THE HIGH COURT

[2023] IEHC 305

[Record No. 2013 / 3528S]

BETWEEN:

DANSKE BANK A/S TRADING AS DANSKE BANK AND (BY ORDER) PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFFS

AND

DENIS CADOGAN SENIOR, DENIS CADOGAN JUNIOR AND BRIAN CADOGAN

DEFENDANTS

RULING of Ms. Justice Siobhán Phelan, delivered on the 11th day of May, 2023

INTRODUCTION

1. There were two motions listed before the Court for hearing, namely:

(i) The Plaintiff's motion issued on the 13th of September, 2019 seeking to compel Replies to Particulars delivered in February, 2019;

(ii) The Defendants' motion issued pursuant to an *ex parte* order of the Court made on the 25th of November, 2019 to dismiss proceedings on grounds of inordinate and/or inexcusable delay.

2. It was conceded on behalf of the Defendants when the applications were opened before me that in the event the application to dismiss the proceedings on delay grounds was unsuccessful, replies to particulars would have to be provided by the Defendants and that there would be no requirement for the Court to hear and determine that application as it would not be opposed. I was further advised that the application to dismiss was being maintained on behalf of the Second and Third Named Defendants only as the First Named Defendant had died

since the motion issued and a grant of representation had not yet been extracted in respect of his estate.

3. Since the issue of both motions, a co-Plaintiff has been joined in these proceedings arising for the transfer of the interest in the loans the subject of the proceedings. An amended Statement of Claim has been delivered on behalf of both Plaintiffs who share legal presentation. References to the Plaintiff hereinafter mean the First Named Plaintiff, as the party involved in the proceedings at material times, unless otherwise specified or clear from the context.

CLAIM

4. The Plaintiffs' claim arises on foot of the alleged failure of the Defendants, jointly and severally, to make repayments, despite being called upon to do so, on foot of four separate term loan facilities entered into between National Irish Bank Limited and the Defendants between December, 2004 and August, 2009 giving rise to a total indebtedness of almost €300,000. The Defendants are family members and the loans secured were for business purposes, specifically a farming business. The loan facilities were subsequently subject to a scheme of transfer, effected with Ministerial approval granted by statutory instrument (Central Bank Act 1971 (Approval of Scheme of National Irish Bank Limited and Danske Bank A/S) Order 2007, S.I. 29/2007) made pursuant to s. 33 of the Central Bank Act, 1971. The effect of the Ministerial order was to transfer the banking business (excepting agreed excluded business) of National Irish Bank Limited to the First Named Plaintiff in accordance with the Scheme of Transfer agreed between National Irish Bank Limited and the First Named Plaintiff. The overall level of indebtedness has more recently been reduced through the sale of a charged property. Following credit for the proceeds of sale of the charged property, the sum outstanding as claimed in the proceedings remains in excess of €250,000.

5. In affidavits filed in response to an earlier summary judgment application, the Defendants did not deny that sums were due. Nonetheless, at the hearing of that application before Noonan J. in November, 2015, I understand from counsel that two grounds of defence were maintained, namely:

1. It had not been established that the Scheme of Transfer included each of the Defendants' loans;

2. The approval of the Scheme of Transfer by statutory instrument made pursuant to s. 33 of the Central Bank Act, 1971 constituted an unlawful delegation of power and was *ultra vires.*

6. I have not been referred to any other argument made before Noonan J. to resist summary judgment and no further specific factual basis for a defence is apparent from the affidavits sworn on behalf of the Defendants in response to that application. Although there is no written ruling available, given that no proceedings had been initiated to challenge the Ministerial approval of the Scheme of Transfer as *ultra vires* when the application for summary judgment came on for hearing in 2015 (or indeed since), it seems to me most likely that Noonan J. was persuaded to transfer to plenary hearing by the failure to demonstrate satisfactorily on the evidence before him that each of the loans were the subject of the Scheme of Transfer. This is what the Plaintiff has referred to in argument before me as a "*technical defence*" for which oral evidence is not required.

7. From the terms of the Defence and Counterclaim subsequently delivered, it appears that the Defendants belatedly identified an additional ground of defence in that they now also plead unconscionability and breach of duty in providing the loan facilities. No specific facts are pleaded to ground a plea of unconscionability, but it is generally pleaded that the Plaintiff was aware of the Defendants' limited financial circumstances, their personal circumstances, age and future earning potential and should therefore have known that they would be unable to make repayments and should not have advanced the loans. This has been characterized as no more than a plea of "*reckless lending*" by counsel for the Plaintiffs who maintains that such a plea is unstateable.

8. It is noted that while a claim is advanced in the Defence and Counterclaim filed that s. 33 of the Central Bank Act, 1971 is unconstitutional insofar as it provides for approval of the Scheme of Transfer by statutory instrument and that the said statutory instrument in turn constitutes the exercise of an unlawful delegation of legislative power and/or an *ultra vires* exercise of power, no properly constituted proceedings have ever been brought on behalf of the Defendants challenging either the constitutionality of s. 33 of the Central Bank Act, 1971 or the vires of SI No. 29/2007. This simple fact speaks volumes as to the reality of this line of defence.

CHRONOLOGY AND BACKGROUND

9. I gratefully adopt the chronology prepared on behalf of the Plaintiffs and handed into Court without objection from the Defendants as follows:

DATE	STEP	TAKEN BY
30th October, 2013	Summons issued	1st Plaintiff
11th February, 2014	Summons served on 1st Defendant	1st Plaintiff
14th May, 2014	Order for substituted service made re: 2nd and 3rd Defendants	Application made by 1st Plaintiff
7th July, 2014	Summons served on 2nd and 3rd Defendants	1st Plaintiff
16th June, 2014	Appearance entered	Defendants
9th July, 2014	Motion for judgment issued	1st Plaintiff
11th July, 2014	Motion for judgment served	1st Plaintiff
20th November, 2014	Replying affidavit sworn on Defendants' solicitor	Defendants
2nd December, 2014	Replying affidavit sworn by 1st Defendant	Defendants
6th December, 2014	Replying affidavit sworn by 1st Defendant	Defendants
6th February, 2015	Replying affidavit sworn by 1st Defendant	Mr. Justice Noonan
9th November, 2015	Motion for judgment heard and adjourned for plenary hearing	1st Plaintiff
6th January, 2016	Statement of Claim delivered	1st Plaintiff
12th April, 2016	21-day warning letter sent seeking defence	1st Plaintiff
11th July, 2016	21-day warning letter sent seeking defence	1st Plaintiff

5th August, 2016	Final warning letter seeking defence	1st Plaintiff
28th September, 2016	Motion for judgment in default of defence issued	1st Plaintiff
29th September, 2016	Motion for judgment in default of defence served	1st Plaintiff
14th November, 2016	Defendants ordered by consent to deliver defence within 4 weeks (costs of the 1st Plaintiff)	Mr. Justice Cross
9th January, 2017	Defence delivered	Defendants
March - July 2018	Settlement negotiations	1st Plaintiff and Defendants
12th December, 2018	Notice for Particulars	1st Plaintiff
3rd January, 2019	Notice of intention to proceed served	1st Plaintiff
26th February, 2019	Notice for particulars served a second time	1st Plaintiff
15th April, 2019	21-day warning letter seeking relies to particulars	1st Plaintiff
10th May, 2019	Warning letter that motion to dismiss against 1st Defendant will issue is proceedings not discontinued	Defendants
16th May, 2019	Defendants notified proceedings will not be discontinued	1st Plaintiff
18th June, 2019	Solicitor for Defendants indicate particulars will be responded to	Defendants
27th June, 2019	14-day warning letter sent seeking replies to particulars	1st Plaintiff
5th July, 2019	Solicitor for Defendants indicates particulars will be forthcoming and again warns of motion to dismiss	Defendants
9th July, 2019	Solicitor for 1st Plaintiff seeks replies to particulars	1st Plaintiff

11th July, 2019	Solicitors for Defendants indicates particulars will be forthcoming	Defendants
5th September, 2019	Solicitors for Defendants indicates particulars will be replies to again warns of motion to dismiss	Defendants
9th September, 2019	Affidavit sworn to ground motion for particulars	1st Plaintiff
13th September, 2019	Motion for particulars issued	1st Plaintiff
16th September, 2019	Motion for particulars served	1st Plaintiff
21st November, 2019	Dr. T. Dennehy swears affidavit in support of motion to dismiss	Defendants
22nd November, 2019	Solicitor for Defendants swears affidavit in motion to dismiss	Defendants
25th November, 2019	Motion to dismiss issued	Defendants
25th November, 2019	1st Plaintiff's solicitor seeks exhibits to affidavit grounding motion to dismiss	1st Plaintiff
27th November, 2019	Solicitor for Defendants refuses to provide exhibits	Defendants
28th November, 2019	1st Plaintiff solicitor again seeks exhibits to affidavit grounding motion to dismiss	1st Plaintiff
29th November, 2019	Solicitor for Defendants promises exhibits but does not provide them	Defendants
29th November, 2019	Solicitor for 1st Plaintiff swears affidavit in reply to motion to dismiss without benefit of Defendants' exhibits	1st Plaintiff
18th December, 2019	Solicitor for Defendants swears replying affidavit	Defendants
16th January, 2020	Solicitor for 1st Plaintiff swears replying affidavit	1st Plaintiff
	Both motions adjourned from time to time	

24th May, 2022	Notice for re-entry of motion for particulars filed	1st Plaintiff
25th May, 2022	Notice for re-entry served	1st Plaintiff
25th May, 2022	Motion to join 2nd Plaintiff issued	2nd Plaintiff
22nd July, 2022	Affidavit of solicitor for Defendants sworn	Defendants
25th July, 2022	2nd Plaintiff joined as Co-Plaintiff and motions for particulars and to dismiss re-entered	Mr. Justice Dignam

10. From the Chronology and the papers before me it is clear that while the proceedings commenced by summary summons in October, 2013 they were delayed through the requirement to obtain an order for substituted service on the Second and Third Named Defendants (Order made by Peart J. in May, 2014). Thereafter, proceedings were adjourned in the Master's Court while the First Defendant (now deceased) filed a series of affidavits from which it is clear that time was sought in order to meet with a Personal Insolvency Practitioner and to enter into some form of payment arrangement with the then Plaintiff. These affidavits were short and did not purport to advance a substantive defence. Insofar as the affidavits denied the debt, they did so only on the basis that the Plaintiff had not proven that any monies were due and owing. Specifically, the defence of unconscionability now sought to be advanced was not intimated on the affidavits filed.

11. Ultimately, Noonan J. heard the application for summary judgment and decided to transfer the matter to plenary hearing in November, 2015 with directions regarding the exchange of pleadings, specifically that a Statement of Claim be delivered within three weeks and that the Defendants have three weeks from the delivery of the Statement of Claim to deliver a Defence (Order of Noonan J. made on the 9th of November, 2015). Although the Plaintiff delivered their Statement of Claim on the 6th of January, 2016, somewhat outside the court directed time-frame but not egregiously so, the Defendants did not deliver their Defence and Counterclaim for a further year (9th of January, 2017) and then only following several warning letters, a motion for judgment in default of defence and finally an order on consent to deliver a defence within four weeks (Order of Cross J. of 14th of November, 2016), which consent order was not complied with.

12. Against this background of delay, having received the Defence and Counterclaim in January, 2017, no further active steps were taken to advance proceedings for almost two years. During this period, however, there was unsuccessful engagement between the parties to negotiate a settlement. Following an apparent breakdown in settlement negotiations in July, 2018, a Notice for Particulars on the Defence and Counterclaim was delivered in December, 2018 at which time it was appreciated that a Notice of Intention to Proceed would require to be served first. Despite the service of a Notice of Intention to Proceed and re-service of the Notice for Particulars in February, 2019 and despite the Defendants indicating an intention to reply, no Replies to Particulars were then or since furnished, in turn necessitating several warning letters over the course of several months before a motion finally issued in September, 2019. Although the Defendants separately wrote during this period to intimate that they would seek to have proceedings dismissed on delay grounds, no motion issued until after they were served with the Plaintiff's motion seeking to compel replies to particulars. Even then, more than two months elapsed before the Defendants made an application *ex parte* for short service and an early return date for the motion to dismiss on delay grounds. As apparent from the affidavits grounding the application to dismiss (including an affidavit from the First Named Defendant's GP), prejudice is identified by reason of delay because of the First Named Defendant's advancing age and state of health.

13. By reason of the *ex parte* application, the Defendants engineered a situation whereby both the Plaintiff's motion, which was earlier in time by several months, and the Defendants' later motion, travelled thereafter together. This has meant that despite the passage of more than four years since particulars were first raised on behalf of the Plaintiff and despite it being now conceded that if the dismiss application is unsuccessful that replies will have to be furnished, no replies have yet been provided.

14. While there was no particular delay in the Plaintiff filing a replying affidavit to the Motion to Dismiss and no replying affidavit at all has been filed in respect of the application to compel replies to particulars, it has still taken more than three years for these motions to be heard by the Court. I understand that the motions were listed for hearing during this period on no less than three occasions. The first occasion was in July, 2020 when court services were still somewhat disrupted due to the COVID-19 Pandemic and the matter did not get on because there was no judge available. On two subsequent occasions, however, hearings were adjourned

on consent of the parties. The first adjournment application was to allow for settlement talks and laterally the applications the subject of this ruling were not progressed to permit an application to be made by the existing Plaintiff to reconstitute the proceedings following the further transfer of the interest in the loans to Pepper Finance Corporation (Ireland) DAC.

15. Pepper Finance Corporation (Ireland) DAC were joined as co-Plaintiff by order in July, 2022 (Order of Dignam J. made on 25th of July, 2022 joining Co-Plaintiff and re-entering motions for particulars and to dismiss) in circumstances where the Defendants contended on affidavit sworn by their solicitor that the proceedings had in fact been compromised already. It was objected that the First Named Plaintiff was seeking to resile from that compromise including by transferring the interest in the loan. From the Affidavit of the Defendants' solicitor sworn in July, 2022 in response to the application to join a Co-Plaintiff, it appears that in the intervening period the First Named Defendant had in fact died (April, 2022) and no grant had yet been extracted by his Executor due to her difficult family circumstances as outlined in the affidavit. Further detail was also given in respect of the alleged compromise of proceedings and the Defendants' solicitor states that if the Motion to Dismiss for delay is unsuccessful, they will be applying to amend their Defence to contend that the Plaintiff's claim has been compromised and/or that the Plaintiff is estopped from pursuing relief against the Defendants.

16. Also exhibited on behalf of the Defendants is an open letter dated the 23rd of March, 2022 from the then Plaintiff's solicitor (now First Named Plaintiff) offering to compromise the proceedings on payment by the Defendants of €40,000 in full and final settlement of all claims and the parties agreeing to bear their own costs. It is the Defendants' position as articulated by their solicitor on affidavit that this offer to compromise the proceedings ignores the fact that the proceedings have already been settled on a basis which included the return of lands held as security in circumstances where it subsequently transpired that the lands in question had already been sold, the Defendants say at an undervalue. Whether the proceedings have in fact been settled is not a matter before me for determination and is relevant to these proceedings only insofar as it signals a necessity for amendment and potentially changes the nature of the proceedings going forward. These intervening events suggest that instead of the relatively simple debt matter arising from an alleged failure to repay a series of loans, the court may first be required to determine whether the claim advanced has been compromised in a legally binding manner such as to preclude the further maintenance of these proceedings.

DELAY AND APPLICATION TO DISMISS

17. The application to dismiss for delay is grounded on Affidavits of the Defendants' solicitor and the now deceased First Named Defendant's doctor. While it is complained on affidavit that time was wasted by wrongly invoking a summary procedure, that complaint was not pursued at hearing before me. The application is now squarely predicated on the delay between January, 2017 when the Defence and Counterclaim was delivered and December, 2019 when a Notice for Particulars was raised followed shortly thereafter by a Notice of Intention to Proceed on the 3rd of January, 2019. It is this period of some two years, which it is claimed is inordinate and inexcusable, particularly viewed in the overall context of proceedings relating to loans the latest of which dates to 2009, proceedings which were commenced by summary summons in 2013 and anticipated further delay in circumstances where the case is not yet ready for hearing given that a grant has not yet been extracted in respect of the estate of the First Named Defendant and it is anticipated that an Amended Defence and Counterclaim is necessitated by the claimed purported settlement of the proceedings. The question of discovery was also identified as a factor which will contribute to future delay. It is noted in this regard, however, that neither party has sought discovery to date, a fact which counsel for the Defendants somewhat unconvincingly attributes to the failure of the Plaintiff to deliver a Reply to their Defence and Counterclaim. It is accepted on behalf of the Defendants that during the identified two-year period of inordinate delay there were settlement negotiations which spanned a period of months between March and July, 2018 but it is not accepted on behalf of the Defendants that this excuses the failure to progress proceedings.

18. While the application was commenced by reason of alleged prejudice arising from the advancing age and declining health of the First Named Defendant and his consequent unavailability as a witness, the unfortunate fact of his intervening death crystallises the claim to prejudice as it is now very clear that the First Named Defendant will be unavailable as a witness. Regrettably, his last years were marred by the existence of these proceedings which were no doubt a source of worry for him. In terms of the importance of the First Named Defendant as a witness given that he is one of three defendants and three parties to the loans relied upon, the Second and Third Named Defendants complain, through their solicitor, that their defence of the claim is prejudiced as the First Named Defendant is no longer available to

provide what is described as (see para. 15, Affidavit of L. Baker, Solicitor, sworn on the 22nd of November, 2019):

> *"corroborating, cogent and accurate evidence as to whether, and if so on what terms and in what circumstances the Defendants entered into any agreements with the Plaintiff or any other lending institutions".*

19. The Defendants' solicitor adds:

> *"I say that this evidence would be particularly important in supporting the Defendants' contention that any agreements that the Plaintiff purports to be entitled to enforce against them are invalid on the basis that they are unconscionable and in breach of the Plaintiff's common law and/or statutory duty to the Defendants. I further say that absent this evidence and given the effect that the passage of time has on individuals' ability to recollect matters cogently and accurately, the Defendants will not be able to obtain a fair and just hearing by the time these proceedings are likely to be heard."*

20. Neither the Second nor Third Named Defendant have sworn affidavits in support of the application to dismiss.

21. In a replying Affidavit on behalf of the Plaintiff by their solicitor, it is denied that the Plaintiff has been guilty of any delay in progressing proceedings and reliance is placed on the delay of the Defendants in filing their defence resulting in the necessity for a motion to be brought, the fact that following delivery of the Defence and Counterclaim, attention was focussed on without prejudice discussions between March and July, 2018, the fact that no steps have been taken on behalf of the Defendants to actively progress proceedings be it through raising particulars or seeking voluntary discovery and the fact that no reference was made to the First Named Defendant's ill health until after the Plaintiff first raised its Notice for Particulars in December, 2018. Reliance was also placed on the fact that in serving their application to dismiss, the Defendants neglected to provide a copy of the exhibited *"relevant correspondence"* referred to in the Affidavit. Despite request in writing this omission was not remedied and the Plaintiff's affidavit in reply was sworn without the benefit of this correspondence.

22. The point was made on behalf of the Plaintiff on affidavit of its solicitor, in response to the asserted prejudice, that the Defendants were co-borrowers and that the Second and Third Named Defendants can give their own evidence. In terms of the reliance placed on the importance of the evidence of the First Named Defendant to the existence of indebtedness and the plea of unconscionability, the Plaintiff's solicitor refers to the position of the Defendants up to that point in seeking to enter into an arrangement to compromise proceedings and in opposing the application for summary judgment which it is suggested is not consistent with a denial of indebtedness or a claim that the loans were unconscionable. The point is made, reiterated in oral submissions, that the preliminary objections raised regarding the lawfulness and effectiveness of the approval of the Scheme of Transfer from National Irish Bank Limited to the Fist Named Plaintiff are legal matters which are not dependent on the Defendants' oral evidence.

THE LEGAL TEST

23. The law in relation to the dismissal of proceedings for want of prosecution and/or inordinate delay is reasonably well settled, although its application is not always straightforward and is fact dependent. A book of authorities was furnished for my assistance which included: *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459; *Corcoran v. McArdle* [2009] IEHC 265; *PTSB v. Orcona Ltd* [2014] IEHC 541; G*orman v. Minister for Justice, Equality and Law Reform* [2015] IECA 41; *Cassidy v. The Provincialate* [2015] IECA 74; *Millerick v. Minister for Finance* [2016] IECA 206; *Start Mortgages DAC v. Joseph McNamara and Joseph Harris* [2020] IEHC 187 and *Doyle v. Foley* [2022] IECA 193. Separately, I was handed in a copy of my own judgment in *Brannach v. Brothers of Charity Galway* [2022] IEHC 323.

24. In this case the Defendants rely primarily on post-commencement delay, specifically the two-year period between January, 2017 and January, 2019, pointing to a hardening line of authority whereby litigants are now to be held to more exacting standards of expedition than in the past. The parties are essentially agreed that the test to be applied is a three-stage test (the so-called *Primor* test), namely: is the delay inordinate; if inordinate, is it explained in a manner which excuses it; if both inordinate and inexcusable, is the balance of justice in favour or against the proceedings being continued. Added to this is the further consideration where delay

is established as to whether the circumstances of the case are such that it would be unfair, notwithstanding the reason for delay which may conceivably mean that it is neither inordinate nor inexcusable, to permit the proceedings to continue because of the risk to a fair hearing arising from the passage of time.

25. From the case-law I am satisfied that in deciding on this application, I must decide whether there has been inordinate and inexcusable delay. Where inordinate and inexcusable delay is demonstrated, the proceedings may be dismissed where the balance of justice requires it. Subject to an overarching consideration of risk of unfairness by reason of delay, it is only where the delay is found to be both inordinate and inexcusable that I am obliged to consider the third limb of the test, namely, whether the balance of justice favours the dismissal of the action.

26. In terms of the balance of justice test, even moderate prejudice can tip the balance in favour of dismissal. Prejudice is evaluated in the context of a wide range of factors such as the nature of the claim, the respective conduct of the parties, any contribution to the delay, the degree of specificity with which prejudice is identified including prejudice associated with the availability of witnesses and the impact on the defence of the proceedings together with the impact on the Defendants of protracted proceedings. Prejudice must be evaluated in the context of the issues in the case and having regard to whether proof or defence of the claim is substantially based on documentary or oral evidence. Where the balance of justice test is applied by the Court, there should generally, absent special circumstances, be no separate requirement to consider the fairness of permitting the proceedings to progress as this is normally subsumed within the balance of justice exercise already carried out.

DECISION ON AN APPLICATION OF THESE PRINCIPLES

Whether Delay Inordinate

27. There was almost a two-year delay following the delivery of the Defence and Counterclaim before the next step to progress proceedings was taken through the service of a Notice of Intention to Proceed thereby permitting the raising of a Notice for Particulars. The fact that settlement negotiations were in train for a portion of this period (five months) or that the parties had become somewhat inured to delay because the Defendants had taken so long to

deliver their Defence and Counterclaim, does not render this lapse of time acceptable. I am satisfied that the delay was inordinate.

Whether Delay Excusable

28. The only real excuse offered for the extended delay from January, 2017 to the next step to progress proceedings at the end of 2018 or beginning of 2019 is the existence of settlement talks over the course of a five month period against a background of the Defendants' delay. While it is not possible to ignore the Defendants' delay, two wrongs do not make a right and it is proper that the Defendants' contribution to delay of the proceedings be considered in terms of the balance of justice considerations rather than as part of an explanation or excuse for the Plaintiff's delay.

29. The fact that settlement talks were in progress cannot excuse the entire period of delay. Self-evidently the five-month period involved in settlement talks accounts for only a portion of the overall period. Furthermore, it is relevant in terms of the force of the excuse offered that the next step in progressing the proceedings from the Plaintiff's perspective was raising a Notice for Particulars. Accordingly, while engagement in settlement talks may operate to excuse a portion of the delay, the next step here should not have prejudiced settlement negotiations nor led to significant additional costs. It seems to me, therefore, that these proceedings could have been progressed notwithstanding a willingness to engage in settlement talks and the fact of settlement talks did not preclude the Plaintiff from taking steps to progress the proceedings. While there is some explanation for a five-month period of the delay complained of, I am not satisfied that the total period of delay has been adequately explained or is excusable. There being both inordinate and inexcusable delay, I must now consider the balance of justice.

Balance of Justice

30. It is quite clear that if the proceedings are dismissed a significant prejudice is caused to the Plaintiffs by reason of their inability to pursue a valuable monetary claim in respect of monies advanced to the Defendants and received by them which have not been repaid. This is so even though the Plaintiffs have, in open correspondence, already offered to compromise their claim for a significantly reduced sum. This offer of compromise was not accepted and the Plaintiffs have a constitutional right to pursue litigation to vindicate the right to recover money lawfully due and owing. As against this, the Defendants have a right to expedition in the

conduct of proceedings and to fairness in the process engaged in to pursue money claimed to be due and owing by them. It bears note, however, that neither the Second nor Third Named Defendant have sworn affidavits to support the application to dismiss on delay grounds or to otherwise explain or expand upon the prejudice to them of the proceedings being maintained or more specifically the importance of their deceased father as a witness in defending the action. Insofar as reference is made in general terms to corroborating evidence which is no longer available, it is noted that there is no indication that it is contended that the First Named Defendant had unique knowledge or dealings exclusive to him. Indeed, the defence intimated at summary summons stage is one which is entirely based on documents in respect of which oral evidence adds little. The position of the Defendants at that stage amounted to little more than putting the Plaintiffs on proof and engaging in legal argument around the effectiveness or lawfulness of the Scheme of Transfer.

31. While the basis for a defence was subsequently expanded upon when the Defence and Counterclaim was delivered more than three years after the issue of proceedings and several affidavits later, the factual or evidential underpinning for the expanded pleas have not been elaborated upon in the manner to be expected for such a plea. When the late addition of a plea of unconscionability, first intimated after the proceedings were transferred to plenary hearing, is combined with the vague and bare manner in which this plea is advanced in the terms of the Defence and Counterclaim, one is caused to question whether a real and substantive factual basis for this plea has been identified at all. I consider that to demonstrate the substance of this plea as a significant factor weighing against this action proceeding, it would have been necessary for the Defendants to engage more fully either on affidavit or through particulars of their pleadings with the factual basis for the claim advanced that the transaction was unconscionable before then addressing in a tangible way the question of why the First Named Defendant's evidence was material to this plea having regard to the factual basis upon which it was made. Instead, there was no real engagement on affidavit with the facts alleged to elaborate on the bare claim made on the pleadings and to demonstrate how the evidence which the First Named Defendant could have given were he still available was important evidence which only he could give. It remains unclear to me, even having heard the application and considered all of the papers, in what measurable or specific way it is alleged the death of the First Named Defendant impacts on the defence of the proceedings as pleaded.

32. In assessing where the balance of justice lies my primary focus is on the impact of the identified period of inordinate and inexcusable delay on the overall fairness of the proceedings and the question of prejudice to the Defendants. The Defendants own delay requires to be considered as a factor in conducting a proper balancing exercise. Accepting that the burden to progress proceedings lies on the Plaintiff, it is quite clear that when the Plaintiff sought to progress proceedings in this case it was met with a complete lack of expedition on the part of the Defendants. The record in relation to the warning letters and motions required both in relation to the delivery of the Defence and replies to particulars speaks for itself. The fact that this motion issued in direct response to the motion compelling replies to particulars and not before is particularly telling. It is quite clear that the Defendants have contributed to a significant extent to the overall period of delay such that their complaint on this application lacks the force it might otherwise have had. While the First Named Defendant was undoubtedly in failing health and of advanced years this was not a factor which caused any expedition on the defence side of the case and I consider that the complaint of delay when made to be somewhat opportunistic in the overall scheme of the delays in the case.

33. It appears their Defendants' interest in expedition is one-sided expedition only. While not a very significant factor as it has transpired it warrants note that there was even delay on the Defendants' side in terms of the service of the papers grounding their own delay application as clear from the missing exhibits complained of by the Plaintiff which remained unaddressed by the Defendants. Indeed, at the commencement of the hearing before me the Defendants' counsel handed up copy correspondence omitted from the papers which would have been encompassed within the said missing exhibit but was provided to the Plaintiffs only on the day of the hearing before me – more than three years after the motion issued and despite being previously listed for hearing. Nothing in particular turns on this *inter partes* correspondence save that it is noteworthy that even the simple expedient of furnishing a copy of exhibited correspondence to which the Plaintiff was plainly entitled was not addressed in a timely manner.

34. A separate factor requiring to be considered on this application is the case made of unfairness arising from an anticipated further delay combined with the delay to date. Anticipated further delay arises because of the turns and twists of this litigation which include the need to reconstitute the proceedings in the light of the First Named Defendant's death and the breakdown of an intervening settlement process which means that the Defence and

Counterclaim may now require to be amended to plead these intervening developments. It seems to me that these factors mean that the proceedings become more complex and are not yet ready to be determined. This does not mean that there will be further undue delay or that there is any inevitable prejudice or lack of fairness arising to the Defendants in consequence of some further inevitable delay which might warrant a pre-emptive order dismissing proceedings at this stage. Absent demonstrated risk of unfairness, the real prospect of some further necessary delay arising from complexities which occur in litigation cannot properly be relied upon to tip the balance of justice in favour of a dismissal at this stage on the facts and circumstances of this case. In all the circumstances of this case, I do not find the balance of justice to lie in favour of dismissal at this stage.

35. Furthermore, no demonstrated risk of unfairness arising from delay has been made out in my view. If unfairness is caused by further delay in these proceedings, this is an issue which the court on subsequent application based on then prevailing facts and circumstances is equipped to deal with, including through orders made at the hearing itself where an unfairness caused by delay becomes manifest.

CONCLUSION

36. There has been inordinate and inexcusable delay in this case, albeit not of the most egregious kind. Despite this the facts and circumstances are such that the balance of justice does not favour the dismissal of the proceedings. The Plaintiffs' have a constitutional right of access to the Court to pursue monies claimed to be lawfully due and owing. The Defendants have not demonstrated in any real way how they have been prejudiced by requiring them to defend the proceedings notwithstanding the undoubted delays to date, including delay to which the Defendants themselves contributed. Specifically, it has not been demonstrated how the fact that the First Named Defendant is no longer available as a witness impairs the defence of the proceedings having regard to their nature, including the facts that the proceedings concern documented financial transactions and the Second and Third Named Defendants were parties to the transactions in question on a joint and several basis and remain available as witnesses and having regard to the issues which arise for determination on the current state of the pleadings. Nor do I consider that a real risk of unfairness by reason of delay has been demonstrated.

37. Given undoubted delays to date, I propose to hear the Defendants in relation to the time required to deliver replies to the particulars which were first raised as long ago as December, 2018 and which it is conceded are properly raised. I will hear the parties in respect of the steps proposed to regularise the representation of the First Named Defendant's estate where a grant has not yet been extracted by the executor. I will also hear the parties in relation to any other consequential matters including in relation to the time-frame sought for delivery of a mooted amended Defence and Counterclaim, the time to be allowed for raising particulars on same or delivery of a Reply to same, if any, and the time-frame for raising issues of voluntary discovery and pursuing same by way of motion, if required. Participation in further settlement efforts, if any, should not be permitted to derail the expeditious hearing of these proceedings. Such talks are usually encouraged by courts but there is no reason in this case why they may not be progressed in tandem.