to the request for discovery was that it was premature because the defendant's motion to dismiss was coming, rather than because the pleadings had not closed. I do however attach weight to the fact that the amendment of statement of claim came about because the plaintiff wished to restate his case ten years and upwards after the events complained of.

## **Summary and conclusion**

98. It is accepted that there has been inordinate delay in the prosecution of this action. For the reasons given, I am satisfied that the delay was inexcusable and culpable. It would be an injustice, without more, that the defendant should be compelled to meet litigation the pace of which has been dictated by the waxing and waning interest of the plaintiff in prosecuting it.
99. I am satisfied that the defendant has been prejudiced by the plaintiff's delay. Apart from the effect of the lapse of time on both parties' memories, it will have affected the memories of others who might have been, and the availability of documents which might have been, of assistance in resolving the dispute.
100. I am satisfied that the defendant has also suffered prejudice by the continued existence, and more so by the revival, of litigation in which his business reputation is potentially at stake.
101. For these reasons I am satisfied that the defendant is entitled to an order in the terms of the notice of motion dismissing the action on the grounds of inordinate and inexcusable delay.
102. I can think of no reason why the costs of the motion and action should not follow the event but I will list the matter for mention on 31st May, 2022 at 10:30 a.m. in case the plaintiff should wish to argue otherwise.