APPROVED

THE HIGH COURT

[2023] IEHC 760

Record No. 2016/2099S

BETWEEN:

ALLIED IRISH BANKS PLC

PLAINTIFF

-AND-

KEALAN DELANEY AND JOHN MINION

DEFENDANTS

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 19th day of December 2023

INTRODUCTION

Preliminary

1. The two motions which are before the court arise from the same set of proceedings which relate, in summary, to the issuing of a Summary Summons on 8th November 2016 and a subsequent application by the plaintiff for an order granting the plaintiff liberty to enter final judgment against the first named defendant in the sum of €1,603,210.61.

2. The background to the proceedings, and the applications before me, concern a loan facility in the sum of €2,103,730 originally advanced by the plaintiff, Allied Irish Banks plc ("AIB"), to Redrock Quarry Company Limited pursuant to a letter of commercial loan sanction dated 26th May 2008, which terms were accepted in writing on 18th June 2008. The guarantee in this case was signed in writing on 30th November 2007 for an amount that would not exceed €2,000,000. By a global Deed of Transfer dated 4th October 2022 executed between, *inter alia*, AIB and Everyday, AIB transferred to Everyday its loan and the underpinning security.

3. It is against this background that the motions which are before me were issued. It was agreed by the parties that both motions would be opened together given the overlapping facts and, in this judgment, I have addressed them in the following sequence.

4. First, an order is sought pursuant to O. 17, r. 4 of the Rules of the Superior Courts 1986, as amended and substituted ("RSC 1986"), substituting Everyday Finance Designated Activity Company ("Everyday') as the plaintiff for AIB in the proceedings ("the substitution application").

5. Second, the first named defendant ("Mr. Delaney") seeks an order from the court dismissing and/or striking out the plaintiff's case against him on a number of grounds including *Primor* grounds[1] and/or pursuant to O. 19, r. 28 RSC 1986 and/or the inherent jurisdiction of the court.

6. Mr. Paul Gunning BL appeared for the plaintiff and Mr. Louis McEntagart SC (together with Mr. Rudi Newman BL) appeared for the first named defendant.

SUBSTITUTION APPLICATION

Legal Principles

7. It is accepted by the parties that the threshold for the plaintiff to meet in a substitution application is low, but it is argued on behalf of the first named defendant that the plaintiff has failed even on a *prima facie* evidential basis to show that Everyday is the successor in title to AIB in respect of the loan and/or guarantee, which is the subject of the application before me.

[1] *Primor Plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459. The principles established in *Primor* were extensively analysed by the Court of Appeal in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245

8. O. 17, r. 4 RSC 1986 provides as follows:

> "*[w]here by reason of death, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence*."

9. I have addressed the circumstances by which the application for substitution came to be made *on notice* to the first named defendant in the next part of this judgment dealing with the application to dismiss.

10. The test to be applied and the meaning of '*prima facie* evidence' was discussed in the judgment of the Court of Appeal in *Pepper Finance Corporation (Ireland) Ltd v*

Macken & Another [2021] IECA 15,[2] where Murray J.[3] *inter alia* referenced a number of decisions of the High Court, for example: *IBRC v Comer* [2014] IEHC 671 (Kelly J.), *IBRC v Morrisey* [2014] IEHC 527 (Finlay Geoghegan J.); *IBRC v Lavelle* [2015] IEHC 321 (Baker J.); the Court of Appeal in *Stapleford Finance Ltd v Lavelle* [2016] IECA 104;[4] and the Supreme Court in *Ulster Bank v O'Brien* [2015] IESC 96; [2015] 2 I.R. 656.[5]

11. Murray J. *inter alia* observed at paragraph 25 of the judgment of the Court of Appeal in *Pepper Finance Corporation (Ireland) Ltd v Macken & Another* [2021] IECA 15, that:

> "*… central to that test is the meaning and import of the phrase 'prima facie evidence'. As McMenamin J. observed in Ulster Bank v O'Brien*[6] *as a general principle, a prima facie case will be made out when, on the evidence available, it would be open to a tribunal of fact, if no other evidence was given, or if that tribunal accepted that evidence even*

[2] The Court of Appeal comprised Haughton J., Murray J. and Collins J. Haughton J. and Collins J. agreed with the judgment delivered by Murray J. on 25th January 2021.

[3] It might be usefully aligned to the test applied in deciding whether a claim is sufficiently stateable at law to withstand a dismissal application under either Order 19 Rules of the Superior Courts or the inherent jurisdiction of the Court.

[4] The Court of Appeal was comprised of Irvine J., Sheehan J and Costello J. Costello J. gave the judgment of the court.

[5] The Supreme Court was comprised of MacMenamin J., Laffoy J., and Charleton J. who each gave concurring judgments.

[6] [2015] IESC 96 [2015] 2 I.R. 656 (at paragraph 2).

though contradicted in its material facts, to enter a verdict for that party.[7] *These decisions are directed to a prima facie case in contexts and for purposes different from those at issue here – the sufficiency of a case to withstand an application for a direction (as in O'Toole v Heavey) or to sustain an application for summary judgment (the issue in O'Brien). However, the essential definition is the same …".*[8]

The Issues

12. Mr. Gunning BL emphasises that his case centres on the guarantee alone. Mr. McEntagart SC, in response, says that the loan and the guarantee cannot survive independently by virtue of the principle of subrogation.

13. In his submissions on this issue, Mr. McEntagart SC places much reliance on the replying affidavit of Kealan Delaney (the first named defendant) sworn on 3rd November 2023, particularly at paragraphs 15 to 24, and makes the point that the matters put before the court in the affidavit of Emmet Martin sworn on 1st November 2023 do not satisfy or discharge, the *prima facie* evidential threshold required in a substitution application.

14. In this regard, Mr. McEntagart SC submits that if AIB have disposed of 'their rights', it must mean that Everyday has acquired them but that Everyday has not shown that they have in fact acquired them. He further submits that the assertion on behalf of AIB

[7] Citing *O'Toole v Heavey* [1993] ILRM 343 at p. 344.

[8] [2021] IECA 15 per Murray J. at paragraph 25.

that they transferred their rights is insufficient and that the Deed of Transfer, which the plaintiff relies on, in fact indicates that the *chose in action* has <u>*not*</u> been transferred.

15. The guarantee in this case was signed in writing on 30th November 2007 for an amount that would not exceed €2,000,000 and is exhibited at paragraph 5 of the affidavit of Emmet Martin sworn on 1st November 2023.

16. What was transferred from AIB to Everyday is described in the global Deed of Transfer dated 4th October 2022 which was executed between, *inter alia*, AIB and Everyday, whereby AIB "*unconditionally, irrevocably and absolutely granted, conveyed, assigned, transferred and assured to Everyday all such rights, title, and interest*", as AIB had in Redrock Quarry Company Limited's facility and the security as set out in the schedule contained within the Deed of Transfer with effect from 4th October 2022.

17. In the redacted document, global Deed of Transfer dated 4th October 2022 exhibited at paragraph 12 of the affidavit of Emmet Martin sworn on 1st November 2023, under the sub-heading, 'Loan Facilities' is described as follows:

Connection ID	Borrower ID	Sub-borrower ID	Sub-borrower Name	Facility ID	Legal Entity	Type	Facility Letter Date

18. Going through the redacted global Deed of Transfer, Mr. McEntagart SC, under the heading 'Loan Facilities', refers to 'Type' as meaning a '<u>*Facility Letter*</u>' and the Facility Letter Date as '<u>*08/01/2008*</u>' (which letter is not exhibited).

19. The letter dated 8th January 2008 is not, Mr. McEntagart SC submits, the Facility which underpins either the summary summons application or the substitution application. Counsel states that this is important because the letter dated 26th May 2008 – namely, the 'Letter of Sanction in lieu of that issued on 08/04/2008' and signed on 18th June 2008 – is the basis for the plaintiff's case in both the summary summons and the substitution application.

20. Turning to the Guarantee, the redacted global Deed of Transfer, contains the following redacted information:

Connection ID	Borrower ID	Sub-borrower ID	Guarantor ID	Guarantor Name	Facility ID	Other Collateral ID	Guarantee Only: date of Guarantee

21. The redacted global Deed of Transfer then sets out the following information:

CNS212538	6279859	5993410	GUAR_00000611; GUAR_00000626; GUAR_00000625;	John Minion; [A]lan Delaney; Marion Minion	93310410904123	OC15864030	19/12/2007

22. Mr. McEntagart SC submits that the date of 19th December 2007 under the heading 'Guarantee Only: date of Guarantee' is not the same as the date of 30th November 2007 written on the Guarantee document, exhibited at paragraph 5 of the affidavit of Emmet Martin sworn on 1st November 2023.

23. It is submitted, for example, that the letter dated 26th May 2008 and referenced 'Letter of Sanction in lieu of that issued on 08/04/2008' describes the 'Security' *inter alia* as follows:

> 1. "*[l]etter of Guarantee to be signed by Keelan Delaney in favour of the Bank for EUR2,150,000 for the obligations of Redrock Quarry Company Limited, Supported by:*
>
>   - *All Sums Mortgage over leasehold interest in Folio 5036F Co. Carlow comprising of c.15 acres of agricultural land with fully licensed quarry at Cloughrennan, Carlow to include the benefit of license agreement.*
>   - *All Sums Mortgage over leasehold interest in Folio 4091F Co. Carlow comprising of c. 100 acres of agricultural land with a fully licensed quarry at Cloughrennan, Carlow to include the benefit of license agreement.*
>
> *Security items 1 above must be in place before drawdown. The Bank's costs and outlay if any in taking the security will be advised to you in advance and debited to your account.*"

24. Further, the affidavit of Emmet Martin, solicitor, sworn on 22nd November 2022, does not address paragraphs 15 to 24 of the replying affidavit of Kealan Delaney sworn on 3rd November 2023.

25. Mr. McEntagart SC points to the differences between the dates in the global Deed of Transfer and the documents which underpin the summary summons and which are referred to in the affidavits.

26. In summary, the argument on behalf of the first named defendant is that documents which the plaintiff relies on do not correlate with either the claim in the summary summons or, indeed, the substitution application. There is, it is submitted, an incongruity between what is asserted on affidavit and what is in fact exhibited and it is contended in this case, on behalf of the first named defendant, that the test of presenting *prima facie* evidence has not been met.

Application & Decision

27. The starting point for considering this application is the legal threshold which applies in a substitution application brought pursuant to O. 17, r. 4 RSC 1986. It is accepted by both parties that insofar as the application is dependent upon facts, the requirement is to put before the court sufficient *prima facie* evidence to justify the making of the order and Mr. McEntagart SC emphasises that it must be 'evidence' and not 'argument.'

28. When applying the legal test to the facts of an application, the Court of Appeal (Murray J.) in *Pepper Finance Corporation (Ireland) Ltd v Macken & Another* [2021] IECA 15

inter alia observed at paragraph 26 of the judgment that "… *consistently with the position stated in the authorities that it is not the function of the Court in an application of this kind to embark upon a detailed inquiry into the facts or to resolve disputed issues of fact, the fact that there is other evidence appearing to contradict that evidence adduced and relied upon by the applicant does not mean that it has not established a prima facie case: the resolution of those conflicts is a matter for the ultimate trier of fact* …".

29. In the ordinary course, therefore, the question as to whether the evidence is sufficient to enable the substituted plaintiff to obtain the reliefs sought in the proceedings is left over to the hearing of the summary summons (or in whatever form that may take in due course).

30. In this case, applying the test set out by Murray J. in *Pepper Finance Corporation (Ireland) Ltd v Macken & Another* [2021] IECA 15 at paragraph 26 of the judgment, I am not concerned to establish whether the Everyday will prove its claim, but whether it has adduced a sufficiently cogent case that it should be permitted to advance it. On this application it is not a matter for me to decide finally on the matters adduced at paragraphs 15 to 24 of the replying affidavit of Kealan Delaney (sworn on 3rd November 2023) and, for example, whether the dates referenced in the exhibited documentation align with the dates referred to in the affidavit. Rather, all of these matters can be raised in due course having regard to the summary summons which was issued on 8th November 2016 and the first named defendant is not shut out from making these, and indeed any other, objections at a substantive hearing.

31. Further, and for the following reasons, applying the threshold set out in *Pepper Finance Corporation (Ireland) Ltd v Macken & Another* [2021] IECA 15, I am of the view that Everyday has produced evidence capable of substantiating its claim that it has legal title to the assets in question so as to enable it to sustain a claim for the relief sought in the action and to enable a future court, as the trier of fact, to determine that issue in its favour at hearing. Mr. Martin, in his affidavit sworn on 1st November 2023 (and Mr. Ruane, in his affidavit sworn on 16th August 2023), exhibit documentation which establishes, in my view, *prima facie* evidence which would enable it to sustain a claim. The letter of 29th August 2016 to Redrock Quarry Company Limited from solicitors for the plaintiff, for example, refers to the letters of sanction dated 26th May 2008 and states *inter alia* that at "*… the close of business on the 9th August 2016 the aggregate sum of €1,572,704.53 including accrued interest of €3,369.77 was owing by you to the Bank under the Letters of Sanction, as follows: i) Loan Account, account no. 933104 10904123 – principal in the amount of €1,569,334.76 and interest in the amount of €3,369.77– daily accrual of interest based on current interest rate is €270.84. In the circumstances, we hereby demand immediate payment from the Company of the sum of €1, 572, 704.53 plus additional interest accruing in accordance with the Facilities to the date of payment of the said sum in full, at the rate or rates provided for in the Letters of Sanction …*".

32. Further, Mr. Martin, in his affidavit sworn on 1st November 2023 (and Mr. Ruane, in his affidavit sworn on 16th August 2023) at paragraph 5 refers to and exhibits guarantees in writing signed by the first and second named defendants on or about 30th November 2007. Mr. Martin, in his affidavit sworn on 1st November 2023 (and Mr. Ruane, in his affidavit sworn on 16th August 2023), at paragraph 12 refers to unredacted entries in

schedule 1 to the global Deed of Transfer which it is averred "… *refer to securities and charges in respect of the Second Named defendant and shows (as part of the global deed) the mechanism by which this was transferred from AIB to Everyday* …". Further, the exhibited global Deed of Transfer dated 4th October 2022 defines terms including *inter alia* "Security" and "Underlying Loans" (which "*means the outstanding loans more particularly described in Schedule 1 hereto to be purchased by the Buyer and each an "Underlying Loan"*"), and redacted parts of Schedule 1, some of which were referred to earlier in this judgment, are also exhibited. Accordingly, the position in this case is not analogous to that described by the court (Simons J.) at paragraph 7[9] of the

[9] In *Mars Capital Finance Ireland DAC (in Substitution for EBS Mortgage Finance) v Temple* [2023] IEHC 94 Simons J. observed as follows at paragraph 7 of the judgment: "*The only evidence currently before the court in respect of the supposed transfer of the debt is that set out in the affidavit grounding the application on 21 November 2022 to substitute Mars Capital as plaintiff in lieu of EBS Mortgage Finance. It is averred that EBS Mortgage Finance has, since the date of the Circuit Court order on 11 December 2019, sold the relevant loan, its related mortgage security and the benefit of all related matters, including the order for possession, to Mars Capital. A deed of transfer dated 30 April 2021 has been exhibited. This deed is between a number of companies within the AIB Group and EBS DAC (who are identified as the sellers) and Mars Capital Finance Ireland DAC (who is identified as the buyer). The exhibit consists of three pages containing what might be described as operative clauses. Thereafter, there are two additional pages which appear to be extracts from a schedule to the deed. These pages are heavily redacted and all that is legible is a series of headings and a single entry which references, inter alia, the name of the defendant and the address of the property the subject of the charge. There is then a column which identifies the "legal entity" as EBS Mortgage Finance Ltd. There is nothing in the first three pages of the exhibit, i.e. the operative part of the deed, which makes any reference to, still less explains the legal effect of, the schedule. It may be, but this is only speculation, that certain crucial pages have been omitted from the redacted form of the document which Mars Capital has deigned to put before the court. The limited*

judgment in *Mars Capital Finance Ireland DAC (in Substitution for EBS Mortgage Finance) v Temple* [2023] IEHC 94.

33. I will, accordingly, make an Order pursuant to O. 17, r. 4 RSC 1986, substituting Everyday Finance Designated Activity Company of 16 Briarhill Business Park, Ballybrit, Galway, being a company incorporated within Ireland for the plaintiff in the above-entitled proceedings. I will discuss with the parties the terms of any order and any further or ancillary matters which may arise.

STRIKE OUT APPLICATION

Initial observations

34. The essential thrust of the first named defendant's application to dismiss or strike out the plaintiff's application for summary judgment against him was characterised, on behalf of the plaintiff, as the first named defendant being caught between two stools and as amounting to the assertion of two entirely inconsistent and contradictory positions, which he was not entitled to do. Thus, it was submitted on behalf of the plaintiff, that the first named defendant cannot rely on the global Deed of Transfer dated 4th October 2022 in aid of the motion to strike out the summary summons, on the one hand, and then disavow that there was, in point of fact, any such transfer in seeking to oppose the substitution application, on the other hand. Describing this alleged

---

material before the court does not establish, even on a prima facie basis, that the defendant's debt has been transferred to Mars Capital Finance Ireland DAC."

approbating and reprobating in the vernacular via a sporting idiom, it was submitted on behalf of the plaintiff that it cannot be asserted on behalf of the first named defendant that AIB "*having left the pitch*", Everyday cannot now "*come onto the pitch*" because of its alleged delay.

35. Initially, in reliance on the matters set out at paragraphs 15 to 24 of the replying affidavit of Kealan Delaney sworn on 3rd November 2023 which questions the fact of any transfer, the first named defendant submitted that the plaintiff had failed to show, even on a *prima facie* evidential basis, that a transfer had taken place and, therefore, the plaintiff's action was bound to fail. I have found, however, that the plaintiff has satisfied the requirements of O. 17, r. 4 RSC 1986 and that Everyday Finance DAC can be substituted for the plaintiff in the above-entitled proceedings.

Applicable Legal Principles

36. In substance, the application to strike out or dismiss the plaintiff's action centred on reliance upon the Supreme Court decision in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 as interpreted and applied by the Court of Appeal in the judgment of Collins J. in *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 and the exercise of the general inherent jurisdiction of the court.[10]

[10] In this context see also *O'Domhnaill v Merrick* [1984] I.R. 151 which addresses the court's inherent jurisdiction to strike out proceedings, where the lapse of time between the cause of action accruing and the trial of the

37. Insofar as the application, on behalf of the first named defendant, is made by reference to O. 19, r. 28 RSC 1986, as per the observations of Costello J. (as he then was) in *Barry v Buckley* [1981] I.R. 306 at page 308, the court's consideration is by reference to the pleadings and on the assumption that any statements of fact in the Summary Summons issued on 8th November 2016 are true and can be proved by the plaintiff *i.e.*, that the sum which is claimed is owed. The pleadings are, therefore, at a summary stage and depending on what occurs at the next stage, if, for example, leave to defend is granted, further interlocutory applications, such as discovery, may arise.

38. As is well established, there are three aspects to the *Primor* test: first, the first named defendant must establish that the delay on the part of the plaintiff in prosecuting the claim has been inordinate; second, if that is established, then he must establish that the delay has been inexcusable; and third, if it is established that the delay has been both inordinate and inexcusable, the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the proceedings of the case.

Chronology & periods of time

39. The following periods of time are applicable in this case.

---

proceedings would be such that there would be a real and serious risk of an unfair trial even in circumstances where there has not been inexcusable delay.

8th November 2016 -30th April 2018 (approximately 17 months).

40. On 8th November 2016 a summary summons issued. On 29th November 2016 the first named defendant entered an appearance. On 30th April 2018 the plaintiff issued a motion to enter final judgment.

10th May 2018 to 19th March 2020 (approximately 10 months)

41. On 10th May 2018 the first named defendant issued its first motion to dismiss for delay/want of prosecution. On 21st/22nd June 2018 the plaintiff's claims against the defendants were struck out by the Master of the High Court. On 26th June 2018, the plaintiff lodged an appeal against the order of the Master of the High Court. On 12th November 2019, the order of the Master was set aside and the plaintiff's motion for judgment against the defendant was reinstated and transferred to the Summary Judgment list for 20th February 2020. On 19th November 2019 a notice of intention to proceed was filed. On 19th March 2020 the motion for Summary Judgment was adjourned generally arising from the COVID-19 pandemic.

42. In relation to these two periods, which combined range from 8th November 2016 to 19th March 2020, I find that the first named defendant has not established that the delay on the part of the plaintiff in prosecuting the claim has been inordinate and therefore the question of excuse does not arise. If anything, the delay during this period was contributed to by the initial application by the first named defendant in seeking to have the proceedings struck out.

19th March 2020 to January/February 2022 (22/23 months)

43. As referred to earlier, the motion for Summary Judgment was adjourned generally arising from the COVID-19 pandemic on 19th March 2020 and the COVID-19 restrictions were ended in or around January-February 2022.

44. On behalf of the first named defendant, reference is made to the affidavit of Emmet Martin sworn on 9th November 2023 (solicitor for the plaintiff) where in relation to the shorter period between January/February 2022 to 8th July 2022, it is *inter alia* stated that "… *the Covid restrictions were ended in or about January and February 2022 and the within application to re-enter was issued on 8th July 2022. I say, believe and am advised that this period of approximately six months in the context of the end of a global pandemic cannot be considered to be an important period of delay* …" .

45. In asking the court to scrutinise this further, Mr. McEntagart SC refers me to the decisions of the High Court (Stack J. and Butler J.) respectively in *Darcy v AIB plc & Ors* [2021] IEHC 763 at paragraph 8 and *Campbell v Geraghty & Others* [2022] IEHC 241 at paragraphs 22 and 23 and reliance was placed on the following observations of Stack J. in *Darcy* at paragraph 8 of the judgment "… *I am not overlooking the difficulties caused by the pandemic, but on the facts of this case, these have not been particularly material as there was nothing to stop the parties from progressing the pleadings, particulars, and discovery, during the pandemic. The pandemic cannot be said, therefore, to have interfered with the progress of the proceedings as might occur if a hearing date were cancelled, for example* …".

46. However, insofar as the COVID-19 restrictions are concerned in the context of this case, during this time, affidavits had been exchanged and a hearing date was in substance all that was left to be assigned.

7th July 2022-10th October 2022

47. On 7th July 2022 AIB advised the first named defendant of its loan sale to Everyday.

48. On 8th July 2022 the plaintiff filed an application to re-enter the proceedings which was made returnable to 10th October 2022. On 4th October 2022 the Global Deed of Transfer transferred underlying loans, guarantees, debts and securities from AIB to Everyday.

10th October 2022 to 18th October 2023 (12 months)

49. On 10th October 2022, 24th January 2023, 28th April 2023 and 13th June 2023 the proceedings were adjourned to allow for a substitution application.

50. It is common case that no order of the court was drawn up after the hearing before Meenan J. on 13th June 2023 and it is submitted on behalf of the plaintiff, if reliance was placed on the observations of Meenan J. on that date, as if they were an order, the plaintiff would have been denied an opportunity to appeal same. The affidavit of Shane Ruane, Senior Relationship Manager of Everyday, sworn on 16th August 2023, initially grounded the application for substitution but it is accepted that no *ex parte* application pursuant to O. 17, r. 4 RSC 1986 was made before 1st September 2023 and it was

submitted on behalf of the plaintiff that there was no reality to such an application being made during the long vacation.

51. Prior to this matter being heard on 29th November 2023, it appears that on 18th October 2023 the proceedings were re-entered and listed, and the previous order made on 17th October 2023 striking out the proceedings was vacated on an application made on behalf of the plaintiff.

52. Arising from the directions of this court (Hyland J.) on foot of an application on behalf of the first named defendant, the substitution application, rather than being heard *ex parte*, was made on notice to the first named defendant by way of notice of motion dated 1st November 2023 which was made returnable to 15th November 2023 and grounded on the affidavit of Emmet Martin solicitor sworn on 1st November 2023. The first named defendant takes issue with the substitution application being grounded on the affidavit of Mr. Martin given his means of knowledge. It is noted that the earlier affidavit of Shane Ruane sworn on 16th August addresses, by and large, identical issues.

53. The first named defendant's dismiss/strike out application was dated 31st October 2023 with a return date of 15th November 2023. Accordingly, both the strike out application and the substitution application travelled together, both were being heard on notice, and both had an initial return date of 15th November 2023.

Assessment and Decision: Prejudice & Causal Connection?

54. There are a number of important factors which arise in considering these last two periods which in essence covered the period of one year, from October 2022 to October 2023. From the first named defendant's perspective, the plaintiff's acknowledgement that it was responsible for much of this period of delay is an important starting point but, of course, is not dispositive of the issue.

55. Before examining this period in more detail, some general observations arise.

56. In *Cave,* for example, Collins J. held that the court's assessment of the balance of justice did not involve a free-floating inquiry divorced from the delay that has been established. The nature and extent of the delay was a critical consideration in the balance of justice. In circumstances where inordinate and inexcusable delay ***was*** demonstrated, there had to be a ***causal connection*** between ***that*** delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim.

57. Generally, in this case, the first named defendant submits that the causal connection between the plaintiff's delay and first named defendant's prejudice is as follows.

58. First, it is submitted that the second named defendant has been entirely released from his obligations under his guarantee, pursuant to undisclosed terms which indicate that he has paid monies to AIB whilst not to the credit of Redrock's account or his liability, if any, under a guarantee whereas if the proceedings had progressed in a timely manner the first named defendant may have been in a position to avail of the position which resulted in the second named defendant being released without payment from any liability under his guarantee of the liability of Redrock.

59. The plaintiff replies that this is irrelevant and the point being that as the plaintiff cannot recover ‘on the double’, it can settle with whomever it wishes. Further it is submitted that no prejudice arises and that the first named defendant is at liberty, if he so chooses, to raise this at the hearing of the summary judgment.

60. Second, it is submitted that the principal debtor, Redrock, has now been dissolved for over six years, thereby prejudicing the first named defendant in his ability to rely on any defence which would be available to the principal debtor.

61. The plaintiff responds that this is a matter for the summary judgment and points out that it relies on the guarantee which has not been dissolved and which was furnished without prejudice to any other matters.

62. Third, it is submitted that the fading memory and/or unavailability of witnesses to corroborate the first named defendant’s defence as disclosed in affidavits of 4th February 2020 and 8th December 2021.

63. In response, the plaintiff points out that the affidavits have already been sworn and that it is reasonable to assume, in the circumstances of a guarantee of an amount in the region of €2,000,000, that the records are in existence. It is also pointed out that the jurisprudence from *Primor* to *Cave* requires the detail of fading memory or unavailability of witnesses to be established rather than being by way of a general assertion.

64. Fourth, it is submitted that if this application is refused and Everyday's application is successful, the first named defendant will be prejudiced in his ability to garner documentation, information and witness testimony from AIB, whom Everyday propose to substitute out of the proceedings. It is submitted that the first named defendant would be deprived by reason of the delay from pleading a counterclaim as against AIB.

65. On behalf of the plaintiff, in response, it is submitted that the affidavits have been exchanged in the summary summons process and that further affidavits can be sworn. Further, it is pointed out that separate legal thresholds apply in a strike out application and substitution application and still further, the legal tests to be met in the summary summons application or entering final judgment are different again and accordingly no prejudice arises.

66. Fifth, it is submitted that the first named defendant is already experiencing difficulty in obtaining discovery from AIB in the related plenary proceedings and the delay in these proceedings has prejudiced his ability to obtain discovery from AIB in this action.

67. In response the plaintiff submits that this is entirely a matter for those separate proceedings.

68. Sixth, it is submitted that Everyday's records will be limited, having been allegedly assigned, and the personnel involved in the original lending have not given evidence on the plaintiff's behalf (nor would it appear that they are likely to).

69. In response, it is submitted on behalf of the plaintiff that this possibility, if it was to arise, is entirely the plaintiff's potential problem which may arise at the hearing of the summary summons but does not provide any basis for a strike out application.

70. In applying the principles established in the authorities from *Cave* to *Primor* and in considering these matters generally, the dismissal of a claim should be seen as a matter of last resort.[11]

71. I must also ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant.[12]

72. The suggestion that a defendant might succeed in having a claim against them dismissed *in the absence of evidence of prejudice* is a far-reaching one and would appear to represent a significant development or possible departure from existing jurisprudence where the issue of prejudice was central. In addition, any suggestion that proceedings might be dismissed in the absence of prejudice to the defendant would appear difficult to reconcile with the consistent emphasis in the authorities that the jurisdiction is not punitive or disciplinary in character.[13]

[11] *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 per Collins J. at paragraph 37.

[12] *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 per Collins J. at paragraph 37.

[13] *Cave Projects Ltd v Gilhooley & Ors* [2022] IECA 245 per Collins J. (second bullet-point on page 36 of 67).

73. In this case, the dismiss/strike out application is dated 31st October 2023 with a return date of 15th November 2023. Within this period, considerable emphasis is placed, on behalf of the first named defendant, on the application before this court (Meenan J.) on 13th June 2023.

74. Insofar as this period of just over one year is concerned, where the plaintiff accepts responsibility for the delay, this delay, in my view, was not inordinate. Further, the first named defendant has failed to show that the (accepted) delay between October 2022 to October/November 2023 caused him prejudice.

75. It is noted, for example, from the transcript of the hearing for that morning of 13th June 2023, the court's reaction to the application on behalf of the first named defendant for a wasted costs order was to suggest that such an application was somewhat extreme at that stage.

76. After that observation, the court stated as follows: "… *[c]learly it'll be utterly pointless for me directing this matter to proceed under the circumstances where there's an application to substitute. However, the application to substitute can't be going on forever. So what I'm going to do with the matter is, I'm going to put it in, there's no point to me adjourning it for four or five weeks because any substitution application isn't going to be done before then. What I'm going to do is I'm going to put it in for Tuesday the 17th of October all right and it's being adjourned on that basis that if no application for substitution has been issued on or before Friday the 1st September, there won't be any substitution, okay*."

77. While there was some debate between the parties as to whether the court's directions on 13th June 2023 (as just quoted) amounted in substance to a type of 'unless order' which had not been complied with, which in consequence raised a 'jurisdictional question' over the plaintiff's entitlement to bring the substitution application without any explanation or seeking an extension of time to do so (reference was made, for example, to the plaintiff's 'standing'), the broader context of the first named defendant's focus on the court's observations on 13th June 2023 related to the issue of delay.

78. It was submitted, for example, on behalf of the first named defendant, that the court's observations on 13th June 2023 are an important factor in the consideration of the reckonable period of delay (a period of delay which is accepted by the plaintiff), brought about by the substitution application which commenced on 10th October 2022, and that this case was unique in the sense that the court's comments were predictive or prescient of a default which was to occur by the 1st September 2023 *i.e.*, no substitution application was made by or before that date. Further, it is submitted that there is an overall delay in a summary summons procedure which has been ongoing for some seven years.

79. In my view, to accept the points being urged on behalf of the first named defendant arising from the observations of the court on 13th June 2023 would be contrary to the observations of the Court of Appeal in *Cave*, where it was observed that "… *any suggestion that proceedings might be dismissed in the absence of prejudice to the defendant would appear difficult to reconcile with the consistent emphasis in the authorities that the jurisdiction is not punitive or disciplinary in character: the*

"jurisdiction does not exist so that form of punishment can be inflicted upon a dilatory plaintiff as a mark of the Court's displeasure", (per Peart J. in *Bank of Ireland v Kelly*, at para 52).

80. Accordingly, I refuse the first named defendant's application for the reliefs claimed in the Notice of Motion dated 31st October 2023 seeking to dismiss and/or strike out the Plaintiff's claim as against the first named defendant.

PROPOSED ORDERS

81. Subject to hearing from the parties on the terms of any order, on the first application heard before me, I will make an Order pursuant to O. 17, r. 4 RSC 1986, substituting Everyday Finance Designated Activity Company of 16 Briarhill Business Park, Ballybrit, Galway, being a company incorporated within Ireland for the plaintiff in the above-entitled proceedings.

82. On the second application heard before me, I will make an order refusing the first named defendant's application for the reliefs claimed in the Notice of Motion dated 31st October 2023 seeking to dismiss and/or strike out the Plaintiff's claim as against the first named defendant.

83. I will discuss with the parties the precise terms of any final orders and any further or ancillary matters which may arise and will list the matter for mention before me at 10.30 on Monday 22rd January 2024.

84. When the matter came back before me on Monday 22nd January 2024, on behalf of the Plaintiff, Mr. Gunning BL sought the costs of both motions and Mr. McEntagart SC, for the First Named Defendant, opposed those applications for costs and also sought clarification in relation to paragraph 2 of the judgment. On Tuesday 13th February 2024, I addressed the clarification sought by the First Named Defendant in relation to paragraph 2. In relation to the Plaintiff's application for costs in the substitution application and in the strike out application, I made the costs in both applications costs in the cause.