THE COURT OF APPEAL

High Court Record No.: 2013/4745P
Court Of Appeal Record No.: 2024/14
Neutral Citation No.: [2024] IECA 302

Binchy J.
Allen J.
Butler J.

BETWEEN/

FRANCIS DAVEY

PLAINTIFF/
APPELLANT

- AND -

ULSTER BANK IRELAND LIMITED

DEFENDANT/
RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 17th day of December 2024

1. This is a judgment on an appeal from an order of the High Court (Stack J.) of 8th December 2023 dismissing the within proceedings pursuant to the inherent jurisdiction of the court on the grounds of inordinate and inexcusable delay.

Background

2. The proceedings arise out of a number of facilities issued to the appellant by the respondent during the period 2002-2009 on foot of which the appellant drew down loans from the respondent. On 26th March 2013, and again on 2nd May 2013, the respondent issued letters of demand to the appellant demanding repayment of sums claimed by the respondent to be owing pursuant to the facilities. The amount claimed by the respondent in the letter of 2nd May 2013 was €5,175,571.86.

3. On 13th May 2013, the appellant issued these proceedings against the respondent, claiming damages for: breach of contract, breach of trust, libel and slander, failure to allow him to "*exercise his right of redemption*" and nervous shock. He also claims special damages for alleged breach of duty of care which he claims is owed to him by the respondent "*in a professional capacity in his occupation*". The appellant is a retired auctioneer.

4. In his statement of claim delivered on 12th March 2014 the appellant claims that in 2006 he proposed to the respondent that he would clear all of his liabilities with the respondent by selling certain of his properties, the sale of which, he claims, would have yielded him a surplus, after payment of all of his liabilities to the respondent. However, the appellant claims that having made such a proposal, he was persuaded by an employee of the respondent not to do so, and that he was instead encouraged to invest in more property and to borrow more monies to do so. These claims form what the motion judge described as the appellant's "*central complaint*" in the proceedings. The appellant says that this advice was provided verbally. He did not identify in the pleadings the person who he claims provided this advice; on the contrary, in response to a specific question, raised in a notice for particulars served on behalf of the respondent on 29th May 2014, whereby the appellant was asked to identify the person concerned, the appellant, in his replies delivered on 10th October 2014, declined to answer the question, stating that it was a matter of evidence. However,

the appellant maintains that the respondent was or should have been aware of the identity of the person concerned, not from the pleadings, but because he had, prior to the issue of the proceedings informed the respondent, in a letter sent by him to the respondent on 5th November 2012 that he "*was instructed by Mr Noel Clarke of Ulster Bank in 2006 not to sell which would have enabled me to repay the loan in its entirety*". It is clear that this letter was received by the respondent, as it is referred to in a letter from the respondent to the appellant of 10th June 2013, in which the respondent states: "*As per our letter of the 15th November 2012 there is no record that Mr Clarke instructed you not to sell property in 2006…* ."

5. The plenary summons was not served until 1st November 2013. In the meantime, the respondent had, in September 2013, appointed receivers over six properties which had been mortgaged by the appellant to the respondent as security for the loans. On 16th June 2014, the receivers issued proceedings (the "Receivers' proceedings") against the appellant seeking orders to restrain him from interfering with the receivership. The Receivers' proceedings are relevant in the context of reasons offered by the appellant for the delay in the progression of the within proceedings, and I will return to that issue in due course.

6. Once the within proceedings had been served by the appellant, they moved along with reasonable expedition. A statement of claim was delivered on 12th March 2014, and, following upon the service of the notice for particulars and the delivery of the replies thereto referred to above, a defence and counterclaim was delivered by the respondent on 12th January 2015. The counterclaim was for payment by the appellant of €5,516,647.35 said to be the amount by then due and owing on foot of the loans.

7. An amended statement of claim was delivered by the appellant on 27th April 2015, to which an amended defence and counterclaim was delivered by the respondent on 7th May

2015, and the appellant delivered a reply thereto on 18th May 2015. Discovery was exchanged by the parties during June 2015. A supplemental affidavit of discovery was delivered by the respondent in March 2016.

8. I pause here to mention that in the course of the Receivers' proceedings, Gilligan J. had made an order, *inter alia*, restraining the appellant from collecting rents payable by tenants of the properties that had been secured by the appellant to the respondent. That order notes an undertaking of the appellant, given under oath to the Court, that he would "*expedite the proceedings in which he is a plaintiff, namely* [the within proceedings] *to ensure that same are heard as soon as possible*", and in the same order both the within proceedings and the Receivers' proceedings were listed for mention on 17th April 2015. While the order of Gilligan J. is dated 15th April 2015, and was perfected on 21st April 2015, it appears both from the grounding affidavit of Mr. Ted Mahon (sworn on behalf of the respondent for the purpose of this application) and from the submissions of the respondent that this undertaking may have first been given by the appellant at the hearing of the interlocutory injunction application in December 2014. In any case, while the undertaking has a significance for the purpose of this application, whether it was provided by the appellant in December 2014 or April 2015, or both, is of little consequence.

9. These proceedings were first listed for hearing on 14th July 2015 but that date was vacated, apparently on account of the sale by the respondent earlier that year, in February 2015, of the appellant's loans (and related securities) to Promontoria (Aran) Limited ("Promontoria"). The case was again listed for hearing on 9th March 2016, but was again adjourned, this time on the application of the appellant, in order to allow him time to review additional documentation discovered by the respondent on 1st March 2016. On 11th May

2016, the matter was again listed for hearing, but was adjourned because no judge was available.

10. On 16 May 2016 the appellant issued a motion for further and better discovery of 26 categories of documents. The additional categories of documents appear to have been formulated by reference to a proposed draft further amended statement of claim which had not been delivered and for the delivery of which leave had not been sought.

11. On 1st June 2016, the appellant issued a motion seeking leave to amend further the statement of claim, and this was refused by the High Court (O'Regan J.) on 17th June 2016. The appellant's declared object of the proposed amendment was to *"net and clarify"* his claim, by adding ten pages. The application was refused by O'Regan J. on the ground that the proposed amended statement of claim was *prolix*. She specifically left open the possibility of a further application to amend. While the appellant lodged an appeal from that order, on 20th October 2016 he withdrew that appeal. This was the last substantive action taken by the appellant in the proceedings. Although the appellant did serve two notices of intention to proceed, the first on 18th September 2018 and the second on 5th August 2020, he took no further steps to bring the proceedings to trial thereafter.

12. In September 2020, the appellant issued a motion seeking to join Promontoria as an additional party to the proceedings. However, he withdrew this motion the following month, with the consent of the respondent. In a letter of 20th October 2020 consenting to the withdrawal of the motion, the solicitors for the respondent referred to the undertaking given by the appellant to Gilligan J., as reflected in the order of 15th April 2015, to expedite these proceedings, and stated that the appellant had "*wholly failed to do so*". The solicitors stated that the delay in prosecuting the claim "*represents a significant prejudice to our client given the claims raised in your proceedings, which were issued on 13th May 2013, related to*

alleged events in and around 2006 being some 14 years ago." They called on the appellant to progress the proceedings without further delay and to take steps to have the same set down for hearing within 21 days, or alternatively to serve a notice of discontinuance without delay. They stated that in default of the appellant taking either of these steps, they would apply to the court for an order striking out the proceedings for want of prosecution.

13. In a letter of 6th November 2020, the appellant wrote to the solicitors for the respondent asking, "*to see if we can agree to voluntary discovery between the parties.*" In a reply of 16th December 2020, the solicitors for the respondent stated that discovery had already been provided by way of affidavits sworn on 18th June 2015 and 1st March 2016, and that no issue had been raised by the appellant as to the adequacy or otherwise of the same in the following four and a half years. They again requested that the appellant set the proceedings down for hearing and reiterated the prejudice caused to their client by the appellant's delay in prosecuting the proceedings. They reserved the respondent's right to bring an application to have the proceedings dismissed for want of prosecution whether or not the appellant set the same down for hearing.

14. In the meantime the Receivers' proceedings were finally disposed of by the High Court (Murphy J.) on 30th May 2017. An appeal by the appellant against that order was dismissed by this Court on 14th December 2020.

15. While the respondent issued three subsequent letters calling upon the appellant to progress the proceedings, he did not do so and the next development in the proceedings was the issue by the appellant, on 30th March 2023, of a motion seeking an order to compel the respondent to defend the proceedings and restrain it from removing assets from the jurisdiction ("the motion to compel"). This motion was issued against the background of the respondent's planned cessation of business in this jurisdiction. It came before O'Moore

J. in the High Court on 28th July 2023, when he directed the appellant to deliver written legal submissions by 15th September 2023, with the respondent to reply by 31st October 2023. O'Moore J. further directed that any notice of motion seeking leave to cross-examine should be issued by 15th September 2023, and returnable to the Chancery list on 16th October 2023. Finally, O'Moore J. listed the motion to compel for hearing on 21st November 2023. The appellant failed to comply with the directions made by O'Moore J.

16. On 25th July 2023, the respondent issued a motion seeking an order pursuant to O.122, r.11 RSC dismissing the within proceedings for want of prosecution or, in the alternative, an order pursuant to the inherent jurisdiction of the court striking out the proceedings as against the respondent on the grounds of inordinate and inexcusable delay. This motion was initially returnable for 16th October 2023, and on that date it was listed by Barr J. for hearing on 21st November 2023, being the same date as the motion to compel. As already mentioned, the motion was grounded upon the affidavit of a Mr. Ted Mahon, a Senior Relationship Manager with the respondent, sworn on 24th July 2023. The appellant filed a replying affidavit thereto on 25th September 2023. I will return to the contents of these affidavits in due course.

17. On 14th November 2023, the appellant issued a motion seeking leave to serve notice of cross-examination on Mr. Mahon in respect of the affidavit sworn by him. On the face of it, this motion was returnable for 22nd January 2023 (which was clearly an error, and presumably intended to refer to 2024, but that date would have been of little use to the appellant, since the substantive motion had been listed for hearing on 21st November).

18. On the same date the appellant issued a second motion to cross-examine. While the Court was not provided with a copy of the latter, it is understood that this relates to an affidavit sworn on behalf of the respondent in the context of the motion to compel.

19. At the call-over of the motion to dismiss on 16th November 2023, counsel for the appellant advised Sanfey J. that two motions to cross-examine had been issued by the appellant, on 14th November 2023. On being so informed, and also upon being informed of the earlier directions of O'Moore J., Sanfey J. listed both motions to cross-examine for consideration by the judge assigned to the hearing of the motion to dismiss on 21st November 2023. It is common case that the motions to cross-examine were never formally served by the appellant upon the respondent, although courtesy copies of the motions were provided by counsel for the appellant to counsel for the respondent at the call over on 16th November 2023.

20. Finally, by way of background, it is of some relevance to note that the appellant was acting as a litigant in person for significant periods in the course of the proceedings. It appears that he so acted from the commencement of proceedings until 9th March 2016 and did so again in the period between 25th July 2018 and 20th April 2023. However, he was represented by solicitor and counsel for the hearings both in the High Court and again in this Court.

Grounding Affidavit of Mr. Mahon

21. Having set out the procedural background to the issue of the motion, Mr. Mahon avers that the proceedings concern alleged oral communications between the appellant and an unknown person who the appellant has declined to identify. It is apparent at this juncture that at the time of the swearing of his affidavit, Mr. Mahon had not alluded to the appellant's letter of 5th November 2012, and his averment that the appellant had declined to identify the person who he alleges advised him is most probably a reference to the reply provided by the appellant in his replies to particulars.

22. Mr. Mahon avers that the appellant failed to comply with the undertaking that he gave to Gilligan J. to expedite the proceedings, and that he has taken no substantive steps within the proceedings since October 2016. In particular, Mr. Mahon avers that the appellant has taken no "*proceeding*" for the purposes of O.122, r.11 of the RSC and that being so, the Court should dismiss the proceedings for want of prosecution and/or pursuant to the inherent jurisdiction of the Court.

23. Furthermore, Mr. Mahon avers, having regard to the nature of the proceedings any further delay would cause further prejudice to the respondent in circumstances where the allegations relied upon by the appellant relate to the period circa 2006, the proceedings issued in 2013 and the plaintiff undertook to expedite the proceedings in December 2014. Mr. Mahon avers that in circumstances where the appellant had failed to identify the individual who it is alleged made representations to him, to specify where those representations were allegedly made, and to provide details as to what was allegedly said, or to identify any contemporaneous note memorandum or other document that might shed light upon the claims, the prospect of any fair determination of the claims made as against the respondent has been substantially and significantly eroded, such that it would be wholly prejudicial to require the respondent to face the action.

Affidavit of Appellant

24. In reply to the averment of Mr. Mahon that the appellant has not identified the person who made representations to him on behalf of the respondent, the appellant refers to and exhibits the letter which he sent to the respondent on 5th November 2012, in which he had identified Mr. Noel Clarke as being the person who had advised him against selling properties to discharge his loans.

25. The appellant maintains that the within proceedings are related to the Receivers' proceedings in which he was fully active, and which consumed a lot of his time throughout the relevant period. The appellant denies failing to comply with the undertaking that he gave to Gilligan J. and he goes into some detail about the Receivers' proceedings, which included the application for an interlocutory injunction against the appellant (granted by Gilligan J. in April 2015), the continuation of those proceedings to plenary hearing, the granting of a permanent injunction against the appellant by Murphy J. in May 2017, and thereafter an appeal from that decision by the appellant to this Court which was listed for hearing on 29th April 2020. The Court was not informed of the outcome of the appeal, but nothing turns on that. The appellant avers that he was fully engaged by all of the foregoing proceedings, and also by other related activities, including the making of complaints to An Garda Síochána regarding the conduct of the receivers and also the conduct of the respondent and/or its solicitors in the course of discovery and inspection of documents. So far as is relevant to these proceedings, the allegations made by the appellant to the Gardaí included allegations of forgery of documents. The appellant exhibits documents relating to his complaints, which culminated in a decision of the DPP of 13th April 2022 not to prosecute, on the ground that there was an insufficiency of evidence. However, for the purpose of this application, the appellant maintains that dealing with the making of these complaints was very time consuming for him, and he submits that the complaints were bound up with these proceedings and the Receivers' proceedings all of which should be considered together for the purposes of this application.

26. The appellant asserts that the discovery provided by the respondent was incomplete and inaccurate and that he corresponded with the solicitors for the respondent in November 2022 with a view to completing "*all outstanding matters collaboratively*" and with a view

to having the proceedings brought to hearing as soon as possible. He exhibits correspondence in this regard.

27. The appellant claims that his ability to progress the proceedings was hampered during the Covid-19 lockdown and other restrictions. These difficulties were exacerbated by the illness of his son who tragically died from cancer on 1st March 2022.

28. The appellant summarises the reasons for the delay in his progression of the proceedings at para. 43 of his affidavit, which he says was "*due in part to the Defendant, and to delays in the Courts system, in Garda investigations and in the decision making of the DPP… [and] also due in part to the circumstances of lockdown and extreme personal circumstances…* ."

29. The appellant acknowledges that what he describes as "*a lengthy passage of time*" is highly undesirable, but he denies that the respondent has suffered any prejudice and avers that all outstanding matters will be dealt with expeditiously. However, he also says that he will be making detailed and specific requests of the respondent for further and better discovery, interrogatories and inspection of documents.

Judgment of the High Court

30. At the outset of her judgment, Stack J. addressed the principles applicable to applications to dismiss proceedings for want of prosecution, being those laid down in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, as summarised by this Court (per Irvine J., as she then was) in *Millerick v. Minister for Finance* [2016] IECA 206. At paras. 2 and 3 the judge noted that by these authorities the court is required to address its mind to three issues as follows:-

"2. ...first it must be considered whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay in prosecuting the proceedings is to be considered inordinate. If the court is not satisfied the delay is inordinate, then the application fails.

3. On the other hand, if the Court considers the delay inordinate, it must then decide whether that delay can be excused. If the delay can be excused, then once again the application must fail. But should the Court conclude that the delay is both inordinate and inexcusable, it should nevertheless refrain from dismissing the proceedings, unless it is also satisfied that the balance of justice favours dismissal."

31. The judge noted that the respondent does not rely on the exceptional jurisdiction of the court recognised in *O'Domhnaill v. Merrick* [1984] IR 151.

32. The judge then proceeded to set out the factual background, followed by an analysis of the appellant's claim. At para. 10 she stated that: "*The central plea in the amended statement of claim is that the plaintiff in 2006 proposed to repay all of his loans to the defendant by means of the sale of the properties in respect of which the defendant held securities. He says that, at that time, the sale of his properties would have cleared his indebtedness and, indeed, left him with a surplus.*"

33. At para. 11 the judge continued:-

"However, [the appellant] claims that [the respondent] wrongfully advised and encouraged him to roll over his existing facilities and in fact to purchase further investment properties. While a general criticism could be levelled at the amended statement of claim to the effect that it was extremely vague ... it is quite clear that the only advice complained of is said to have been given in 2006. That appears from paras. 19-22 and para. 26 of the amended statement of claim."

34. At para. 13, the judge stated that the appellant's complaint about the alleged advice given in 2006 by the respondent's employee is "*without any shadow of a doubt, the central complaint in the lengthy statement of claim.*"

35. The judge then proceeded to apply the test prescribed by the authorities to the three issues of delay, the excuses offered by the appellant for the delay, and the balance of justice. She noted that no formal steps had been taken in the proceedings since 20th October 2016 until the issue of the motion herein by the respondent on 24th July 2023, a period of almost seven years. The judge concluded that this delay was inordinate and, at para. 34, she noted that the appellant did not seriously dispute at the hearing of the motion that this was so, and commented: "*Indeed, he could hardly have done otherwise.*"

36. The judge then proceeded to consider, at paras. 36-57, the excuses offered by the appellant for the delay. Since the appellant takes issue with the consideration given by the judge to the excuses offered, it is appropriate to summarise those reasons and the consideration given to each. The judge considered five reasons as follows:

(1) The impact of the Covid-19 pandemic. The judge noted and took into account the appellant's main objection under this heading, being that he struggled with the technology required to conduct litigation during the pandemic. She took into account the fact that the appellant is of advanced years and that he along with many others may have decided, legitimately, to "*cocoon*" for a period. However, she concluded that this did not explain the delay in the period prior to the pandemic from October 2016 to March 2020 or any delay from approximately August 2020, by which time she said that online hearings were well established and those involved in litigation had adapted to electronic and remote communications. She concluded that while the pandemic might excuse

inactivity for a period of a few months, it did not excuse the failure of the appellant to take the opportunity given by O'Regan J. on 17th June 2016 to redraft his statement of claim in a more acceptable manner and to bring a motion to amend in a timely fashion after the withdrawal of his appeal from her refusal of his application on 20th October 2016.

(2) The judge considered the impact upon the appellant of the tragic and premature death of his son in early 2022. Noting that no specific evidence had been adduced by the appellant, she allowed that it would be reasonable to expect that the appellant could not progress the proceedings during this period in respect of which she excused the appellant's inactivity for a period of six months. Taking this and the pandemic together, the judge concluded that they might account for a period of one year, which, she said, in the context of the delay of seven years, is not very meaningful.

(3) The fact that the appellant was a litigant in person for a substantial period. In this regard the judge accepted the submission of the respondent that the status of a litigant as a litigant in person does not entitle a plaintiff to be treated in a manner preferential to that of other litigants. She relied upon the judgment of Power J. in this Court in *Kirwan v. Connors* [2022] IECA 242, para. 165.

(4) (a) The judge then turned to address what she described as the "*more substantive excuses*" offered by the appellant. The first of these was the impact of the Receivers' proceedings. The judge firstly referred to the undertaking given by the appellant in those proceedings to Gilligan J. and concluded that the appellant was in default of that undertaking as he had not expedited these proceedings as promised.

(b) The judge then considered a number of authorities which address the question as to whether or not a litigant may prioritise one set of proceedings over another. Specifically, she considered *Millerick v. Minister for Justice (op. cit), Comcast International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50 and *Diamrem Ltd. V. Clare County Council* [2023] IECA 49. While a majority of the Supreme Court in *Comcast* excused the very considerable delay of the plaintiff in the unique circumstances of that case – in which the plaintiff had deferred progressing the proceedings pending the conclusion of the Moriarty Tribunal – the judge considered those circumstances to be distinguishable from the circumstances of this case, which she considered was governed by the approach taken by this Court in *Millerick*, in which this Court held that, in general, a litigant is not entitled to prioritise one set of proceedings over another, even if they are in some way related, so as to cause the other party to the proceedings to suffer delay. While the appellant relied on his activity in the Receivers' proceedings and also his engagements with the Gardaí to excuse the lack of progress in these proceedings, the judge found that those matters are separate from the prosecution of these proceedings; which she said should have been set down for hearing many years ago. She noted that in *Diamrem,* Butler J. in this Court had stated that the logic of leaving one set of proceedings aside while prioritising another is that the latter would determine the former. That logic could have no application in this instance, and, the judge said, the principal claim in these proceedings could not have been determined in the Receivers' proceedings which were concerned with the exercise by the joint receivers of their powers. Furthermore, she said, the sale of the appellant's loans means that his complaints against the respondent in these proceedings are now

entirely separate from the issues in the Receivers' proceedings. While she agreed with the appellant that it would have been preferable for the respondent to indicate clearly to the appellant prior to the issue of the within motion that it was no longer pursuing its counterclaim in these proceedings by reason of the sale of the loans to Promontoria, she considered that to be a minor criticism. More substantively, she held that it is quite clear that any issues the appellant has about his liability on foot of the facility letters or the entitlement of the receivers to the possession of the secured properties could have nothing whatsoever to do with these proceedings, which comprise a claim for damages against the respondent, primarily on the grounds of allegedly assuming the role of financial advisor to the appellant in 2006.

(5) The judge then considered the excuse of alleged acquiescence and/or delay by the respondent. It is not entirely clear exactly what acquiescence was alleged by the appellant. The judge noted, at para. 52, that it was correct that the respondent had written to the appellant on 20th October 2020 asking him to set the case down for hearing and threatening to bring a motion to strike the proceedings out for want of prosecution. It appears therefore that the appellant may have argued that the respondent acquiesced in failing to bring the motion to dismiss any sooner than July 2023. However, following an analysis of events post 20th October 2020, the judge concluded that there was no acquiescence on the part of the respondent or encouragement of the plaintiff by the respondent in taking steps and incurring expense in the proceedings only to be met with an application to dismiss. The judge concluded that the appellant had simply taken no steps at all and, despite fair warning, did nothing even to head off the motion in the year before its issue.

37. The judge then proceeded to consider the question of balance of justice. In doing so, she firstly gave consideration to the fact that the averment in Mr. Mahon's grounding affidavit that the individual with whom the appellant alleges he had a conversation in 2006 had not been identified was incorrect – he had in fact been identified by the appellant in the letter sent by him to the respondent on 5th November 2012, prior to the issue of the proceedings. The judge opined that this letter was probably overlooked in preparing Mr. Mahon's affidavit, which she said was "*possibly… drafted in reliance on the notice for particulars and the replies thereto but is worded in broader terms.*" She opined that, possibly as a result, the grounding affidavit of Mr. Mahon did not address any steps taken by the respondent, after notification as to the identity of the individual concerned, to obtain his account of the alleged conversation with the plaintiff in 2006, or to preserve any documents or identify any documents that may have been disposed of because the respondent did not realise they might be required for court proceedings.

38. The judge then proceeded to consider the significance of this omission. She noted that the first mention of the conversation was over six years after it was alleged to have taken place, and at a time when there were no proceedings in being. She said that even if the respondent had taken steps to ascertain from the individual his recollection of the alleged conversation, the nature of the case being made by the appellant is that oral evidence at trial would be hugely significant. She said that the appellant, in order to succeed with his claim, would have to demonstrate that the respondent's employee went above and beyond simply recommending taking out of further loans and in some way assumed the role of his financial advisor, even though the appellant already had such an adviser at least up until shortly before the alleged conversation. She observed that the appellant had, by 2006, a number of property investments and is himself an auctioneer. Accordingly, the judge concluded that, for the

appellant to succeed, a "*fairly detailed*" cross-examination of the respondent's former employee would be required.

39. In the view of the judge, even if the respondent had taken steps with that employee to record in late 2012 his recollection of a conversation alleged to have taken place in 2006, the court would still be left in the extremely unsatisfactory position of trying to assess what are likely to be disputed issues of fact on the basis of the cross-examination of a witness as to his recollection of a conversation which had taken place in 2006. Moreover, the judge considered that, having regard to the steps that the appellant contended he still had to take in the proceedings to further amend his statement of claim and pursue discovery issues, it was very unlikely that any trial would take place prior to 2025, and so any cross-examination would take place a period of approximately 19 years after the alleged conversation took place.

40. The judge added that had the appellant acted more promptly after issuing his proceedings, he might have had a basis for a complaint that the respondent should have taken steps to explore with its employee the nature of the alleged conversation, but, she concluded, that given the further delay of approximately seven years from 2016 onwards, it is now virtually impossible for a fair trial of this issue to take place.

41. The judge concluded, at para. 67 in the following terms:-

> *"In my view the extensive delay since 2016, coupled with the central significance of oral evidence about a particular conversation in 2006, and the delay in instituting proceedings themselves, all point to dismissal of the proceedings in the interests of justice."*

42. Before concluding, the judge then made reference to the appellant's application to cross-examine Mr. Mahon, as deponent of the respondent's grounding affidavit. The judge

firstly concluded that this application should be refused as the motion was not issued in compliance with the directions of O'Moore J., and was not therefore formally before the court.

43. The judge added, at para. 70, that even if the motion to cross-examine Mr. Mahon had been properly before the court, she would in any event have refused it as the only relevant issue of fact arising from the affidavits exchanged on this application is whether or not the appellant had in fact advised the respondent of the identity of the employee with whom he claims to have had a conversation in 2006. Since the respondent had conceded that this had been done in correspondence prior to the issue of proceedings, there was no need for cross-examination to establish that fact. The judge further stated that any remaining issues of fact related to the appellant's dispute with the joint receivers, and were not material to the motion to dismiss.

Notice of Appeal and Submissions of Appellant

44. In his notice of appeal the appellant advances three grounds of appeal, divided into ten sub-grounds. The three grounds of appeal are under the following headings:

(1) Whether the plaintiff's delay is excusable;

(2) Alleged acquiescence/delay by the defendant; and

(3) Cross examination.

45. Under the first heading, the appellant claims that the judge erred in law and in fact in failing to give consideration and due weight to (a) the other litigation which the appellant was involved and (b) the personal circumstances of the appellant and (c) the cumulative effect of both the other litigation and the appellant's personal circumstances, all of which the

appellant asserts impacted upon his reasonable capacity to progress the proceedings with due expedition.

46. The appellant argues that the judge erred in not accepting that the Receivers' proceedings are directly related to the within proceedings and in failing to take account of the time required to be spent upon those proceedings by the appellant. Further, it is said that the judge erred in failing to take account of the time that the appellant was required to spend in addressing other related matters such as the complaint to the Gardaí about the alleged forgery of a document and the transfer of the appellant's debt by the respondent to Promontoria.

47. The appellant contends that the judge gave too little weight to the impact upon him of his son's sudden and early death and the impact of the pandemic. The appellant argues that his son's death occurred following a serious illness of several months, and that he was again in contact with the respondent on 17th August 2022 and it is contended that that period should have been discounted by the judge in her consideration of the delay. Unfortunately, the start date of this period is not clearly identified.

48. The appellant also argues that the judge did not give sufficient consideration to the impact of the Covid-19 pandemic upon the ability of the appellant to progress the proceedings, in particular taken together with the impact of his son's illness and death. It is submitted that these events taken together should have excused the appellant from progressing the proceedings for a period of two years, and that such a period, taken together with the periods of time taken by the respondent to reply to the appellant's correspondence, as well as the time necessarily taken up waiting for court dates, would excuse nearly all of the period from 2016 to 2023. Unfortunately, however, these latter claims are not particularised by reference to dates.

49. Under the second heading of acquiescence/delay, it is asserted that the judge failed to give due consideration and due weight to the actions and inactions of the respondent which gave rise to a number of delays and which would, if properly considered, have reduced the periods of delay for which the appellant has been held responsible. While no specific actions or inactions of the respondent upon which the appellant relies are identified, he refers to the period between October 2016 and July 2023, during which he contends that he awaited a response from the respondent. However, the appellant does not identify any issue to which a response was awaited, nor the period or periods involved.

50. The appellant further argues that the judge failed to take into account the inaction of the respondent in failing to bring the motion to dismiss any sooner than it did so, and in only bringing forward the motion subsequent to and arguably in response to the motion to compel which issued on 30th March 2023.

51. Under the heading of cross-examination, it is asserted that the judge erred in not hearing the appellant's motion to cross-examine Mr. Mahon or alternatively that the judge erred in not hearing his motion until after having heard the respondent's motion to dismiss. Furthermore, it is claimed that the judge erred in deciding not to hear the motion to cross-examine without having heard the submissions of counsel for the appellant. It is further claimed that the judge erred in regarding the motion to cross-examine as not being properly before the court.

52. It is submitted that the appellant's motion to cross-examine was properly before the court, having been returned by Sanfey J. for decision by the judge hearing the respondent's motion. The appellant argues that the motion to cross-examine was filed on 14th November 2023, one week in advance of the hearing of the respondent's motion, and that the court may not have been fully aware that the contents of the respondent's grounding affidavit were

controverted, with the result that the judge took into account controverted but untested evidence.

53. Furthermore, the appellant contends that the judge did not hear submissions from the appellant regarding the motion to cross-examine, and that not having done so the conclusions of the judge at para. 70 of her judgment (summarised at para. 41 above) demonstrate actual prejudice.

54. In his written submissions, the appellant argues that the judge erred in holding that the appellant delayed in the issue of proceedings. The appellant contends that proceedings could not have been issued before the impact upon the appellant of the advice proffered by the respondent's employee was identifiable, and this did not materialise prior to 2013.

55. The appellant also contends that the judge failed to take into account that the appellant was, for much of the period, a litigant in person, and failed to take into account the inequality of arms as between the parties. In this regard, the appellant relies upon the judgments of McKechnie J. and Clarke J. (as he then was) in *Comcast*.

56. Finally, the appellant maintains that the respondent has failed to demonstrate or to particularise any actual prejudice flowing from the delay. He submits that the conclusion of the judge that a fair trial is not possible is based upon speculation as to the capacity of the witness for the respondent to recall the conversation relied upon by the appellant, and the nature or changes in the relationship between the appellant and the respondent by reason of that conversation. The appellant contends that it may be presumed that the respondent would place the appellant upon full proof of the existence and content of the conversation with the appellant and would deny the assertions of the appellant. However, the appellant argues that the court would be well able to assess the assertions of the appellant notwithstanding the passage of time and without any or any significant prejudice to the respondent. The appellant

argues that the circumstances relied upon by the respondent regarding frailty of memory and absence of records regarding the conversation of 2006 does not amount to a real risk of an unfair trial of the kind discussed by Irvine J. (as she then was) in *Cassidy v. The Provincialate* [2015] IECA 74.

57. The appellant also placed reliance upon the late withdrawal of the counterclaim by the respondent. According to the judgment under appeal, para. 9, this did not occur until 8th October 2020, approximately five years and eight months after the sale of the respondent's interest in the appellant's loans to Promontoria. However, in discussion with the court, counsel for the appellant was unable to identify the relevance of this issue to the application before the Court, and why the existence of the counterclaim would in any way have prevented the appellant from advancing the proceedings. Moreover, although the respondent's counterclaim was only formally withdrawn on 8th October 2020, neither counsel for the appellant nor counsel for the respondent could explain how it might have been thought that the respondent could advance a counterclaim for repayment of the loans after the debt and associated security had been sold to Promontoria.

Respondent's Notice and Submissions of Respondent

58. The respondent contends that it is evident from the High Court judgment that the judge gave significant consideration to all of the reasons advanced by the appellant for not progressing the proceedings, and asserts that the appellant does not identify any error in fact or in law on the part of the judge in her consideration of the explanations offered by the appellant.

59. In its written submissions, the respondent submits that there are just two matters that require consideration by this Court:

(i) The test applied by the High Court judge; and

(ii) The excuses raised by the appellant.

60. The respondent submits that the judge correctly applied the *Primor* principles, and that she correctly held that the primary onus is on a plaintiff to bring proceedings on to hearing, and on the basis that no formal steps had been taken since October 2016, the judge was correct in finding that the appellant had been guilty of inordinate delay in the prosecution of the proceedings.

61. The respondent submits that it is clear from the judgment of the High Court judge that she gave appropriate and discerning consideration to each of the excuses proffered by the appellant for his delay, and correctly found the delay to be inexcusable.

62. In relation to the appellant's argument that the delay should be excused on account of his engagement with the Receivers' proceedings, the respondent relies on *Millerick*, and says that the judge correctly identified it as authority for the proposition that a litigant is not entitled to prioritise one set of proceedings, so as to leave the defendant in another suffer under delay. Moreover, the respondent submits, the judge was correct in her determination that the Receivers' proceedings could not determine the within proceedings, as the issues raised by the Receivers' proceedings are entirely different to those raised by these proceedings. Therefore, the respondent submits, the Receivers' proceedings cannot be relied upon by the appellant to excuse his inordinate delay in progressing these proceedings.

63. While the appellant does not specify the personal circumstances of the appellant upon which he relies, the respondent assumes that this is a reference to the tragic death of the appellant's son. The respondent says that it is evident from para. 38 of the judgment that the judge considered and afforded the appellant time in light of his son's death. However, the

respondent submits that the judge correctly held that this could not excuse the entirety of the delay of seven years since the last substantive step had been taken by the appellant.

64. Likewise, as far as the impact of Covid-19 is concerned, the respondent submits that it is apparent that the judge made appropriate allowance for its impact on the progression of proceedings, and points out that the appellant was able to issue a motion in September 2020 to join Promontoria and Royal Bank of Scotland as parties to the proceedings (albeit that this motion was withdrawn soon afterwards, on consent, on 2nd November 2020). Accordingly, the respondent submits, the appellant could not have been hampered in these proceedings by Covid-19 any later than September 2020.

65. So far as alleged acquiescence/delay by the defendant is concerned, the respondent submits that the appellant does not specify what actions or inactions of the respondent were allegedly raised by the appellant in the court below, and nor does he identify how the judge erred in fact or in law in her determination of this issue.

66. As regards the appellant being a litigant in person, the respondent submits that the judge correctly observed that the appellant was in fact represented for much of the period of the delay, and that the judge also correctly noted that in the decision of this Court in *Kirwan v. Connors* it was held that the fact that a litigant is self-represented does not entitle that party to be treated preferentially.

67. The respondent also submitted that the fact that it did not withdraw its counterclaim any sooner than it did is irrelevant, and could have had no bearing upon the appellant's failure to progress the proceedings one way or another.

68. As to the appellant's arguments in relation to cross-examination, again the respondent makes the point that the appellant does not specify how the judge erred in law in determining that the court should not hear motions which were not issued in compliance with the

directions order made by O'Moore J., which were not served on the respondent, and which were not properly before the court.

69. Furthermore, the respondent says, the appellant did not address the fact that notwithstanding the above, the judge considered the point and concluded that there was no matter material to the application before the court that necessitated cross-examination. This was so in circumstances where the respondent had conceded that the appellant had, prior to the issue of proceedings, advised the respondent as to the identity of the person with whom he allegedly had the conversation in 2006, upon which he relies.

70. The respondent says that it is a stranger to the allegation that the judge did not allow submissions to be made by counsel for the appellant, and says that this is not correct and that counsel for the appellant did in fact make submissions to the judge to have the motions to cross-examine to be heard.

71. As to the balance of justice, the respondent relies upon the following passages from the judgment of Irvine J. (as she then was) in *Cassidy v. The Provincialate* wherein the court held, at paras. 36 and 60:-

> *"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. …*
>
> *…As already stated by Kearns J. in* [*Stephens v. Flynn* [2008] 4 I.R. 31], *even moderate prejudice against a backdrop of inordinate inexcusable delay may be deemed sufficient to tip the scales of justice in favour of dismissing the proceedings. …"*

72. In this case, the respondent submits that the High Court judge correctly held that the nature of the case being made by the appellant is such that oral evidence at trial will be hugely significant. The respondent submits that the judge was correct to conclude that even if the respondent had taken steps to make contact with the employee with whom he claimed to have had the relevant conversation in 2006 in order to record his recollection of that conversation, the court would still be left in the extremely unsatisfactory position of trying to assess what are likely to be disputed issues of fact on the basis of cross-examination of a witness as to his recollection of a conversation which had taken place in 2006. The respondent submits that, were the trial to proceed in such circumstances, it would be very much at the risk of an unfair trial and the High Court judge was correct to so conclude.

73. Finally, the respondent places reliance on its pre-motion correspondence with the appellant, pointing out that on no fewer than nine occasions between October 2020 and August 2022 its solicitors wrote to the appellant and warned him to progress the proceedings, failing which action would be taken.

Discussion and Decision

74. Unsurprisingly – not least given that the appellant did not contest the issue in the court below – there is no appeal from the conclusion of the High Court judge that the appellant's delay in progressing the proceedings is inordinate.

75. While the appellant contends that the High Court judge failed to give "*due consideration and due weight*" to the various excuses tendered on his behalf for the delay, the appellant did not explain or elaborate in any meaningful way upon these assertions and in particular did not explain in what manner he claims that the High Court judge erred in her treatment of the various excuses put forward by the appellant. In my view the respondent is

correct in its submission that these are generalised and vague assertions. Moreover, it is apparent from High Court judge's treatment of the various excuses offered that she gave them all due consideration and provided clear reasons for rejecting each one.

76. It is apparent that the appellant's real grievance is that the judge declined to accept that the reasons offered for the appellant's inordinate delay, whether considered individually or taken together, did not constitute an excuse for the delay. However, beyond merely asserting that the trial judge erred in her conclusions on each of the reasons offered, the appellant did not put forward any persuasive basis for these assertions. Accordingly, each of the excuses put forward by the appellant for his delay may be addressed very briefly.

The Appellant's Excuses for Delay

The Receivers' Proceedings

77. The appellant placed much emphasis upon the time required to be spent by the appellant in dealing with the Receiver's proceedings, and other matters such as complaints to the Gardaí. The appellant did not disagree that *Millerick* is authority for the proposition that, in general, a litigant is not entitled to prioritise one set of proceedings by leaving the defendant in another set of proceedings – even if those proceedings are in some way related – to suffer undue delay. Instead, he argued that there is a direct connection between the matters giving rise to the Receivers' proceedings and these proceedings, such that the time spent by the appellant in addressing the Receivers' proceedings should be accepted by the court as an explanation for at least some of the delay in progressing these proceedings.

78. But this is just to re-argue the same point made by the appellant in the High Court, without attempting to explain by the High Court judge erred in her analysis and conclusions, which, so far as this argument is concerned, I have summarised at para. 36(4) above. In my

view, the analysis of the judge and the conclusions drawn from that analysis are unimpeachable and there is no need to repeat them again here. Neither the grounds of appeal nor the submissions of the appellant engage with the reasoning of the trial judge. While the two proceedings may be said to share a common root – i.e. the loan facilities granted by the respondent to the appellant – that common root cannot and does not serve in any way to explain the delay of the appellant in progressing these proceedings, in respect of which he gave an undertaking to expedite to Gilligan J. in April 2015, and also perhaps even earlier, in December 2014. In giving that undertaking, which was given in the context of the Receivers' proceedings, the appellant must have understood that these proceedings are separate and distinct from the Receivers' proceedings, involving as they do different parties and entirely different causes of action. Otherwise, there would have been no need for him to give the undertaking. In any case he gave the undertaking, and the High Court judge quite correctly found the plaintiff to be in breach of the same. She was also manifestly correct in concluding that from the time of the sale of the appellant's loans to Promontoria the Receivers' proceedings diverged from the within proceedings, and that the issues raised by the Receivers' proceedings have nothing whatsoever to do with this case, and could not be accepted as a reason for failing to progress these proceedings. As Butler J. observed in *Diamrem Ltd. V. Clare County Council* [2023] IECA 49, at para. 39:-

> *"39. Logically if a party to litigation puts one set of proceedings on hold in order to await the outcome of another, it is because the outcome of the other proceedings is likely to be determinative of the first."*

In *Diamrem*, Butler J. found that the outcome of the other proceedings in which the plaintiff in that case was involved, also as Plaintiff, was potentially relevant to the outcome of the proceedings sought to be dismissed in that case, and was prepared in principle to accept the

other proceedings as an excuse for not progressing the proceedings. However, that reasoning obviously has no application to these proceedings.

79. Likewise, there was no need for the appellant to await the outcome of the criminal investigation opened by the Gardaí, and it was obviously open to the appellant to raise issues concerning the alleged forgery of any documents relied upon by the respondent within these proceedings, where any such issues would fall to be addressed by reference to a lower standard of proof than in criminal proceedings.

80. And in any event, the Receivers' proceedings were finally disposed of in the High Court on 30th May 2017 and by this Court on 14th December 2020. In the time during which the appeal was awaiting a hearing date and thereafter until judgment was delivered there was nothing for the appellant to do which could have distracted him from his obligation to progress these proceedings.

The Covid-19 Pandemic and the Death of the Appellant's Son

81. The appellant also contended that the judge erred in failing to take account sufficiently of the impact of the Covid-19 pandemic and the untimely death of his son. The appellant submits that the judge should have allowed of the order of two years in respect of these events. So far as Covid-19 is concerned, the judge agreed that the pandemic would have intervened to delay the proceedings through no fault of the appellant, and gave credit for a period of approximately five months under this heading, i.e. from March 2020 to August 2020, by which time the courts and litigants, including lay litigants, had adapted to the conduct of court business remotely. That the appellant himself managed to adapt is demonstrated by the fact that he issued a motion to join Promontoria and Royal Bank of Scotland as parties to the proceedings in September 2020. This would suggest that the period excused by the judge under this heading was perfectly adequate.

82. As regards the impact upon the appellant of his son's illness and tragic untimely death, the judge accepted that these sad events would have impacted upon the appellant's ability to progress the proceedings and excused him a period of six months under this heading. The appellant suggests that the judge should have allowed him up to a year under this heading. How much time should be allowed to a person to progress proceedings in such circumstances will vary from case to case. Of its very nature, there is no exactly right answer, and how much time may be allowed will depend upon the evidence offered as to the impact of the events relied on by the litigant on the one hand, and the nature of the litigation and the need of the other party to the litigation to have it brought to a conclusion within whatever period may be reasonable in the circumstances on the other.

83. In this case the judge observed that no specific evidence had been given by the appellant, and so she addressed the matter in a general way, allowing for period of approximately six months around the time of the death of the appellant's son, during which she accepted that the appellant could not have been expected to progress the proceedings. She then stated that that period taken together with the period allowed for the Covid-19 pandemic should not be more than one year, which, the judge said, was not very meaningful in the context of a delay of seven years. The appellant contends that the judge should have allowed two years, but even if he is allowed two years, that does not get him very far, leaving as it does a period of five years within which he failed to take any steps at all to progress the proceedings, and for which he has failed to advance any acceptable explanation.

The Late Withdrawal of the Counterclaim

84. The late withdrawal of the counterclaim is clearly irrelevant as an excuse and is no more than a red herring. In fairness to counsel for the appellant, in discussions with the

Court he did not press this point and agreed it is difficult to identify any impact on the appellant arising from the late withdrawal of the counterclaim.

The Fact that the Appellant was Unrepresented for Certain Periods

85. The appellant, while arguing that the judge should have taken into account that he was for much of the period involved a litigant in person, did not address the decision of this court in *Kirwan v. Connors* [2022] IECA 242, to which the trial judge referred when considering this point. At para. 166 of *Kirwan*, Power J. addressed the issue as it arose in those proceedings as follows:-

> *"166. The appellant in this case was not entirely unfamiliar with the courts. Whilst his counsel, on appeal, made several references to his lay litigant status as a ground for greater tolerance to be shown towards him, no indication was given as to where the line for such extended tolerance is to be drawn in respect of a litigant who does nothing to prosecute his case. A litigant in person should not be placed in a better position than litigants who have representation (ACC Bank Plc v. Kelly [2011] IEHC 7, para. 2.6). Represented or not, no plaintiff is entitled to institute proceedings and then to leave them lie, unprosecuted, indefinitely."*

86. Likewise, in these proceedings, no indication was given by the appellant as to the tolerance which he contended should be afforded to him by reason of his status as a litigant in person. Moreover, for a considerable portion of the most relevant period of inactivity, the appellant in this case was in fact represented.

87. But the appellant has relied upon the *dicta* of McKechnie J. and Clarke J. (as he then was) in *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50, in which those learned judges considered the implications of a disparity of resources in proceedings in the context of delay. At para. 3.10 of his judgment, Clarke J. stated:-

"3.10 However, I should express my agreement with a number of the observations made on this question by McKechnie J. in his judgment in this case. First, I agree fully with the comments made by reference to Guerin v. Guerin [1993] I.L.R.M. 243. The circumstances of the parties and, in particular, any disparity in the resources available to the parties must always be a factor which the court takes into account. The degree of expedition and compliance with time limits which could properly be expected of large corporations involved in commercial disputes cannot reasonably be required of poorly resourced or otherwise disadvantaged litigants who may have to resort for representation to small law firms frequently accepting instructions without any guarantee of payment. Any legitimate tightening up must give all due consideration to the difficulties with which such parties are faced in progressing litigation which can, in many cases, be of significant importance to the party concerned."

88. Later in his judgment, at para. 3.13, Clarke J. added:-

"With those observations in mind I do, however, remain of the view that tightening up is required. While the court will, understandably, be concerned to balance the interests of justice arising in the case before it and, in that regard, to consider all relevant facts, nonetheless the overall approach of the courts, if unduly lax, has the potential to create injustice by delay across a whole range of cases whose facts may never come to be considered by a judge, but whose progress is adversely affected by a culture of delay."

89. There does not appear to me to be any inconsistency between what was held by this court in *Kirwan*, and indeed in other cases, and the sentiments expressed by both McKechnie J. and Clarke J. in *Comcast*. All cases fall to be assessed on their own facts, but in this context, the starting position must be, as stated by Power J. in *Kirwan*, that no litigant is entitled to institute proceedings and then to leave them lie, unprosecuted, indefinitely. In

this case, the pleadings had closed, discovery had been exchanged and the case had been set down for hearing for the first time in March 2016, all before the appellant first became represented, and it has not been explained why the fact that he was not represented between then and 2018 operated so as to prevent him from progressing the proceedings during that period. That being the case, the judge was, in my view, correct to reject the excuse that the proceedings were delayed as they were because the appellant was a litigant in person.

For all of the reasons discussed above, I am of the view that the conclusions of the judge on the various excuses put forward by the appellant for his delay in progressing the proceedings were arrived at following a meticulous analysis of all relevant facts and were well within the margin of discretion of the judge and should not be disturbed. In my view, there was an abundance of reasons for the judge to conclude that the delay was both inordinate and inexcusable.

Balance of Justice

90. The appellant has raised four matters that fall to be addressed under the heading of the Balance of Justice. These are:

(i) the alleged acquiescence of the respondent. While the High Court Judge appears to have considered this issue under the heading of "Excusability", it is, as the passage cited below from *Millerick* makes clear, more properly a matter to be addressed under the heading of balance of justice, and the appellant has correctly followed that course in this appeal.

(ii) the appellant's motion to cross-examine Mr. Mahon;

(iii) the suggestion that the appellant delayed in issuing the proceedings;

(iv) the prejudice asserted by the respondent.

Acquiescence of the Respondent

91. This ground could hardly have been more vaguely expressed. No periods of what is sometimes referred to as "*culpable*" delay on the part of the respondent were identified at all. It appears that the appellant simply relies on the fact that the respondent did not issue the motion to dismiss until July 2023, and that notwithstanding threats to bring a motion to dismiss the proceedings, the solicitors for the appellant, in their correspondence in the years leading up to the issue of the motion, simultaneously invited the appellant to progress the proceedings.

92. In *Millerick*, at para. 36, Irvine J. (as she then was) had the following to say about alleged acquiescence on the part of defendant:-

> *"It is clear from the authorities that the conduct of both parties to proceedings has to be examined in considering an application of this kind. Having said that, the judgment of Fennelly J. in* [*Anglo Irish Beef Processors Limited v. Montgomery* [2002] 3 I.R. 510] *makes clear that it is the conduct of the litigation by the plaintiff, that is the primary focus of attention. A defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant that constitutes acquiescence in the delay, his silence or inactivity is not material. It is obviously not a consideration on the first question as to whether the delay is inordinate or inexcusable. The only way it can arise therefore is in the balance of justice. The question at that point is whether the defendant has caused or contributed to the plaintiff's delay or in some manner gave the plaintiff to understand or led him to believe that the defendant was acquiescing in the delay. Mere silence or inactivity in*

itself is insufficient because that does not communicate acceptance to the plaintiff. This understanding of the law is also consistent with the later authorities of the Supreme Court and the High Court."

93. At para. 39, Irvine J. continued:-

"For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words a simple failure on the part of a defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would likely give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."

94. The appellant has not identified any such conduct on the part of the defendant in this case. While the defendant did write several letters to the appellant inviting him to progress the proceedings, in some cases simultaneously stating that if he did not do so a motion to dismiss would be brought, such correspondence can hardly be deemed to constitute acquiescence, not least in circumstances where the appellant failed to take up the invitation to progress the proceedings.

95. The judge conducted a detailed analysis of the steps taken in the proceedings by each of the parties and concluded that nothing that the respondent had done amounted to acquiescence on its part or encouragement of the plaintiff in taking steps and incurring expense only to be met with an application to dismiss. The judge concluded that, on the

contrary, the appellant had simply taken no steps at all, and despite fair warning, did nothing even to head off the motion in the year before it issued.

96. While the appellant maintains that the judge erred in failing to find that the respondent had acquiesced in the delay, he has failed to identify any error in the analysis of the judge and in particular has failed to point specifically to anything said or done by the respondent might constitute acquiescence on its part. This ground of appeal must also therefore be dismissed.

The Appellant's Motion to Cross-Examine Mr. Mahon

97. The appellant argues that the judge erred in in her treatment of his notice of motions to cross examine. Although there were two such motions, this point concerns only the motion to cross-examine Mr. Mahon on his grounding affidavit. In fairness to counsel for the appellant, at the hearing of this appeal, he accepted that this was a "*very weak*" point, and he acknowledged that the motion had been issued much too late. Even so, he did not abandon the point altogether, and so it is best that I address it.

98. In my view there can be no doubt at all that the judge was correct in holding that the motions were not actually before the court. They had not been served and they were listed by Sanfey J. for consideration by the judge hearing the motion to dismiss on 21st November, leaving it to that judge to deal with the motions to cross examine as she saw fit, as distinct from listing them for hearing.

99. The judge in any case dealt with the substance of the motion, albeit after hearing the motion to dismiss. In doing so she made the point that there was no issue of fact that was material to the motion before the court (i.e. the motion to dismiss) in respect of which cross-examination was required. While counsel submitted that the replying affidavit of the appellant raised many issues of controversy between the parties, in respect of which cross-

examination was required, the appellant's affidavit grounding the motion to cross-examine does not identify any specific fact relevant to the motion to dismiss in respect of which there is a dispute between the parties and nor did the appellant identify any on appeal, whether in the notice of appeal, the written submissions or the oral submissions to the court.

100. In my view the judge was correct in holding that the only relevant issue of fact raised by the affidavits exchanged on the motion to dismiss was the averment of Mr. Mahon that the respondent did not know the identity of the person with whom the appellant claimed to have had a conversation in 2006. Once the respondent conceded that this person had been identified by the appellant in his letter of 5th November 2012, this issue ceased to be of any relevance. None of the other matters raised by the appellant in his replying affidavit necessitated cross-examination, because for the most part the facts relied on were not in dispute, and what was at issue was how the judge should exercise her discretion in light of those facts. In any case, the appellant did not even attempt to identify any specific issue that he claimed necessitated cross-examination, and for this reason alone this ground of appeal must fail.

101. I should not leave this issue without addressing the ground of appeal and related written submission made on behalf of the appellant that the judge determined this issue without affording counsel for the appellant the opportunity to be heard, and that in so doing, she demonstrated actual prejudice. Had this ground been pursued, a transcript of the proceedings in the High Court would have been necessary. However, no such transcript was provided in the appeal papers, and the ground was not pursued. I would therefore dismiss this ground of appeal. I would add that an allegation of actual bias is a serious allegation to make against a judge, and it should not be made lightly. Where it is made, and a party elects

not to pursue it, that party should make it clear to the Court that the allegation is withdrawn. Unfortunately, that did not happen in this instance.

The Appellant's Delay in the Issuing of the Proceedings

102. In relation to the ground of appeal that the judge erred in holding that the appellant delayed in issuing the proceedings, this was one of just three reasons given by the judge for her conclusion on the issue of balance of justice, the others being the delay since 2016 and the "*central significance*" of oral testimony regarding a conversation that took place in 2006. The issuing of these proceedings was clearly prompted by the respondent's demands for repayment of the loans. The appellant's core complaint is that by reason of what was allegedly said in 2006 – whatever that was – he failed to sell at what later proved to be the top of the market. As a matter of objective fact, the institution of the proceedings came years after the collapse of the market. Even if the appellant was right in his contention that the trial judge erred in finding that the appellant delayed in issuing the proceedings – and to be clear, I am not deciding that issue – it is in any case well-established that the later that proceedings are issued, the greater the impetus on the plaintiff to move them on expeditiously. Here the appellant did not issue proceedings until more than six years after the conversation relied upon, and even assuming that the appellant is correct in his assertion that he was justified in not issuing proceedings any sooner, it manifestly behoved him to move the proceedings along expeditiously thereafter, and he failed to do so.

The Prejudice Asserted by the Respondent

103. Finally, the appellant says the judge erred in finding that the respondent will be prejudiced if the proceedings proceed to a full hearing. The appellant says that no specific evidence of prejudice was provided. However, it is well-established that once inordinate and inexcusable delay has been established, it is not necessary for a defendant to establish

specific prejudice; that general prejudice from the delay may be presumed and that even moderate prejudice is sufficient to sway the balance of justice. See, for example, the judgments of Irvine J. (as she then was) (speaking for this Court) in *Millerick* and Collins J., also speaking for this Court, in *Cave Projects Ltd. -v- Kelly* [2022] IECA 245. In the latter, Collins J. said, at para. 36:-

> *"…The absence of any specific prejudice (or, as it is often referred to in the caselaw 'concrete prejudice') may be a material factor in the court's assessment. However, it is clear from the authorities that absence of evidence of specific/concrete prejudice does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice. The caselaw suggests that the form of general prejudice most commonly relied on in this context is the difficulty that witnesses may have in giving evidence – and the difficulty that courts may have in resolving conflicts of evidence – relating to events that may have taken place many years before an action gets to trial. That such difficulties may arise cannot be gainsaid. But it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis. As a matter of first principle, only such prejudice as is properly attributable to the period of inordinate and inexcusable delay for which the plaintiff is responsible ought to be taken into account in this context. … ."*

104. It can scarcely be doubted that the trial judge is correct that if this case proceeds to a full hearing, the appellant will wish to conduct a detailed cross-examination of the person with whom he said he had a conversation in 2006 as to what that person represented and advised at that meeting. The submissions of the appellant appear to acknowledge that such cross-examination would be necessary. It is true that the respondent has not placed evidence

before the court of the kind that would normally be relied upon to establish actual prejudice. The trial judge specifically considered this and surmised that it might have been owing to the fact that until quite a late stage the respondent remained oblivious to the fact that the appellant had named the person concerned prior to the issue of the proceedings, and that the respondent had clearly relied upon the replies to particulars in which the appellant declined to name the person, and that it was not until after delivery of the appellant's replying affidavit of 25th September 2023 that the respondent was reminded of the appellant's letter of 5th November 2012. In any case, the judge was of the view that it was inevitable that detailed cross-examination would be necessary in relation to a conversation that took place in 2006 and that the prejudice to the respondent arising from this is obvious. Moreover, it is apparent that the respondent has no record that Mr. Clarke advised the appellant not to sell his property in 2006. That this is so is apparent from the letter sent by the respondent to the appellant on 10th June 2013. While the appellant in his letter of 5th November 2012 did identify the bank official with whom he alleges that he spoke, he declined to provide the full and detailed particulars sought as to what precisely it is he alleges was said. Furthermore, the parties exchanged discovery as far back as 2015, and if that had yielded any relevant documents, it is reasonable to assume the Court would have been informed.

105. In his submissions to this court, counsel for the appellant submitted that if the proceedings continue to a full hearing, it may be anticipated that Mr. Clarke will deny having had the conversation with the appellant in 2006, or alternatively will deny having advised the appellant as the appellant claims that he did. In such circumstances, counsel for the appellant submits, the court will have to assess the evidence of the appellant on the one hand, and Mr. Clarke in the other, and form a view as to whose evidence, on the balance of probabilities, is more likely to be correct. The burden of proof will be on the appellant. None of this, it is submitted, suggests any prejudice to the respondent.

106. With respect, however, I disagree. The authorities are replete with statements that the longer the interval between a conversation and the hearing of proceedings the determination of which will be resolved by reference to that conversation, the more justice is put on the hazard. Very many of those cases are concerned with intervals of much shorter duration than in this case, which, if it is allowed to proceed to trial will probably involve an interval of the order of 20 years between the conversation relied upon and the trial of the action. This is in circumstances where the first mention of this conversation was six years after it was first alleged to have taken place and in which the appellant, in replies to particulars, declined to furnish any specific details of the conversation, instead replying to the queries raised that they are "*a matter for evidence*".

107. Even on his own case, the appellant appears to agree with the opinion of the judge that, if the matter proceeds to trial, a detailed cross examination of Mr. Clarke would be necessary. The trial judge also found that even if the respondent had taken steps with that employee to record in late 2012 his recollection of a conversation alleged to have taken place in 2006, the court would still be left in the extremely unsatisfactory position of trying to assess what are likely to be disputed issues of fact on the basis of the cross-examination of a witness as to his recollection of a conversation which had taken place in 2006.

108. In *Rogers v. Michelin Tyre Plc* [2005] IEHC 294, Clarke J., as he then was, considered the difficulties that may arise when a court is called upon to adjudicate upon conversations that took place many years ago. At para. 33 he said:-

> *"In a case where it is likely to be common case that the relevant meeting occurred and that it discussed generally the circumstances surrounding the plaintiff's potential departure from Michelin it is probable that the factual issues between the parties will be as to subtle aspects of what occurred at the meeting. In those circumstances it is*

frequently the case that minor aspects of the surrounding circumstances can play an important part in influencing the court's decision as to which account to accept. In those circumstances a party who is being required to give an account of events which occurred over ten years ago, which were not, at the time, apparently likely to prove controversial and where the relevant witnesses would have spent much of the intervening period under the reasonable apprehension that the proceedings had been allowed to wither will be at a significant disadvantage. If questioned as to the minutiae of the meeting the witnesses are unlikely to be able to recall. If these proceedings had come on for hearing within a reasonable period of time then the relevant witnesses would have been asked to deal with the minutiae of such a meeting in circumstances where each witness would, at virtually all material times since the meeting, have been aware that he was likely to have to give evidence about it. In those circumstances I am satisfied that Michelin will suffer at least a moderate degree of prejudice in defending this action insofar as it relates to the alleged representations made at the September 1995 meeting."

109. While it is clear from this passage that there are differences in the circumstances in which the issue arose in *Rogers* and in which it has arisen in this case, the general principle is the same. The respondent could not have known anything about the conversation relied on for at least six years. It is arguable that moderate prejudice arose even then. However, it did not become aware until the appellant's replying affidavit filed for the purpose of this application that the appellant was referring in these proceedings to the conversation he had referred to in a letter that he had sent to the respondent almost a year before he had served these proceedings. In other words, for the purpose of the proceedings, the respondent was not made aware of the identity of the person with whom the conversation was alleged to have taken place until approximately 17 years after that conversation.

110. As the trial judge stated, a defendant is entitled to know from the pleadings the case being made against it and to elicit further particulars if necessary. A defendant is not obliged to trawl back through its own files to try and fill the information gaps in the case being made against it. The respondent tried to do establish what the appellant's case was by means of a notice for particulars, but the appellant declined to provide the particulars requested. If the case is allowed to proceed to hearing, it is likely that the trial of the action will take place in or about twenty years from the date of the conversation in respect of which it appears there is no written record. It is difficult to imagine how anybody could have confidence as to the detail of what was said in a routine business conversation twenty odd years ago. Such a conversation would surely have been routine to Mr. Clarke. In these circumstances the High Court judge was entitled to and in my view was correct to conclude that the respondent has suffered at least moderate prejudice by reason of the appellant's delay in progressing the proceedings, and to conclude that the balance of justice favours the dismissal of the proceedings.

111. For all of the reasons discussed, I would therefore dismiss this appeal.

112. Since the respondent has been entirely successful in this appeal, as that term is used in s. 169 of the 2015 Act, my preliminary view is that the respondent is entitled to an order for the costs incurred by it in resisting this appeal. If the appellant wishes to contend for a different order, he may do so by written submissions, not to exceed 1,500 words, to be filed within 14 days from the date of delivery of this judgment, excluding vacation days. In such event, the respondent shall file any replying submissions it may wish to make, also not to exceed 1,500 words, within a further 14 days.

113. As this judgment is being delivered electronically, Allen and Butler JJ. have authorised me to indicate their agreement with it.