

**THE HIGH COURT**

**[2023] IEHC 265  
[Record No.: 2006/1814 P]**

**CITY PHARMACY LIMITED, CORRIGAN PHARMACY HOLDINGS  
LIMITED AND EILEEN CORRIGAN**

**PLAINTIFFS**

**AND**

**JAMES ROCHE, IRENE FEHILY, HILARY HAYDEN T/A HILARY  
HAYDEN AND COMPANY, FIONA COTTELL T/A HILLARY  
HAYDEN & COMPANY AND PEMBROKE EQUITY PARTNERS  
LIMITED**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 19<sup>th</sup> day of May, 2023**

**INTRODUCTION**

1. This is an application by the Fifth Named Defendant to dismiss the within proceedings on two separate grounds, namely:

- (i) inordinate and inexcusable delay by the plaintiffs in progressing these proceedings in line with the principles enunciated in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR 459; and
- (ii) discontinuance by the plaintiffs of their claim against the third and fourth named defendants which has the effect that the claim of the third named plaintiff against the fifth named defendant cannot proceed in accordance with an order made in these proceedings on 21<sup>st</sup> of March, 2011.

2. A Chronology exhibited on behalf of the Fifth Named Defendant is appended at Appendix 1 hereto by way of summary overview of developments in both these proceedings and separate but related proceedings entitled *Pembroke Equity Partners Limited v. Eileen Corrigan and JP Galligan* [Record No. 2012 No. 1866S] (hereinafter “the loan proceedings”).

**BACKGROUND**

3. These proceedings arise out of a transaction in April, 2005 whereby the First and Second Named Defendants sold all their shares in the First Named Plaintiff (City Pharmacy Limited (the "Company")) to the Second Named Plaintiff. It appears that the Company was established as a vehicle by which the business of an existing pharmacy business previously operated by the First and Second Named Defendants would be sold to the Second Named Plaintiff. The Second Named Plaintiff in turn was a company established to acquire the interest of the transferred pharmacy and the Third Named Plaintiff (Ms Corrigan) was, at all material times, the principal shareholder of the acquiring company. The Third and Fourth Named Defendants were the accountants and auditors for the pharmacy business prior to its sale by the Vendors and remained in that role post-sale transaction for a period. The said accountants were also the directors and sole shareholders of the Fifth Named Defendant, a company which advanced a loan to the Third Named Plaintiff in connection with the pharmacy transfer.

4. The within proceedings commenced in 2006 (hereinafter "pharmacy acquisition proceedings"). Initially (on the 26<sup>th</sup> of April, 2006), the proceedings were instituted by the Company and the Second Named Plaintiff against the First and Second Named Defendants only. It is clear from the General Endorsement of Claim to the plenary summons as issued that when proceedings commenced, they were directed to issues arising in relation to the transfer of interests in a pharmacy business. At the time these proceedings were instituted, the Third and Fourth Named Defendants continued as auditors and accountants for the pharmacy business. Subsequently, a new firm of accountants was appointed. The breakdown in the relationship with the previous accountants and auditors appears linked to a claim that they had sought to qualify accounts for the business for the period of time up to the date of completion of purchase in a manner which differed from information presented at the time of purchase of the pharmacy business.

5. It appears from papers grounding an application to join additional parties that following the retainer of the new accountants and auditors, a cause of action as against the Third, Fourth and Fifth Named Defendants was identified. An order joining additional parties (namely the Third Named Plaintiff and the Third, Fourth and Fifth Named Defendants) was made by Quirke J. in March, 2011 whereby the issues in the proceedings enlarged to encompass claims in relation to the investment advice provided by the Third, Fourth and Fifth Named Defendants in circumstances where the Fifth Named Defendant, controlled by the Third and Fourth Named

Defendants and existing accountants and auditors to the pharmacy business had advanced funds by way of loan in respect of the pharmacy transfer.

6. In joining additional parties, Quirke J. directed a partition in the sequencing and hearing of issues with the apparent intention that the issues between the purchaser and vendor be determined before the issues with the advisors and funders. He directed, however, that all matters would proceed before the same judge.

7. As is apparent from the General Endorsement of Claim to the amended Plenary Summons, the claim of the Company and the Second Named Plaintiff against the First and Second Named Defendants is separate from the claim of all three Plaintiffs against the Third, Fourth and Fifth Named Defendants. The claim against the First and Second Named Defendants is based on those Defendants' positions as vendors of the Company and is, in essence, a claim for damages and related reliefs arising out of breach of contract and misrepresentation by reason of the alleged provision by them of inaccurate financial information relating to the Company.

8. The claim against the Third, Fourth and Fifth Named Defendants is a claim based on their alleged positions as "*advisors, accountants and corporate financiers*" to all Plaintiffs and is, in essence, a claim for damages for alleged negligence and misrepresentation in the course of acting as advisors. As against the Fifth Named Defendant, it is, in addition, alleged that it advanced a loan of €300,000 to the Third Named Plaintiff which it should not have advanced in light of the knowledge of its directors of the true financial position of the Company. Accordingly, from the amended pleadings it appears that the Plaintiffs' case extends *inter alia* to concealed and/or misrepresented poor financial performance, breach of duty and negligence.

9. Comprehensive defences have been filed on behalf of all Defendants in which all material claims have been put in issue. In its defence the Fifth Named Defendant denies, *inter alia*, that it acted as advisor at all and pleads that its role in the matters at issue was advancing the aforesaid loan of €300,000 to Ms. Corrigan and a Mr. James Paul Galligan ("Mr. Galligan") on the 30<sup>th</sup> of May, 2006 (approximately one year after the acquisition of the Company by the Second Named Plaintiff). It is noteworthy, however, that in its Defence delivered in June, 2012, the Fifth Named Defendant pleaded (at paragraph 22):

*“Further prejudice to the foregoing if (which is denied) this defendant has liability to the third named plaintiff, this defendant is entitled to set off against such liability such sums as are owed to it by the said plaintiff pursuant to the aforesaid loan agreement which the plaintiff and Mr Galligan are in breach of by, inter alia, failing to repay the loan provided for therein and which is the subject matter of separate proceedings before this Honourable Court under record number 2012/1866S entitled Pembroke Equity Partners Ltd v. Eileen Corrigan and James Paul Galligan.”*

**10.** As clear from this plea in the Fifth Named Defendant’s Defence, following the joinder of the Fifth Named Defendant, a further set of proceedings, referred to in this judgment as the loan proceedings, were issued by summary summons by that defendant in 2012 (shortly before the delivery of the Defence in these proceedings). The loan proceedings concerned the loan transaction in 2006 between the Third Named Plaintiff and her husband and the Fifth Named Defendant which loan was advanced to part fund the pharmacy acquisition, the subject of the earlier proceedings. The loan proceedings clearly involve several of the same parties. They were ultimately remitted to plenary hearing by the Master of the High Court (on consent) in or about July, 2014 following an exchange of affidavit evidence over a period of two years.

**11.** In the Defence delivered in June, 2018 on behalf of the First (the Third Named Plaintiff in the within proceedings) and Second Named Defendants in the loan proceedings it is pleaded (at paragraph 21):

*“Without prejudice to the foregoing, the First Named Defendant will seek a set off in respect of any judgement or order obtained against the Plaintiff (Pembroke Equity Partners Limited) in proceedings entitled City Pharmacy Ltd, Corrigan Pharmacy Holdings Ltd and Eileen Corrigan v. James Roche and Irene Fehily, Hilary Hayden and Fiona Cottell practising under the style and title of Hilary Hayden & Co (incorporating Woods Sweetman) Chartered Accountants and Registered Auditors and Pembroke Equity Partners Ltd (Record No. 2006 1814P)(hereinafter “the City Pharmacy Proceedings”).”*

**12.** At paragraph 23 of the Defence filed on behalf of the Defendants in the loan proceedings it is further pleaded:

*“In the City Pharmacy Proceedings it is claimed that the Accountants and the Plaintiff acted as a business advisor and the Accountants provided accountancy services to the First Named Defendant and CPHL (jointly referred to as “the purchasers”). In addition they acted as corporate financiers. In the latter regard they jointly negotiated and organised bank loans and provided finance of the Plaintiffs. Further they agreed to provide financial advice to the purchasers and the defendant herein and owed them a duty of care.”*

**13.** In the Reply to the Defendants’ Defence (delivered in June, 2019) in the loan proceedings it is pleaded (at paragraph 2):

*“By way of specific reply to paragraph 21 of the defence, it is denied that the First Named Defendant is entitled to a set-off in respect of any judgement or order obtained against the Plaintiff in the proceedings referred to therein (therein and hereinafter referred to as “the City Pharmacy Proceedings”). Such a set-off is not permissible as a matter of law.”*

**14.** It is further pleaded (at paragraph 4 of the Reply):

*“Insofar as the pleas in paragraph 23 of the defence are intended to imply or allege that the Plaintiff’s role went beyond that of providing the loan, which is the subject matter of these proceedings, this is denied. All material times, the Plaintiff’s relationship with the Defendants and each of them was as lender who provided the loan which is the subject matter of the within proceedings and the plaintiff’s role did not go beyond that.”*

**15.** A number of other events identified in the Chronology and on affidavit are worthy of specific reference. The First and Second Named Defendants discharged their solicitors in October, 2015. They remain parties to these proceedings but they do not appear to have taken any part therein since in or around that time. In November, 2019 a security for costs motion was brought in the loan proceedings in response to the service of a Notice of Trial in those proceedings. This application was resisted by the Fifth Named Defendant for approximately two years before the motion was conceded shortly before the hearing date. The Plaintiffs’ claim against the Third and Fourth Named Defendants in the within proceedings was withdrawn by

way of Notice of Discontinuance filed in May 2020, seemingly in a context where settlement negotiations had taken place. Then, in February 2022, pursuant to the settlement of the substantive element of a security for costs motion in the loan proceedings (which issue had been appealed to the Court of Appeal), the Fifth Named Defendant lodged the sum of €120,000 as security for costs. The lodging of money to the credit of the action as security for costs cleared the way for a date to be fixed for the hearing of the loan proceedings. When the matter came before the Court for this purpose in May, 2022, however, counsel for the Plaintiffs in the within proceedings indicated an intention to seek to have these proceedings heard together with the loan proceedings heard. A Notice of Intention to Proceed was duly served dated the 18<sup>th</sup> of May, 2022.

**16.** It is therefore clear that it was the reactivation of these proceedings for the purpose of having them heard together with the loan proceedings which precipitated the issue of the within application to dismiss the proceedings.

#### **GROUND 1 - DELAY**

**17.** The parties are agreed on the principles which apply on an application to dismiss on delay grounds in this case. For my assistance, in addition to careful and considered written submissions, the parties furnished a book of authorities which included *Cave Projects Limited v. Kelly* [2022] IECA 245, *Gibbons v. N6 (Construction) Limited* [2022] IECA 112; *Carroll v. Kerrigan Limited* [2017] IECA 66 and *Dunne v. ESB* [1999] IEHC 119 all cases in which the principles applicable in applications to dismiss proceedings by reason of delay/want of prosecution have been considered going back to the foundational decision of the Supreme Court in *Primor*.

**18.** The recent Court of Appeal decision in *Gibbons v N6 (Construction) Limited* [2022] IECA 1 12 (as cited with approval by the later Court of Appeal decision of *Cave Projects Limited v Kelly* [2022] IECA 245) sets out (at paragraphs 78 to 105) a helpful analysis of the applicable legal principles in an application such as this. The starting point is a consideration of the three-limb test set out in *Primor* as summarised by Barniville J. (as he then was) at para. 79 as follows:-

*"There are three limbs to the Primor test. The defendant must first establish that the delay on the part of a plaintiff in the prosecution of the claim has been inordinate. If it establishes that the defendant must then establish that the delay has been inexcusable. If the defendant establishes, or if it is agreed, that the delay is 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 proceeding of the case. (per Hamilton C.J. in Primor at para.(e) on p. 475)".*

**19.** As regards the balance of justice, Barniville J. noted (at para. 82) the list of factors which the Court was entitled to take into account in determining this issue as set out by Hamilton CJ. in *Primor*. These include matters such as basic fairness of procedures and the effect of any prejudice on the proceedings. As more fully considered by Barniville J. in his judgment there has since then been a considerable amount of judicial comment on specific aspects of the balance of justice test. This commentary is helpfully summarised in the judgment of Barniville J. in *Gibbons* (at paras. 81 to 105) and will not be replicated here. However, by way of summary it can be said that when assessing where the balance of justice lies for the purposes of considering the third limb of the *Primor* test, it is necessary for the Court to take into account a wide range of factors the nature of which will vary depending on the facts of a particular case. Further, while there has been some debate in the case-law as to whether the onus shifts to the Plaintiff where inordinate and inexcusable delay has been established, this debate rests with recent *dicta* in the Court of Appeal in both *Gibbons* and *Cave* to the effect that the onus to establish that the balance of justice lies against permitting the proceedings to continue rests on the moving party.

**20.** Addressing the treatment of the applicable test in the case-law since *Primor* in his judgment in *Cave*, Collins J. sought to emphasize a number of points in an extensive passage (at para. 36 of his judgment) opened during argument before me. In particular, he emphasized that an order dismissing a claim is a far-reaching one described variously in the different cases referred to by Collins J. as a “*very serious remedy*”, resulting in “*a terminal prejudice*” or “*enormous prejudice*” to the plaintiff whose claim is dismissed. Collins J. concluded that it would seem to follow that such an order should only be made in circumstances where there has been significant delay and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed. Adapting slightly what was said by Barniville J in *Gibbons* (at para. 86), Collins J. observed:

*“the court must be satisfied that the “the hardship of denying the plaintiff access to a trial of his claim would, in all the circumstances, be [.]proportionate and [.]just”*

21. Collins J. further focussed on the fact that the question of prejudice must be the forefront of the Court’s considerations when weighing where the balance of justice lies, albeit that prejudice is not confined to “*fair trial*” prejudice. Further, the absence of any specific prejudice or concrete prejudice may be a material factor in the court’s assessment even though general prejudice may suffice. Assertions of general prejudice must have a sufficient evidential basis and fall to be carefully and fairly assessed. 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. The jurisdiction is not punitive or disciplinary in character. Having elaborated on points he wished to emphasize in the case-law, Collins J. observed the risks of a tick box approach and overcorrection before concluding as follows:

*“All of this suggests that courts must be astute to 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.”*

22. I gratefully adopt the summary of the principles identified in *Gibbons*, cited with approval and elaborated upon by the later Court of Appeal decision in *Cave*, as recent statements of the law binding on me. It is now necessary to apply the principles to the facts and circumstances of this case.

## **DECISION ON GROUND 1**

23. I intend no insult to the considered and erudite submissions made before me by both parties in confirming in short order that I have no hesitation in finding that there has been both inordinate and inexcusable delay in progressing these proceedings to conclusion. It would be almost impossible to conclude otherwise considering that it is 18 years since the Share Purchase Agreement was entered into, nearly 17 years since the Loan Agreement with the Fifth Named



Defendant was entered into and the proceedings commenced in 2006 and were enlarged through the joinder of additional parties in 2011 at the outer limit of the time permitted under the Statute of Limitations but remain undetermined twelve years later in 2023. Inordinate delay is further evident in the steps on the record of the proceedings including the delay of over four years from the institution of the proceedings (26<sup>th</sup> of April, 2006) to the issuing of the application to join the additional parties (12<sup>th</sup> of November, 2010), the delay of nearly three years from the making of discovery by the Plaintiffs (3<sup>rd</sup> of July, 2015) to the mediation (26<sup>th</sup> of June 2018) and the delay of nearly four years between the date of the mediation (26<sup>th</sup> of June 2018) and the date of the Plaintiffs' Notice of Intention to Proceed (18<sup>th</sup> of May 2022).

**24.** In his submissions on behalf of the Fifth Named Defendant, counsel focussed on three specific periods of delay, namely:

- I. The four years between the issue of proceedings and the joinder of the Fifth Named Defendant;
- II. The three years between the completion of discovery and mediation (albeit the Fifth Named Defendant's discovery was not in fact complete);
- III. The four years between mediation in June, 2018 and the delivery of a notice of intention to proceed as against the Fifth Named Defendant in May, 2022.

**25.** It is acknowledged by Counsel for the Fifth Named Defendant, however, in respect of each of these periods of delay that there are factors which partially explain the delay. In terms of delay between the institution of proceedings and the joinder of the Fifth Named Defendant, it is a fact that the Second Named Defendant had been twice struck off for failure to file returns, events which the Plaintiffs seek to lay at the door of their then accountants and auditors, who were also the directors of the Fifth Named Defendant. It is acknowledged also that delay in the discovery process is attributable in part to the Fifth Named Defendant who made initial discovery in August, 2015 and filed a supplemental affidavit of discovery in June, 2018 almost three years after the initial affidavit. Seemingly, there was also "*without prejudice*" engagement following the failed attempt at mediation albeit that the parties are not agreed as to how extensive this engagement was.

**26.** I appreciate that there is some explanation for periods of delay, particularly when regard is had to steps taken in the loan proceedings as apparent from the Chronology appended hereto.

There have, however, been long periods of time when these proceedings were in seeming abeyance. I cannot ignore that steps taken to progress these proceedings in 2022, in turn precipitating the dismiss application, were clearly a reaction to the fact that a hearing date was being sought in the loan proceedings. The seeking of a date in the loan proceedings had itself been delayed by a protracted security for costs application which was prompted by moves to secure a hearing date in those proceedings in 2019. Accordingly, each time the Fifth Named Defendant has sought to proactively move on the loan proceedings, it has provoked a litigation response from the Plaintiffs.

**27.** The Fifth Named Defendant has queried in submissions whether the Plaintiffs are seriously intent on pursuing this claim at all. They point to the fact that there was nothing to stop the Plaintiffs from pursuing their claim against the Fifth Named Defendant following the conclusion of mediation in 2018 but they did not do so until May, 2022 when the Loan Proceedings were due to be allocated a date for hearing in the Non-Jury case management list. At that point, the Plaintiffs' Counsel (who was acting for the defendants in the Loan Proceedings) indicated to the court that the Plaintiffs herein wished to revive these proceedings so that the Plaintiffs could apply for same to be heard with the Loan Proceedings. This had the effect of deferring the allocation of a hearing date for the Loan Proceedings. A review of the Chronology demonstrates that steps have only been taken in these Proceedings when the Loan Proceedings have been progressed to a certain point suggesting that the Plaintiffs' interest in pursuing these proceedings is tied to the defence of the loan proceedings rather than as an end in themselves. This is perhaps not surprising given what has been disclosed in the security for costs application regarding the financial health of the Fifth Named Defendant.

**28.** It seems to me clear that what is demonstrated by the Chronology is a determination on the part of the Plaintiffs in these proceedings to ensure that if any aspect of the dispute between the Plaintiffs and the Defendants is to be considered by a court, then all aspects should be. In particular, they have been and remain opposed to any determination of the loan proceedings brought on behalf of the Fifth Named Defendant divorced from the claim made in these proceedings against the Fifth Named Defendant. Thus, even if the Fifth Named Defendant turns out to be unable to satisfy any judgment against it in these proceedings (a consideration which is a real one given what is said about the Fifth Named Defendant's financial position on affidavit), the clear intention is for the Third Named Plaintiff to seek to rely on the fact and circumstances of such judgment to mitigate against a potential liability on the part of the Third

Named Plaintiff in the loan proceedings. I accept that such considerations do not entitle the Plaintiffs to effectively “*park*” these proceedings to see if the loan proceedings are pursued. That said litigation is a resource intensive and expensive enterprise and therefore a degree of pragmatism is not only inevitable but also appropriate in money claims which have uncertain prospects of being enforceable even if successful.

**29.** Like the Chronology, the Affidavit evidence filed supports my view that the parties to these proceedings have been playing a strategic game whereby they seek to gain litigation advantage or conversely prevent litigation advantage. Strategic delays of the type apparent in this case are not excusable but they are understandable. The Fifth Named Defendant seeks to advance the loan proceedings as a simple debt matter and would clearly prefer if the complications represented by the within proceedings could be avoided. This strategy is naturally resisted by the Plaintiffs in these proceedings who wish to have both cases heard before the same judge thereby ensuring that a decision is not made in the loan agreement proceedings without full regard to the surrounding circumstances in respect of the said loan.

**30.** The Plaintiffs refer to steps taken in the loan proceedings to excuse delay in the within proceedings. In my view the fact that steps were being pursued in parallel proceedings might explain what was happening at given times but cannot excuse the failure to take steps to progress these proceedings to a state of readiness. I should not be blind, however, to what seems to me the obvious reality that the parties in both cases have adopted litigation strategies with opposing objectives in terms of how these cases should be disposed of. This is a significant factor in the delay in resolving all matters and has been contributed to by both plaintiffs and defendants. When regard is had to the global situation pertaining to both sets of proceedings, it is clear that delay was a “*two-way street*” to which all sides contributed but this does not mean that the delay is excusable and I consider that it is not. The obviously strategic conduct of this litigation has been at the expense of a focus on the timely determination of the proceedings but in my view responsibility for it is shared in a manner which is relevant to an assessment of the egregiousness of the Plaintiffs’ failure to progress proceedings with expedition and the balance of justice.

**31.** In view of my conclusion that delay has been both inordinate and is inexcusable, albeit that the reason it has occurred is understandable, the real issue for me on the application to dismiss on delay grounds in this case is the balance of justice consideration. In this regard I

have to the forefront of my mind the question of prejudice caused by the Plaintiffs' delay and this brings me to the significance of the nexus between these proceedings and the loan proceedings. By way of example of the nexus between the two proceedings, it is noted:

- a) Both cases are connected factually and through an overlap in parties;
- b) Both cases concern City Pharmacy, the acquisition and subsequent financing of same;
- c) Both cases involve claims of misrepresentation by the Fifth Named Defendant;
- d) Both cases involve questions as to the loan by the Fifth Named Defendant to the Third Named Plaintiff and her husband.

**32.** In terms of the party overlap, it is noted that the Plaintiff in the Loan Proceedings is the same as the moving party on this dismissal application, the Fifth Named Defendant, the First Named Defendant in the Loan Proceedings is the Third Named Plaintiff in the within proceedings; and the Second Named Defendant in the Loan Proceedings is the Third Named Plaintiff's husband. Both are directors in the First and Second Named Plaintiffs herein.

**33.** It is also clear that the Loan Proceedings have been travelling in tandem with and codependently with the within proceedings since inception. The overlap in activity is evidenced by the fact that the Fifth Named Defendant waited until a year after the alleged loan repayment date and just a few weeks before its defence was due in the within proceedings before issuing the Loan Proceedings. This allowed it to reference the Loan Proceedings in the defence delivered to these proceedings by way of a claim for set-off. Within two weeks of a Notice of Intention to Proceed being filed by the Plaintiffs in the within proceedings, the Fifth Named Defendant delivered its Statement of Claim (over a year following remittance to plenary) in the Loan Proceedings. It is understood that a mediation took place between the various parties which encompassed both the within proceedings and the Loan Proceedings. It seems that the security for costs application in the Loan Proceedings also relied heavily on the nexus between the two sets of proceedings.

**34.** As apparent from the pleadings in both the acquisition and the loan proceedings summarized above, there is a clear overlap of parties and issues. Even the counsel for the Fifth

Named Defendant accepted in the course of his submissions before me that the proceedings involved a cross-over of parties (albeit of one Plaintiff) and while much was made of the fact that no claim for rescission of the loan agreement has been advanced in these proceedings, it is accepted that there are overlapping issues. It is the Fifth Named Defendant's position that the overlap is not such as to require that the proceedings be progressed together and it would be wrong therefore to attach much weight to the conduct of related proceedings.

**35.** To my mind the interconnectedness of the two proceedings is the single most pressing consideration when balancing the interests of justice. The terminal prejudice which would result from the dismissal of the Plaintiffs' claim in the within proceedings would be compounded by the impact that this would have on the related loan proceedings and the defence of same. My view on prejudice is therefore also clear. I am quite satisfied that it would be wholly unjust to dismiss these proceedings whilst the loan proceedings remain in being. To do so would serve to disadvantage the Third Named Plaintiff in her defence of the loan proceedings and would constitute a clear unfairness in my view. I see no countervailing unfairness in permitting all issues as between the parties to proceed to final determination on their merits. While it is true that a plea of misrepresentation suggests that this is a case which may not be entirely based on documents and may involve some oral evidence bringing into play considerations of fading memories with the passage of time, little is advanced on affidavit on behalf of the Fifth Named Defendant as to how the balance of justice is tilted in favour of dismissal for this reason. Indeed, very little is said of any specific or concrete nature regarding the question of prejudice arising from delay. At paragraph 36 of his affidavit grounding this application, Mr. Haydon refers to the fact that "*it is unsatisfactory to have the uncertainty of this type of litigation hanging over it for so long*" and while it is stated in general terms that being required to defend these proceedings at this remove of time would create real and substantial difficulties for it which would, in the circumstances, impose "*an unduly harsh and unwarranted burden*", no attempt has been made to identify what specifically these difficulties are.

**36.** Notably, this is not a case in which it is suggested that witnesses are no longer available or evidence has been lost through the effluxion of time. Reference is made to the absence of any engagement on behalf of the First and Second Named Defendants for a protracted period and it appears that their current whereabouts are unknown to the Plaintiffs. It is suggested that it is telling that this issue is raised on behalf of the Fifth Named Defendant in an affidavit sworn

by its solicitor rather than Mr. Haydon as director of the Fifth Named Defendant in circumstances where it is averred on behalf of the Plaintiffs that Mr. Hayden worked with the First and Second Named Defendants for many years such that it is considered likely that he is aware of their whereabouts. Be this as it may, I accept that Mr. Haydon has not been formally requested to provide details of the said Defendants whereabouts and is under no obligation to assist the Plaintiffs in ensuring proper service on notices on the First and Second Named Defendants. The Plaintiffs fully acknowledge that further steps are required to ensure that these proceedings are in a position to proceed. These are steps which are amenable to active case-management where delay concerns of the type agitated on behalf of the Fifth Named Defendant arise. There is no reason to conclude at this stage that all remaining necessary steps will not be taken in a timely manner and in accordance with any appropriate court direction.

**37.** While the Fifth Named Defendant complains of difficulties in defending the within proceedings because of the passage of time, it is clear that it wishes for its own part to maintain its own proceedings but undermine the Third Named Plaintiff's defence of those proceedings by ensuring that the proceedings in which her claims of wrongdoing against the Fifth Named Defendant is not determined. I am satisfied that to accede to the Fifth Named Defendant's application would result in an unfair and one-sided prejudice to the Third Named Plaintiff as party to both proceedings in circumstances where both Plaintiffs and Defendants (including the Fifth Named Defendant) have contributed to delay in these proceedings and where the Fifth Named Defendant has failed to identify a proper evidential basis for specific or concrete prejudice but relies on general assertions. The general assertions made on behalf of the Fifth Named Defendant cannot outweigh the risk of injustice to the Plaintiffs in dismissing the within proceedings. Indeed, I am satisfied that dismissing the claim would create a serious and real risk of causing injustice rather than preventing it given the extent to which these proceedings are connected with the loan proceedings which the Fifth Named Defendant remains intent on prosecuting.

## **GROUND 2 – EFFECT OF DISCONTINUANCE**

**38.** The Fifth Named Defendant maintains that these proceedings should be dismissed because they can no longer be conducted in accordance with the Order to which the Fifth Named Defendant refers which specifies *inter alia* that:

*“the Statement of Claim be partitioned and that the issues as between Eileen Corrigan and Pembroke Equity Partners Limited be tried separately by the same Judge at the end of the said proceedings.”*

**39.** At the hearing of the application, it was clarified that this ground was advanced as a basis to dismiss the proceedings taken on behalf of the Third Named Plaintiff only. Accordingly, were proceedings dismissed on this basis as urged on behalf of the Fifth Named Defendant, they would remain extant at the suit of the other parties but the case as against the Fifth Named Defendant would be materially affected given its involvement in advancing loans to the Third Named Plaintiff, who would no longer be in a position to maintain her proceedings.

**40.** The Fifth Named Defendant was not a party to the application to join additional parties but submits that it seems clear from the terms of the Order made that the application to add additional parties to the proceedings was acceded to on the condition that issues between the Third Named Plaintiff and the Fifth Named Defendant be tried by the same Judge who had heard (and determined) all other claims in the Proceedings. The Fifth Named Defendant submits that in circumstances where the Plaintiffs have since discontinued their claims against the Third and Fourth Named Defendants seemingly following the agreement of settlement terms, the condition imposed that the Third Named Plaintiff's claim against the Fifth Named Defendant be heard by the same Judge who heard and determined the other claims in the proceedings cannot now be complied with as the Judge hearing these proceedings will not hear and determine any claims against the Third and Fourth Named Defendants. It is contended that permitting the claim to continue impermissibly ignores the terms of the Order made. The Fifth Named Defendant's position is that the order does not permit the splitting of the 2006 proceedings and does not permit the claim as against the Fifth Named Defendant to be pursued separately and independently from the claims against the other defendants. It is their position that the joinder of the Fifth Named Defendant in these proceedings was condition on the sequencing of issues envisaged by Quirke J. in his order and as this condition cannot now be satisfied, the claim cannot be further pursued.

**41.** No authority was adduced in support of this submission and the application was made secondary to the application to dismiss on delay grounds.

## **DECISION ON GROUND 2**

**42.** I do not construe the Order of Quirke J. directing partition of the claim and the sequence in which issues would be heard and/or determined an impediment to the case proceeding at all where the claim as against the Third and Fourth Named Defendants has been settled. The Order did not purport to and did not operate to preclude trial of any issue in the event that other issues in the proceedings were settled as between the parties. It remains the case that the issues between the Third Named Plaintiff and the Fifth Named Defendant fall to be determined when the other remaining issues in the case have been tried. If there are no other issues remaining when the proceedings come on for hearing, it follows that the issues between the Third Named Plaintiff and the Fifth Named Defendant will still require to be resolved. As things stand, remaining issues in the case include the issues between the Plaintiffs and the First and Second Named Defendant. These outstanding issues fall to be heard before the issues between the Third Named Plaintiff and the Fifth Named Defendant in accordance with the terms of the Order of Quirke J. The implications of settlement terms agreed, if any, with parties who have been released from the proceedings is a matter for the trial of the action.

**43.** I am satisfied that no basis has been established for dismissing the Third Named Plaintiff's claim because all other issues which were live in the proceedings in 2011 will not now be determined by the judge who decides on the Third Named Plaintiff's claim as against the First Named Defendant. I am satisfied that Quirke J. did not intend to condition the maintenance of the claim as against the Fifth Named Defendant in these proceedings as being permissible only where the claims against the other Defendants were heard and determined first. This was neither the purpose nor the effect of the order made.

**44.** In making the order in the terms in which he did Quirke J. did no more than recognise that the claim against the newly joined Defendant was of a different nature to that against the other defendants such that it was appropriate to deal with them separately but given the overlapping nature of the claims and the evidence to be adduced, it made sense that duplication which would result from separate proceedings should be avoided. His clear intention was that all issues be determined by the same judge thereby avoiding the additional burden on resources (including court resources) that would arise from presenting the case as against the Fifth Named Defendant in separate proceedings and before a different judge. This was a sensible order



which does not purport to prohibit the further conduct of the proceedings if there is a narrowing of issues between the parties.

## **CONCLUSION**

**45.** For the reasons set out above, I refuse the application to dismiss on both grounds advanced. Given the undoubted delays which have beset these proceedings and issues identified on behalf of the Fifth Named Defendant as outstanding and likely to cause further delays (for example, issues of service relating to the First and Second Named Defendants, exchange of expert reports, witness statements, particulars of special damages etc.), I will hear the parties in relation to making directions with a view to achieving an expeditious determination of all remaining issues. I invite the parties to agree a timetable in this regard and if not possible to make such application for directions as may appear appropriate. I will also hear the parties in relation to any other consequential matters flowing from this decision.



|                    |   |
|--------------------|---|
| 21 March 2021      | Quirke J orders, on foot of the above motion as brought on the 12 <sup>th</sup> day of November 2010, the joining to the proceedings of Eileen Corrigan as the third named plaintiff, Hilary Haydon and Fiona Cottell practicing as Hilary Haydon and Co. as the third and fourth named defendants and Pembroke Equity Partners Limited as the fifth named defendants |
| 30 March 2021      | Plenary Summons is amended  |
| 7 April 2011       | A statement of claim is delivered (it appears this is the first statement of claim to have been delivered.)   |
| 20 June 2011       | Notice of Motion seeking judgement in default of defence against the first and second-named defendant is brought by the Plaintiffs  |
| 13 July 2011       | Memo of Entry of Appearance is filed on behalf of the third, fourth and fifth named Defendants  |
| 4 November 2011    | Defence of the first and second-named defendant is delivered  |
| 21 November 2011   | The motion for judgement in default of defence against the first and second-named defendant, as brought on the 20 <sup>th</sup> day of June 2011, is struck out, on consent, by Mr. Justice Ryan  |
| 5 December 2011    | Motion for Judgment against third and fourth named defendants issued  |
| <b><u>2012</u></b> |   |
| 7 February 2012    | Notice of Change of Solicitor is issued (LK Shields Solicitors come on record for third and fourth named defendants   |

|                        |  |
|------------------------|--|
| 13 February 2012       | The third, fourth and fifth-named defendants are ordered by Quirke J to deliver their defences within 6 weeks.   |
| 15 March 2012          | A notice seeking particulars on behalf of the third and fourth named defendants is issued against the plaintiffs   |
| 16 March 2012          | Defence of the Third and Fourth-named defendants is delivered  |
| 18 May 2012            | The fifth- named defendant (as a plaintiff) institutes the proceedings entitled: "Pembroke Equily Partners Limited V Eileen Corrigan and James Paul Galligan 2012/1866s." (Hereinafter, "the Loan Proceedings.") |
| 24 May 2012            | The plaintiffs reply to particulars  |
| 22 June 2012           | The defence of the fifth named defendant is delivered  |
| 19 July 2012           | Third and fourth-named defendant's motion seeking an Order compelling the plaintiffs to reply to particulars is issued   |
| 13 September 2012      | Appearance is entered by the third-named plaintiff and James Paul Galligan (as defendants) in the Loan Proceedings.  |
| <br><b><u>2013</u></b> |  |
| 28 January 2013        | Mr Justice Charleton orders an amendment to the Statement of Claim and gives directions as to the conduct of further proceedings.  |
| 7 February 2013        | A notice seeking particulars is issued by the third and fourth-named defendants,   |

|                  |  |
|------------------|--|
| 27 February 2013 | Plaintiffs issue further particulars of loss to the third and fourth named defendants.   |
| 28 February 2013 | Third and fourth-named defendants issue a request for voluntary discovery to the plaintiffs.   |
| 7 March 2013     | Plaintiffs reply to aforesaid request for discovery).  |
| 7 May 2013       | Third and Fourth-named defendants issue a motion to strike out the plaintiff's statement of claim for failure to comply with Charleton J' s order as issued on January 28 <sup>th</sup> , 2013   |
| 8 May 2013       | Plaintiffs issue a motion for discovery against the third and fourth-named defendant   |
| 27 May 2013      | Third and Fourth named defendants bring a Notice of Motion for discovery against the plaintiffs  |
| 20 June 2013     | A Notice of Motion is brought by the fifth named defendant against the plaintiffs  |
| 28 June 2013     | <p>The hearing of the above four notices of motion are heard before Charleton J</p> <p>Charleton J orders, inter alia, the third and fourth named defendants to reformulate their request for discovery and refuses their request to strike out plaintiffs statement of claim (as sought in the Notice of Motion as brought on the 7<sup>th</sup> day of May 2013.)</p> <p>Charleton J also orders that the plaintiffs reformulate their request for discovery against the third and fourth-named defendant*</p> |

7 August 2013 Motion for Summary Judgment is issued in the Loan Proceedings

22 October 2013 Chareyton J makes the orders of discovery against the first, second, third and fourth-named defendants and directs the plaintiffs to reply to particulars

## **2014**

24 July 2014 Order is issued by the Master of the High Court remitting the Loan Proceedings to Plenary hearing

## **2015**

13 May 2015 Notice of Change of Name of Solicitor for the fifth named defendant to O'Brien Redmond is filed

3 July 2015 Affidavit of discovery on behalf of all plaintiffs

16 July 2015 Notice of intention to proceed is filed by plaintiff's solicitors

27 July 2015 The fifth-named defendant (as plaintiff) delivers its Statement of Claim in the Loan Proceedings

[?] October 2015 First and second-named Defendants discharge their solicitors by way of Notice of Discharge

19 August 2015 Affidavit of Discovery of fifth-named defendant

## **2017**

19 July 2017 Amended Statement of Claim is delivered

## **2018**

|                    |   |
|--------------------|---|
| 28 February 2018   | Notice of Discharge of first and second named Defendants is filed   |
| 7 March 2018       | The third-named plaintiff and Mt Galligan (as defendants) issue a notice of particulars in the Loan Proceedings   |
| 31 May 2018        | The fifth-named defendant (as plaintiff) replies to the particulars as sought by the defendants in the Loan Proceedings   |
| 14 June 2018       | Supplemental affidavit of discovery by fifth named defendant  |
| 25 June 2018       | The third-named plaintiff and Mr Galligan (as defendants) deliver the defence in the Loan Proceedings.  |
| 26 June 2018       | Mediation takes place   |
| <b><u>2019</u></b> |   |
| 14 June 2019       | The fifth named defendant (as plaintiff) replies to the defence in the Loan Proceedings.  |
| 20 June 2018       | As defendants in the Loan Proceedings, the third-named plaintiff and Mr Galligan reply to the particulars as sought by the fifth named defendant (as Plaintiff) in January of 2019. |
| 22 October 2019    | Notice of Trial issued in the Loan Proceedings.   |
| 11 November 2019   | Security for Costs motion brought by the thirdnamed plaintiff and Mr. Galligan (as defendants) in the Loan Proceedings.   |

**2020**

25 May 2020

A notice of discontinuance is filed with regard to the Third and Fourth-named defendants. .

## **2021**

23 November 2021

Security for costs motion as brought by the defendants in the Loan Proceedings comes on for hearing and, on consent, an order for security for costs is made. After a contested application, the costs of this motion are awarded against this defendant (the plaintiff in the Loan Proceedings)

## **2022**

1 February 2022

The aforesaid Order for Security for Costs in the Loan Proceedings is perfected.

7 April 2022

The Loan Proceedings appear in the Chancery list to fix dates. The matter is transferred to the Chancery Case Management List.

18 May 2022

Case management hearing of the Loan Proceedings takes place. Counsel for the defendants in the Loan Proceedings (namely, the Third named Plaintiff herein and Mr Galligan) makes a submission to the Court in respect of these proceedings. The court suggests that the plaintiffs in these proceedings may need to serve a notice of intention to proceed on the defendants and adjourns case management in the Loan Proceedings to the 13<sup>th</sup> day of July 2022.

Notice of intention to proceed is served by the Plaintiffs

08 July 2022

Plaintiffs' Solicitors give notice to fifth named defendants' solicitors of their intention to set proceedings down for trial at



the expiration of 21 days from the date thereof.