THE HIGH COURT

[Record No. 436 S.]

BETWEEN

EMBERTON FINANCE LTD.

PLAINTIFF

AND

MAURICE CRONIN

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 19th day of October, 2018

1. The plaintiff seeks summary judgment against the defendant in the sum of €259,966.45. The claim is brought on foot of a loan agreement made on 9th October, 2007 whereby Friends First Finance Ltd. agreed to lend the sum of €250,000 to the defendant which was repayable over a period of 60 months by way of 60 monthly interest payments amounting to €1,498.39 per month, followed by a "balloon" payment of €250,000. The sum of €250,000 was advanced to the defendant on 11th October, 2007. The annual percentage rate of interest charged was 7.39%. The purpose of the loan was to facilitate the acquisition by the defendant of a share in a new office building then under construction in New York City. This was clearly a business venture. The loan facility was to repaid on or before the 1st December, 2012. It was not repaid. The benefit of the loan was transferred by Friends First Finance Ltd. to Emberton Finance Ltd. by deed of transfer dated 3rd March, 2014.

2. The first page of the copy of the loan facility exhibited describes it as a "revolving credit facility agreement". It specifies the amount advanced and the number of repayment instalments, 60, and the total amount repayable together with the description of the cost of the credit furnished. It states:-

"YOU MAY WITHDRAW FROM THIS AGREEMENT AT ANY TIME WITHIN TEN DAYS OF RECEIVING THIS AGREEMENT OR A COPY OF IT.

LEGAL ADVICE SHOULD BE TAKEN BEFORE THIS AGREEMENT IS SIGNED.

Regulated by the Consumer Credit Act, 1995".

A letter from Friends First dated 1st October, 2007 described the purpose of the facility as "investment related". Under "conditions precedent" it is stated that the drawdown of the facility is subject to the prior receipt of a number of forms satisfactory to the lender, indicating:-

- "Signed accepted copy of this facility letter.
- Drawdown notice form, duly completed.
- Duly completed direct debit mandate.
- Acknowledgement that you have read and fully understood this Loan Facility offer letter and the Standard Terms and Conditions attached to this letter."

3. The "security" described in the letter is:-

> "Irrevocable letter of undertaking from Sorrento Asset Management in relation to this investment."

4. At the conclusion of the letter, the addressee is informed that if he wishes to accept the offer of the loan facility on the terms and conditions contained in the letter, he should sign the letter and retain the enclosed copy for his records. The acceptance is signed by the defendant and witnessed by James Loughnane with an address given as Kenmare Place, Killarney. It is dated 9th October, 2007.

Previous Proceedings

5. In earlier proceedings, Friends First Finance Ltd. sought summary judgment in respect of the same amount against the defendant (Record No. 2011 305 S). A summary summons issued on 21st January, 2011. An appearance was entered on 26th July, followed by a notice of motion seeking summary judgment on 4th September, 2011. This was grounded and the affidavit of Gordon Hill. A replying affidavit was filed on 23rd January, 2012. The matter was thereafter adjourned from time to time before the Master of the High Court to enable the plaintiff to furnish a further affidavit which it failed to do. Eventually the Master struck out the proceedings by reason of the delay in so doing.

The Law

6. The principles applicable to the court's consideration of an application to grant summary judgment are well established and summarised by McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 as follows:-

> "9. … it seems to me that the following is a summary of the present position:-
>
> (i) the power to grant summary judgment should be exercised with discernible caution;
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> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
>
> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
>
> (iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is

suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the *bona fide*s of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

7. In *Aer Rianta c.p.t. v. Ryanair Ltd*. [2001] 4 I.R. 607 Hardiman J. stated at p. 623:-

> "… the fundamental questions to be posed on an application such as this remains: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

8. In *IBRC Ltd. v. McCaughey* [2014] 1 I.R. 749 the Supreme Court considered the approach to be adopted in considering facts deposed to on affidavit in an application for summary judgment. Clarke J., delivering the judgment of the court, stated:-

> "22. It is important, therefore, to re-emphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Rianta v. Ryanair Ltd*. … be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction … the court may come to a final resolution of such issues. That the court is not obliged to resolve such issues is also clear from *Danske Bank v. Durkan New Homes* [2010] IESC 22, ….

23. Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta* …. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

Proposed Points of Defence

9. The defendant raises a number of points which are advanced as arguable grounds of defence. The following are the main points raised:-

(i) Alleged breaches of the Consumer Credit Act 1995;

(ii) A claim that the defendant's accountant misrepresented to him the nature of the loan agreement which he entered with the plaintiff as a 'non-recourse' loan to the extent that he is entitled to rely upon the defence of *non est factum*; and,

(iii) A linked claim that he is prejudiced by reason of delay in advancing the proposed defence at (ii) because his accountant is now deceased

(i) Consumer Credit Act 1995

10. In a replying affidavit in the first set of proceedings and in subsequent affidavits the defendant seeks to raise a defence based on alleged breaches of the Consumer Credit Act 1995 which it was submitted rendered the loan agreement unenforceable. He claimed that the plaintiff was not entitled to enforce the loan agreement because it was in breach of sections 30(3)(a) and/or (b), 31(1)(e) and/or (f), (h) and (k), 36 and 54 and 55 of the 1995 Act. Section 38 provides that a creditor shall not be entitled to enforce a credit agreement unless the requirements of Part III of the Act are complied with unless the court is satisfied that a failure to comply was not deliberate and has not prejudiced the consumer and that it would be just and equitable to dispense with the requirement.

11. I do not accept that the defendant has advanced an arguable ground that the provisions relied upon have been breached. There was an express provision for a cooling off period of ten days from the date of receipt of the agreement or a copy thereof. He was

clearly handed the original of the agreement for signature by his accountant on his own evidence. He was sent a copy of the agreement by the plaintiff on 26th October which again gave him the opportunity to withdraw from the agreement if he wished. I am not satisfied that there is any arguable or *bona fide* defence available based on a breach of section 30. The loan agreement clearly sets out the conditions under which the APR may be changed in accordance with s. 31(1)(e), the necessary details under s. 31(1)(f) and the date upon which each instalment is payable under section 31(1)(h). There is no basis for the assertion that s.31(1)(k) I am not satisfied that any of the assertions made in respect of s. 31 constitute the basis for an arguable defence. He had also been advised in bold type in the letter of loan offer to seek legal advice at an early stage.

12. I am satisfied that a Notice in the prescribed form of the term of the loan was furnished in compliance with the Third Schedule of the Act under section 36.

13. Section 54 provides that a creditor shall not enforce a provision of an agreement or the subject of the Act or determine it by *inter alia* demanding early repayment of any sum or treating any consumer rights as determined or restricted unless at least ten days notice is given prior to taking action which identifies the agreement, the creditor's name and address, the consumer's name and address, the term to be enforced and a statement of the action the creditor intends to take to enforce the agreement. If a breach of the agreement is capable of remedy the consumer must be given twenty-one days to remedy same. In this case it is claimed that the plaintiff did not give the defendant valid notice of the matters set out in section 54.

14. The plaintiff's claim is based upon the fact that the loan was to be repaid on or before the 1st December, 2012 as set out in the exhibited statement of account "C" in the affidavit of Mr. Jonathan Hanly of 1st June, 2016. The term of the loan was for a maximum period of 60 months from the date of drawdown which was 11th October 2007. The defendant made regular interest payments until 15th September, 2009 and paid nothing thereafter. The present proceedings were issued on 9th March, 2016 some three years and four months after the date upon which the plaintiff was obliged to repay the loan in full. It seems to me that the defendant was clearly in default of the terms of repayment and since December 2012 and has defaulted completely in relation to the repayment of the loan. I am not satisfied that there is any arguable basis under s. 54 to complain about the manner in which the creditor seeks to recover the money now owed and I am satisfied that reliance upon s. 54 is inappropriate and misconceived in the circumstances.

15. There is no basis for the proposition that the plaintiff's claim entails 'any unjust enrichment' under s. 55 of the Act. In respect of the amount claimed Mr. Hanly avers that the sum outstanding as of 9th February, 2017 was €259,966.45 of which €9,966.45 represented interest. No interest has been added since 16th August, 2010.

16. Though the agreement is said to be subject to the terms of the 1995 Act it was clearly a business transaction with the defendant who describes himself as a businessman in his affidavits. Thus in the normal course the definition of consumer under s. 3 of the Act would not have applied to him for the purpose of this transaction: it was clearly a business investment in respect of which he took professional advice from his accountant. Be that as it may, the loan is said to be subject to the provisions of the Act but I do not consider that there is any arguable defence that the contract of loan is unenforceable on the basis of the alleged breaches. Even if the breach of any of the statutory requirements had been established I do not consider that there is any arguable basis upon which it could be said that such alleged breaches were deliberate and prejudiced the defendant or that it would not be just and equitable to determine nevertheless that the agreement should be enforced against him. In any event it is also claimed that the very agreement in respect of which he claims lack of compliance was never made by him with the plaintiff.

(ii) and (iii) Alleged Misrepresentation by the defendant's accountant

17. The defendant claimed that he had been introduced to the proposed investment in a New York property by his accountant, the late Mr. James Loughnane. He agreed to become a partner in Oakbury Partnership and would thereby gain a share in a building at 34th Street and Madison Avenue, New York. He understood that the partnership would become one of Class B limited partners in Sorrento S34 Madison Limited Partnership and that others named in the affidavit would become Class A limited partners in the investment. The purpose of the partnership was to construct a building at 34th Street and Madison Avenue in New York.

18. Mr. Cronin claimed that Mr. Loughnane who became the managing partner in the Oakbury Partnership informed him that he could secure finance for him for the project from the plaintiff through a loan which would be "non-recourse" against the defendant. He also understood that Mr. Loughnane had secured similar finance which was "non-recourse" for other members of the partnership. In addition, he stated that he never met any officials of the plaintiff and received no correspondence from them until a letter of the 26th October, 2007 confirming that the funds had been transferred into an account held by solicitors for the Oakbury Partnership. The plaintiff in effect used Mr.Loughnane as its conduit, if not its agent, for conveying documents and information about the loan to the defendant. He stated he received no legal advice prior to executing the loan agreement nor was he advised to do so. At para. 14 of the affidavit, he stated that he understood that the loan would be "non-recourse" against him in that if there were a default on the repayments of the loan, the plaintiff accepted that its only recourse would be against the security named in the loan agreement quoted above, namely Sorrento Asset Management.

19. By letter dated 26th October, 2007 from Friends First to the defendant, Ms. Antonia McTaggart confirmed to the plaintiff that the sum of €250,000 had been transferred to his bank on the 11th October, 2007. Enclosed was a copy of his letter of offer and he was advised to keep the document in a safe place.

20. By letter dated 9th October, 2007 to Mr. Brendan McKenna of Friends First Finance Ltd., Mr. Cronin requested the drawdown of €250,000 to an account held in the name of Mason Hayes & Curran Client Account, re: 34th Street, quoting the reference Maurice Cronin. Mr. Cronin states that this account to which the money was transferred was an account which he understood to be the account for the Oakbury Partnership. In his affidavits in both proceedings, Mr. Cronin states that he would not have entered the partnership deal or sought and agreed to a loan but for the representations made to him by Mr. Loughnane that the loan was "non-recourse". This was emphasised by Mr. Loughnane as a "selling point" in order to induce him to enter into the contract. He states that he would not have acted to his detriment by entering into a loan had he not believed it to be non-recourse against him personally. He states that he never got a copy of the loan.

21. He accepts that his signature is contained in the letter of loan offer dated 1st October, 2007. He claims that at a meeting on the 9th October, Mr. Loughnane produced the letter of loan offer and confirmed to Mr. Cronin orally that it was a non-recourse loan. He signed it in the place to which he was directed by Mr. Loughnane. Mr. Loughnane signed as a witness and included his address and dated the document. During the same meeting he also signed another document at Mr. Loughnane's direction which was a form of letter of authorisation permitting Friends First to lodge the sums under the loan to the Mason Hayes and Curran account.

22. There is nothing in the loan facility letter suggesting that the loan is a non-recourse loan as against the defendant. The terms of the facility are clearly to the contrary. It is clear from the terms of the letter that it was repayable on demand and in the absence of a demand it was repayable no later than 1st December, 2012. It clearly provides that in the event of default of payment of any sum

due, the lender was entitled to terminate the facility and seek repayment from the defendant. Thus in the first set of proceedings the default in payment was relied upon as the basis for initiating the proceedings. In the second proceedings the time for repayment of the entire amount had long since passed and the entire amount remained unpaid. The terms did not contain any restriction on the rights of the lender in that regard. There is no documentary evidence, note or memorandum exhibited to support the proposition relied upon by Mr. Cronin. However, the defendant submits that such evidence will only be available to him if the case proceeds to plenary hearing and he seeks discovery of all relevant documents.

23. The defendant seeks to rely on parol evidence to refute the clear written terms of the loan agreement and this may only be done in very limited circumstances.

24. The loan was executed in the presence of and witnessed by the defendant's accountant Mr. Loughnane. Mr. Cronin states in his affidavits that he believes that Mr. Loughnane may have acted as the agent of the plaintiff notwithstanding the fact that Mr. Loughnane was in fact the defendant's advisor who was on his evidence organising the purchase and development of the New York property. The averment that Mr. Loughnane may have been an agent of the plaintiff is no more than an assertion. It does not of itself provide an arguable ground of defence.

25. In his affidavit in response to the first proceedings dated 23rd January, 2012 the defendant referred briefly to the alleged "non-recourse" nature of the loan at para. 12 and stated:-

> "Mr. Loughnane who became the managing partner in the Oakbury Partnership informed me that he would secure finance for me for the project from the plaintiff through a loan which would be "non-recourse" against me. I also understand that Mr. Loughnane secured finance for other members of the partnership which would be "non-recourse" against them and I do not understand how/why the plaintiff purported to deal differently with me."

He added that he had not received any correspondence other than a letter of the 26th October, 2007 confirming that the funds had been transferred into an account held by solicitors for Oakbury Partnership. He said he had received no legal advice prior to executing the loan agreement nor was he advised to do so. He also complained that the plaintiff caused or permitted Mr. Loughnane to explain the details of the financing to be provided to him as well as the personal risks to him on the loan.

26. In his affidavits in the second proceedings, the defendant repeats that Mr. Loughnane represented that the loan was "non-recourse" against him. This is restated in his second and third supplemental affidavits. While suggesting that Mr. Loughnane acted as the agent for the bank he also acknowledges that Mr. Loughnane negotiated the loan on his behalf at para. 14 of his replying affidavit to these proceedings.

27. The defendant also claims that he has been prejudiced by the delay in instituting the second set of proceedings. The Master of the High Court, as noted above, struck out these proceedings on 15th January, 2013 because of the failure of the plaintiff to deliver a replying affidavit notwithstanding the fact that the case had been adjourned from time to time to enable them to do so. The second set of proceedings was initiated subsequently on 9th March, 2016. However, by this stage Mr. Loughnane was dead. Unfortunately, he died in January 2016 just two months before these proceedings issued. Therefore, the defendant claims that he would be entirely prejudiced by reason of this delay since he will not have the testimony of Mr. Loughnane available to him. It is clear from the defendant's affidavits that the other investors in the New York scheme were involved in litigation with the late Mr. Loughnane and are said to have alleged that Mr. Loughnane did not protect their interests in the course of the enterprise. Though clearly, the defendant believed that late Mr. Loughnane would have supported his contention that he informed the defendant that the loan was a non-recourse loan, that would have exposed Mr. Loughnane to allegations that he was negligent or in breach of duty in so advising the defendant or had misrepresented the situation to him. Mr Cronin does not appear to have sought redress against the late Mr. Loughnane in respect of his alleged negligence or misrepresentation of the loan terms to him. There is no suggestion that the plaintiff stated or represented to the defendant that the terms of the loan which it was agreeing with him were on the basis that it was "non-recourse" while at the same time supplying him with a loan agreement to be signed and executed which stated the exact opposite. The bank later wrote to the defendant enclosing a copy of the loan agreement and indicating that he had a ten day period within which to withdraw from its terms if he so wished.

28. It is clear therefore that the defendant contends that in signing the loan facility, he did so believing its terms to be otherwise than stated. He believed himself to be signing a "non-recourse" loan agreement. In effect the defendant is advancing a defence of *non est factum*. The test applicable to the maintenance of such a defence was considered by Kelly J. (as he then was) in *Allied Irish Banks plc. v. Higgins & others* [2010] IEHC 219 in which he stated:-

> "The defence of *non est factum* is one which has been considered in the context of an application for summary judgment by Morris J. (as he then was) in *Tedcastle McCormack & Company Limited v. McCrystal* (15th March, 1999). There that judge considered the decision of the House of Lords in *Saunders v. Anglia Building Society* [1971] AC 1004 which is the authoritative modern authority on the topic. He said:-
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> 'I am satisfied that a person seeking to raise the defence of non est factum must prove:-
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> (a) That there was a radical or fundamental difference between what he signed and what he thought he was signing;
>
> (b) That the mistake was as to the general character of the document as opposed to the legal effect; and
>
> (c) That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was."

In the course of his speech in Saunder's case, Lord Reid having pointed out that there is a heavy burden of proof on the person who seeks to invoke this remedy went on to say:-

> 'The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief …'

Lord Hodson in the same case said:-

> "Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving *non est factum* is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care.'"

29. It would appear that the defendant in this case chose not to read the document or obtain legal advice in respect of the document. He chose not to respond to the invitation to withdraw from the agreement if he had any difficulty with it when a copy was furnished to him on 29th October. There is no evidence that the creditor contributed in any way to any alleged lack of understanding on his part as to the nature and legal character or consequences of the loan facility. It may be thought odd that a business man whose main concern in the transaction he was about to enter was that he was obtaining a non-recourse loan and considered this to be the main "selling point" of the entire enterprise would not take steps to read the relatively short loan facility letter and/or the copy with which he was later furnished to ensure that it was not the standard type loan facility to which he did not wish to commit himself. However, I also note that the plaintiff has not set out on affidavit any evidence which challenges Mr.Cronin's account of how the loan was negotiated or describing its dealings through Mr.Loughnane with the defendant.

30. The account advanced by the defendant may be criticised as lacking credibility in a number of ways. However, the court must apply the legal test set out above without determining whether it believes this account or not. The case advanced is based upon the facts that the defendant was misinformed by the late Mr.Loughnane as to the nature and effect of the loan agreement he was about to sign on the 9th October 2007. He has deposed as to what transpired on that occasion. His averments arguably come within the third part of the test set out by Morris J. quoted above. For the purpose of this application I must accept the facts as the defendant states them to be. This is a case that goes beyond mere assertion. It is not the court's function to form an overall view of the defendant's veracity on this issue at this stage. I am satisfied that the facts as presented by the defendant are capable of giving rise to a defence if accepted and amount to an arguable defence as defined in the case-law cited above.

31. The defendant also claims that the death of the late Mr. Loughnane has impaired the likelihood of a fair trial if the court were disposed to send the matter for plenary hearing and that consequently, the plaintiff's case should be dismissed. It said that the plaintiff is blameless for the delay which ensued in this case and there is a real and serious risk of an unfair trial if the matter is allowed to proceed. In *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, Finlay P. set out a number of principles in respect of the issue governing the dismissal of a case for what of prosecution. It must be established that the delay complained of has been inordinate and inexcusable. Secondly, even where there has been an inordinate and inexcusable delay the court must exercise its discretion and decide whether the balance of justice lies in favour of or against the case proceeding. A delay on the part of the defendant in seeking a dismissal may be an ingredient in the exercise by the court of its discretion. The Supreme Court in *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at pp. 475-476 stated that in considering the balance of justice the court must take into consideration and have regard to the constitutional principle of basic fairness of procedures, whether the delay and consequential prejudice on the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and make it just to strike out the plaintiff's action and any delay on the part of the defendant. The court should also consider 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.

32. In this case the plaintiffs delayed for three years and four months approximately in issuing these proceedings. It should be noted that the difficulties in respect of the loan were obvious from 2009 when the defendant defaulted in payments. The plaintiff brought proceedings on 27th January, 2011 which were struck out in January 2013 because of its delay in furnishing a further affidavit. The proofs on behalf of the plaintiff are largely document based. There is nothing to suggest that the requisite proofs in respect of the loan and the default in payments are in any way affected by the passage of time. The only fact of relevance relied upon is that Mr. Loughnane died just shortly before the second set of proceedings issued. Witnesses become unavailable in civil and criminal proceedings for many reasons. It does not necessarily follow that the proceedings must be stopped. Each case must be considered on its own merits. It does not appear to me that on a motion of this kind the court should entertain an application to dismiss the case for want of prosecution or an abuse of process and thereby deny the plaintiff its right to pursue these proceedings on the basis of the unavailability of the late Mr. Loughnane. This attempt to dismiss the plaintiff's case is not brought under the rubric of any particular rule of the Superior Courts; rather it is said that the court should exercise its jurisdiction in the interests of justice and refuse summary judgment and indeed dismiss the proceedings for want of prosecution by reason of the prejudice allegedly caused by the delay in pursuing this case. I am not satisfied that it is in the interests of justice or appropriate to accede to this application in these circumstances. Since the court has decided to refuse summary judgment this matter may be addressed under the relevant Rules of the Superior Courts when the issues have crystallised between the parties and discovery is obtained if that is thought to be appropriate. At that stage the engagement of the parties with each other may be better understood.

Conclusion

33. For all of the above reasons I am satisfied that the defendant has established an arguable or *bona fide* case within the principles set out above in respect of the *non est factum* defence. However, I am not satisfied to grant leave to defend on any of the other points raised in the numerous affidavits delivered by the defendant each of which I have considered. I refuse the application to grant summary judgment and direct that the case be sent for plenary hearing on this sole issue which ought now to be fully pleaded.