

THE HIGH COURT

[2022] IEHC 657

[Record No. 2014/7651P]

BETWEEN:

PHILIP O’SULLIVAN

PLAINTIFF

AND

CANADA LIFE (IRELAND) LIMITED

AND

IRISH LIFE ASSURANCE PUBLIC LIABILITY COMPANY

AND

OREGAN FINANCIAL LIMITED

AND

PSC WEALTH PLUS LIMITED T/A PSC WEALTH PLUS

DEFENDANTS

AND

[Record No.: 2014/7652P]

LIAM SUGRUE

AND

FARNES CONSTRUCTION LIMITED

PLAINTIFF

AND

CANADA LIFE (IRELAND) LIMITED

AND

IRISH LIFE ASSUARANCE PUBLIC LIABILITY COMPANY

AND

OREGAN FINANCIAL LIMITED

AND

PSC WEALTH PLUS LIMITED T/A PSC WEALTH PLUS

DEFENDANTS

**JUDGMENT OF Ms. Justice Siobhán Phelan delivered on the 25th day of November,
2022**

INTRODUCTION

1. These separate but related matters came before me on foot of two applications on behalf of each of the Third Named Defendant and Fourth Named Defendants to dismiss the proceedings in these related proceedings pursuant to O. 122 R. 11 of the Rules of the Superior Courts 1986 (as amended) and/or the inherent jurisdiction of the Court on the grounds of delay and want of prosecution (four separate motions heard together).

2. The two sets of proceedings in which these applications are brought are related in that they both concern investments made by the Plaintiffs in each case (referred to hereinafter as the “*O’Sullivan*” and the “*Sugrue and Farnes*” proceedings to distinguish them from each other) in the same property fund (hereinafter “the property fund”). The Third Named Defendant provide investment services and the Fourth Named Defendant is an investment product intermediary. The Plaintiff in the *O’Sullivan* case is a solicitor by profession and acts for the Plaintiffs in *Sugrue and Farnes*. The proceedings are maintained against the same Defendants and concern, *inter alia*, a claimed tort of negligent misstatement and breach of fiduciary duty arising from the existence of a loan to value covenant in bank borrowings to secure the investment, of which it is claimed the Plaintiffs were not advised before entering into their

investments. Proceedings did not issue within six years of the investment in either case but the Plaintiffs contend that they are not statute barred as they were commenced within six years of negative impact of the loan to value covenant on their investments in the property fund.

3. The thrust of the Plaintiffs' resistance to these applications is focussed on the excusability of delay in the particular circumstances of these cases and balance of justice considerations. The primary explanation for delay between 2016 and 2020 advanced in both cases is the fact that a preliminary issue in relation to the Statute of Limitations, 1957 (as amended) [hereinafter referred to as "the Statute of Limitations"] was being pursued in a case which was "on all fours" with these cases, namely, *Cantrell v. AIB Plc* (Record No. 2014/690P) [hereinafter "the *Cantrell* proceedings"], finally resulting in a decision of the Supreme Court which found that those similar proceedings were not statute barred (see [2020] IESC 71).

4. Given the similarity between the two sets of proceedings and the respective applications of the Third and Fourth Named Defendants on these applications to dismiss and to avoid unnecessary duplication, I am delivering a single judgment, addressing each application and claim separately and individually only to the extent I consider necessary.

BACKGROUND

5. To properly contextualize the within applications it is important to understand the significance for these cases of the decisions of the Superior Courts in the *Cantrell* proceedings. By way of summary, in the *Cantrell* proceedings it was claimed that the nature of the borrowing was not known to the investors at the time of subscription to the funds in issue. In each case, however, borrowing was negotiated after the closing of the funds and the loan agreement contained a loan to value covenant which provided that if the value of the property fell below 80% of the initial value, or below the amount lent, then the lender was entitled to activate the clause, and a floating charge would crystallise in which case the lender would be entitled to take control of the property and sell it in reduction of its debt. In the *Cantrell* proceedings the Courts (High Court, Court of Appeal and finally the Supreme Court) were required to determine the date of occurrence of damage in tort actions in which damage is an ingredient of a cause of action (unlike claims for breach of contract) by way of trial of a preliminary issue on a motion.

6. The judgments in the *Cantrell* proceedings applied to eight cases in total listed for hearing together but all against AIB Plc. The complexity of the issue for determination is borne out by the differing judgments of the courts. In the High Court (Haughton J.) it was concluded that assuming that actionable wrong occurred when the investments were entered into, the cause of action in tort did not accrue at the date of entry into the investments as there was a mere possibility of loss but no actual loss and the loan to value covenant made no difference to this. It was only when actual damage or loss was caused that the tort became actionable. In the Court of Appeal (Baker J.), the Court overturned the decision of the High Court and concluded that the investors had suffered a loss when the loan to value covenants were entered into for the purpose of securing the borrowings (para. 161).

7. In his judgment on behalf of the Supreme Court on appeal from the decision of the Court of Appeal, O'Donnell J. described the cases as “*pathfinder*” cases selected from more than 300 proceedings brought by disappointed investors in a series of schemes promoted by AIB Plc (para. 5 of the judgment). It was widely understood that the judgment would have implications for many others.

8. Ultimately, the Supreme Court concluded, reversing the decision in the Court of Appeal and affirming the decision in the High Court, that the cause of action for negligent mis-selling accrued in such cases from the date the loan to value covenant had a negative impact on the valuation of the investment.

9. While issues relating to the Statute of Limitations and to delay are related, it is not an answer to an application to dismiss on delay grounds that the proceedings are not statute barred. The relevance of the decision in the *Cantrell* proceedings for this application is not therefore that these proceedings may not be statute barred but rather whether the fact that a preliminary application on foot of the Statute of Limitations was being pursued in those cases excuses the Plaintiffs' delay in progressing these proceedings.

10. Proceedings were issued in 2014 at the suit of the Plaintiffs in two separate sets of proceedings. In the Statements of Claim delivered in both cases the Plaintiffs allege in almost

identical terms that that they have suffered loss as a result of being advised to invest in the same property fund.

11. In the *O'Sullivan* case, the Plaintiff alleges that he invested the sum of €363,294.40, comprised in large part of the transferred accrued benefits from his Law Society of Ireland Retirement Trust Scheme in the sum of €311,742.79, in the Property Fund on the 14th of November, 2005. The Plaintiff pleads that as a result of the existence of a loan to value covenant in a loan for one of the properties in the fund, and the subsequent sale of the relevant property, he lost the opportunity to participate in recovery of the property market. The property at issue was known as the Lateral Building. This property was acquired by the Property Fund in February, 2006. A receiver was appointed in respect of the property in 2010 and the building was sold in 2011. The Plaintiff pleads that had the building not been sold, the hypothetical value of the Plaintiff's investment on retirement at 75 years of age would have been €277,300.

12. In the *Sugrue and Farnes* case, the Plaintiffs plead that the proceeds of the First Named Plaintiff's pension savings and accrued benefits in the combined sum of €57,120.37 were transferred to the First Named Defendant in two separate payments in November, 2005 and February, 2006 for investment in the Property Fund used to purchase the Lateral Building in February, 2006. Like the Plaintiff in the *O'Sullivan* proceedings, in this case the Plaintiffs suffered loss following the appointment of a receiver on foot of the breach of the loan to value covenant and the subsequent sale of the property while it was in negative equity. The Plaintiffs plead that had the building not been sold, the hypothetical value of the Plaintiffs' investment on the First Named Plaintiff's retirement at 75 years of age would have been €88,120.

13. Notably, in the Statements of Claim and in Replies to Particulars, it is pleaded in both cases that the Third Named Defendant failed, *inter alia*, to ensure that the nature and risks of the investment were properly described (including as to the loan to value covenant) and the Fourth Named Defendant advised and recommended that the Plaintiff invest in the property fund and promoted the fund without assessing and advising of associated risks. Reliance is placed on a meeting alleged to have occurred on an unspecified date 2005, prior to the investment, with named officers of the Fourth Named Defendant (different individuals in each case). Accordingly, in both cases reliance is placed not only on documents relating to the investments but also on what was represented orally.

14. Full defences have been filed in both cases by each of the Third and Fourth Named Defendants. As already noted, in each case reliance is placed on a plea that the proceedings are statute barred and issue is joined in relation to pleas that the said Defendants advised or recommended or promoted investment in the fund or were negligent in advising in respect of risk. The Third Named Defendant states that its only role in connection with the Plaintiffs' investment in either case was that of fund manager (at paragraphs 19 and/or 20 of the Defences in each case). It pleaded that the investors in the fund were required to sign a form confirming that they were aware of the risks associated with the investment and that they had consulted with their advisors (at paragraphs 26 and/or 27 of the Defences in each case).

15. Notices of Indemnity and Contribution have been filed as between Defendants including Notices from the First and Second Named Defendants in October, 2021.

16. Applications to dismiss issued on the 16th of November, 2020 and the 14th of September, 2021 in the *O'Sullivan* case and on the 16th of November, 2020 and 14th of September, 2021 in the *Sugrue and Farnes* case, the Fourth Named Defendants' motions being first in time. In each case the applications to dismiss are grounded on solicitors' Affidavits. The Grounding Affidavits do little more than recite the history to the proceedings including by giving a chronology. Only general prejudice by reason of the passage of time is asserted. Fuller Affidavits have been sworn in broadly similar terms by the Plaintiffs in respect of each application. In response to the Plaintiffs' Affidavits from which it is clear that the Plaintiffs deliberately did not advance their proceedings against the Defendants pending a determination of the Statute of Limitation issue in the *Cantrell* proceedings, short supplemental Affidavits were filed on behalf of the Defendants by their solicitors in both cases confirming that the Plaintiffs had not consulted with the Defendants in respect of this approach or sought agreement to same.

17. It is clear from the pleadings exchanged that separate investments were made by the Plaintiffs in 2005/2006 in the property fund for the purpose of pension provision. The Third Named Defendant admits that it produced information materials concerning the property fund and that the Plaintiffs' agreed to invest in the fund which was managed by the Third Named Defendant. The Fourth Named Defendant admits that it introduced the potential investment to the Plaintiffs. Both the Third and Fourth Named Defendants deny any negligence or breach of duty. It subsequently transpired that the investment product sold to the Plaintiffs was subject

to a loan to value covenant in the lending arrangements entered into in relation to the purchase of the investment properties. The Fourth Named Defendant claims to have had no knowledge of the loan to value covenant at the time of the investment. The facts in relation to the state of knowledge of each of the parties concerning the existence of this covenant are not admitted as between all of the parties.

18. Ultimately, the loan to value covenant led first to the appointment of a receiver in 2010 and then to the forced sale of the investment property in 2011 at a time when it was in negative equity with claimed consequential loss to the value of the Plaintiffs' pension funds. When proceedings issued in 2014, it was already more than eight years since the investments were made, almost four years from the appointment of the receiver and some three years from the sale of the property. While the Plaintiffs contend that their losses were realised upon the sale of the property and treat this as the accrual of their cause of action, this may not be the correct position in law. Nonetheless, consequent upon the finding by the Supreme Court in the *Cantrell* proceedings, the Plaintiffs have a good answer to an application to dismiss these proceedings as being statute barred so long as the Plaintiffs can identify that damage was only caused on a date within six years of the issue of proceedings when the negative impact of the loan to value covenant in these proceedings was felt.

19. Even though the proceedings may not be statute barred in view of the decision in the *Cantrell* proceedings, a standalone complaint arises in respect of delay given that it is now more than fourteen years since the investments were made and proceedings have yet to be brought on for hearing. It is properly complained that despite the fact that there had been a significant lapse of time between the making of the investments and even the sale of the property, no substantive steps were taken by the Plaintiffs following the delivery of defences in 2015 in the *O'Sullivan* case and the making of discovery in the *Sugrue and Farnes* case in 2017. This means that by the date of hearing of the within motions no substantive steps had been taken by the Plaintiffs to progress the cases to hearing in more than seven and five years respectively.

20. It must be fairly acknowledged, however, that during this period the Plaintiffs had not been completely inactive. The Plaintiffs in the *Sugrue and Farnes* case had resisted a motion brought forward by the First and Second Named Defendants in relation to discovery (which concluded in 2017) and a further motion seeking trial of a preliminary issue that the

proceedings were statute barred which was brought in 2019 and struck out in 2021. By the time the First and Second Named Defendants' motion on the Statute of Limitations was struck out, however, the within motions had already issued. Although, the First and Second Named Defendants have not made applications to dismiss on delay grounds in these cases, it is important, in view of the primary excuse advanced for the delay in respect of both proceedings, to note that each of the Defendants, including the Third and Fourth Named Defendants, also rely on the Statute of Limitations, 1957 (as amended) in the various defences filed. Therefore, the central significance of the statute plea and the outcome of the preliminary application in the *Cantrell* proceedings is manifestly clear.

CHRONOLOGY

21. Given that there are some differences between the two cases, I will set out hereinafter a chronology in each of the proceedings.

The relevant chronology in the O'Sullivan case is as follows:

The Plaintiff makes the relevant investment	14 November, 2005
Acquisition of the Lateral Building by the Property Fund, to include a loan to value covenant in relation to the property.	February, 2006
Receiver appointed to the Lateral Building	October, 2010
Plaintiff issues letter before action to the Third Named Defendant	August, 2014
Plaintiff commences the within proceedings	28 August, 2014
Appearance entered by Gore & Grimes Solicitors for the Third Named Defendant	10 October, 2014
Statement of Claim delivered by the Plaintiff	24 October, 2014

Appearance entered by RD Glynn Solicitors for the Fourth Named Defendant	3 December, 2014
Fourth Defendant delivers a notice for further and better particulars	22 January, 2015
Notice for Particulars raised on behalf of the Third Named Defendant	30 January, 2015
Replies to Particulars delivered by the Plaintiff to Third Defendant's Notice	9 March, 2015
Replies to Particulars delivered by the Plaintiff to the Fourth Named Defendant's Notice	16 April, 2015
Defence delivered by the Third Named Defendant	8 June, 2015
Defence of Fourth Named Defendant delivered	9 July, 2015
Plaintiff became aware from newspaper reports that a preliminary issue was heard by the High Court in the case of <i>Cantrell</i> proceedings.	May, 2016
Decision of High Court in <i>Cantrell</i> proceedings	28 August, 2017
Decision of Court of Appeal in <i>Cantrell</i> proceedings	18 July, 2019
Notice of Intention to Proceed served by the Plaintiff	22 July, 2019
Decision of Supreme Court in <i>Cantrell</i> proceedings	10 December, 2020

Notice of Intention to Proceed served by the Plaintiff 24 March, 2021

Notice of Indemnity and Contribution of First and Second Named Defendants served 18 October, 2021

The relevant chronology in the Sugrue & Farnes case is as follows:

The Second Named Plaintiff makes the relevant investment 14 November, 2005

The First Named Plaintiff makes the relevant further investment 3 February, 2006

Acquisition of the Lateral Building by the Property Fund, to include a loan to value covenant in relation to the financing of the purchase of the property by bank loan February, 2006

The Third Named Defendant advised that the loan to value covenant had been breached but advised also that lenders tend to ignore these breaches while rent is being received to service the loan, as in the case of the property May, 2009

Receiver appointed to the Lateral Building October, 2010

The Plaintiffs issue letter before action 27 August, 2014

The Plaintiffs commence the within proceedings 28 August, 2014

Statement of Claim delivered by the Plaintiffs to Third Named Defendant 24 October, 2014

Appearance entered on behalf of Fourth Named Defendant to Fourth Named Defendant	3 December, 2014
Statement of Claim delivered by Plaintiff to Fourth Named Defendant	10 December, 2014
Notice for Particulars raised on behalf of the Fourth Named Defendant	22 January, 2015
Notice for Particulars raised on behalf of the Third Named Defendant	30 January, 2015
Replies to Fourth Named Defendants Notice for Particulars delivered	16 April, 2015
Defence delivered by the Third Named Defendant	8 June, 2015
Defence delivered by Fourth Named Defendant	9 July, 2015
Plaintiff's solicitor became aware from newspaper reports that a preliminary issue was heard by the High Court in <i>Cantrell</i> proceedings	May, 2016
High Court order re: discovery on application of First and Second Defendants	May, 2016
Data subject access request on behalf of the Fourth Named Defendant delivered	6 July, 2016

Fourth Named Defendant replies to the Plaintiffs' data subject access request	11 July, 2016
The Plaintiffs furnish the prescribed fee for the data subject access request	12 October, 2016
Solicitors for the Fourth Named Defendant respond further to the data subject access request	7 December, 2016
The Court of Appeal orders discovery in favour of First and Second Named Defendants and against the Plaintiffs	January, 2017
The Plaintiffs' solicitors write seeking further documentation from the Fourth Named Defendant	11 May, 2017
Solicitors for the Fourth Named Defendant respond to that request for further documentation	26 May, 2016
Decision of High Court in <i>Cantrell</i> proceedings	28 August, 2017
The Second Named Plaintiff is placed in Creditors Voluntary Liquidation	6 April, 2018
Decision of Court of Appeal in <i>Cantrell</i> proceedings	18 July, 2019
Second Plaintiff dissolved following conclusion of liquidation	7 August, 2019

Filed date on application by First and Second Named Defendants seeking the hearing of a preliminary issue as to whether the within proceedings were statute barred by motion dated 29 November, 2019

8 January, 2020

Application for preliminary issue struck out on consent

18 May, 2020

Motion to dismiss on grounds of delay and want of prosecution issued by Fourth Named Defendant

16 November, 2020

Decision of Supreme Court in *Cantrell* proceedings

10 December, 2020

Notice of Indemnity and Contribution of First and Second Named Defendants served

18 October, 2021

Motion to dismiss on grounds of delay and want of prosecution issued by Third Named Defendant

14 September, 2021

22. The chronology in both cases show that the Third and Fourth Named Defendants moved promptly upon receipt of the Statements of Claim and further particularisation, delivering Defences in June and July, 2015. The Defendant moving parties on this application have not contributed to delay. The Plaintiff was inactive for over 5 years in the *O'Sullivan* case, up to the bringing of the present application by Notice of Motion issued on the 16th of November, 2020. While two Notices of Intention to proceed were delivered, nothing else followed. In the *Sugrue & Farnes* case, there was further activity involving the First and Second Named Defendant but no contact was had with the Third and Fourth Named Defendants and they were

not kept informed as to the reasons for delay. No steps were taken to advance proceedings as against them from 2015.

JURISDICTION TO DISMISS

23. In addition to the Court's inherent jurisdiction to dismiss, O. 122, r. 11 of the Rules of the Superior Courts 1986 (as amended) provides that:

“... In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule.”

24. The Third and Fourth Named Defendants each rely both on O.122, r.11 in moving their applications and the inherent jurisdiction of the Court.

RELEVANT LEGAL PRINCIPLES

25. The legal principles guiding the Court on an application to dismiss on the grounds of inordinate and inexcusable delay are well established and were not in dispute in the hearing before me. They were set out by the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 and have been refined through application in numerous cases since then. The Courts have repeatedly recognised the constitutional imperative to bring an end to the culture of delays so as to ensure the effective administration of justice as well as the obligations on the Courts under Article 6.1 of the European Convention on Human Rights to ensure that civil rights and liabilities are determined within a reasonable time.

26. The parties are agreed that the Court is obliged to address its mind to three issues on these applications. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is

not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay but also bearing in mind the constitutional imperative to bring an end to the culture of delays so as to ensure the effective administration of justice (see further *Millerick v Minister for Justice* [2016] IECA 206 at paras. 18 and 19 and *Gibbons v N6 (Construction) Limited* ([2022] IECA 112) at para. 79).

27. While the parties are agreed on the principles, they are not agreed on the result of their application to these cases and each cite authority in support of their contrary positions, whilst acknowledging that the authorities establish that each case falls to be determined on its own facts and circumstances.

INORDINATE DELAY

28. Following the delivery of the Third Named Defendant's Defence on the 8th of June, 2015 and the Fourth Named Defendant's on the 9th of July, 2015 in the *O'Sullivan* case, it was not until the 22nd of July, 2019 that a Notice of Intention to Proceed was filed, over 4 years later. Further delays then ensued and yet another Notice of Intention to Proceed was required to be filed, this time on the 24th of March, 2021. There was some suggestion that one or other of these Notices of Intention to Proceed although filed may not have been served on the Third Named Defendant, however, as a Notice of Intention to Proceed is not a pleading it is not necessary for me to reach a conclusion on whether they were served or not for the purpose of determining this application. As of the date of the hearing of this application, more than 7 years had elapsed since the delivery of the Third and Fourth Named Defendants' Defences without any meaningful steps being taken by the Plaintiff. The timeframe in the *Sugrue & Farnes* proceedings, while not identical, also shows a lengthy delay following the resolution of discovery issues in 2017 involving other defendants and more than five years have passed since then at the date of hearing of this application.

29. These periods of delay are inordinate by any standards (in this regard see Heslin J. in *Allied Irish Bank Public Limited v Boyle* [2020] IEHC 377; Cooke J. in *Framus Ltd v. CRH plc* [2012] IEHC 316 and; Butler J. in *Cunningham v. Bracken* [2020] IEHC 602). This is particularly so when regard is had to the fact that proceedings were issued in August, 2014, more than 8 years from the investment by the Plaintiffs in the fund. I agree that this “late start” in the proceedings increased the obligation on the Plaintiffs to progress their proceedings without delay. While the Plaintiffs allege that the case was not a “late starter” as he alleges his loss only crystallised on the sale of the Lateral Building in 2011, even taking this as the date a cause of action in tort accrued for present purposes, it was still some 3 years after the alleged loss was sustained before proceedings were commenced and it remains the case that the proceedings concern events which predated the date upon which loss crystallised by five or six years, making these proceedings late starters.

30. There is ample authority for the proposition that where proceedings are commenced late in the day, then there is an onus on the plaintiff to prosecute them expeditiously (see for example the judgment of this Court, the decision of Irvine J. in *William Connolly and Sons Ltd t/a Connolly's Red Mills v Torc Grain and Feed Limited* [2015] IECA 280 and the decision of Noonan J. in *McGuinness v. Wilkie and Flanagan Solicitors* [2020] IECA 111).

31. Against the background of the lapse of time summarised above since the last steps were taken by the Plaintiffs in each of the proceedings, it has not been contested on behalf of the Plaintiffs that delay is inordinate in all the circumstances of these cases.

32. I am satisfied that the periods of inactivity from 2015 constitutes inordinate delay in the *O'Sullivan* case. I am satisfied that there was also inordinate delay at the very least between 2017 (when discovery was finalised) and 2019 (when the motion for trial of a preliminary question on the statute of limitations issued) in the *Sugrue and Farnes* case.

EXCUSABLE DELAY

33. As noted above the Plaintiffs served replying Affidavits in both cases. In both cases the primary excuse offered by the Plaintiffs for delay was the fact that the issue regarding the statute of limitations in this type of claim was being litigated in the *Cantrell* proceedings. It is

a matter of fact that the Superior Courts were seized of this issue for a four-year period between 2016 and 2020.

34. In the *Sugrue and Farnes* case, reliance was also placed upon a data subject access request issued in July, 2016. The First Named Plaintiff also refers to the question of discovery sought from the Plaintiffs by the Second Named Defendant. With regard to the data subject access request, no explanation is given for the delay of nearly one year between receipt of the Fourth Named Defendant's Defence in July, 2015 and the making of that request in July 2016 (beyond knowledge of the *Cantrell* proceedings gained by the Plaintiffs' solicitor in May, 2016). The data subject access request was responded to in December, 2017, with the production of relevant data. There continued disputes between the parties (including as to the entitlement of a corporate entity, the Second Named Plaintiff, to make such a request, and as to the relationship between that request and discovery), but the matter came to rest with the Plaintiffs' solicitor's letter of the 16th of June, 2017 and the effective abandonment of that issue over 3 years before the present application was brought.

35. As for the discovery issue involving the Second Named Defendant, on the First Named Plaintiff's own account, the Court of Appeal ruled definitively against the Plaintiffs on the 23rd of January, 2017, following which further applications arose because of the Plaintiffs' delay and default in making discovery.

Further, reference was made to an application by the Second Named Defendant for trial of a preliminary issue as to whether the proceedings were statute barred, said to have been issued on the 29th of November, 2019 and it is claimed that the proceedings could not have been advanced while this motion was outstanding. This application was struck out following the decision of the Supreme Court in the *Cantrell* proceedings.

36. By far the most significant issue identified in both proceedings and affecting both applications, however, is the existence of the *Cantrell* proceedings. Both Mr. O'Sullivan and Mr. Sugrue aver that it was considered premature to advance their proceedings pending the outcome of the preliminary issue being determined by the Superior Courts in the *Cantrell* case. It appears that Mr. O'Sullivan became aware of the existence of the *Cantrell* proceedings from newspaper reports in May, 2016 in which it was recorded that the application had been heard in the High Court. Each Plaintiff refers in detail to the progress of that case through the High Court, Court of Appeal and Supreme Court. Reference is made to the judgment of the High

Court delivered on the 28th of April, 2017 (see [2017] IEHC 254) finding the proceedings not statute barred on the tort claim, the judgment of the Court of Appeal delivered on the 18th of July, 2019 (see [2019] IECA 217) overturning the High Court decision and finding the proceedings statute barred and the judgment of the Supreme Court delivered on the 10th of December, 2020 [2020] IESC 71 ultimately finding that the proceedings were not statute barred. In replying Affidavits filed by the Defendants' solicitors, it was confirmed that no correspondence was received from the Plaintiffs' solicitors advising the Third or Fourth Named Defendants as to why they were proposing to take no steps in the prosecution of the within proceedings against them or asking for their consent to such a course of action.

37. From the affidavit evidence I am satisfied that the Plaintiffs and/or their solicitor became aware of the application made in the *Cantrell* proceedings in May 2016, approximately eleven months after the delivery of the Defences by the Third and Fourth Named Defendants and while discovery issues remained unresolved in one of the cases. The decision in the High Court in the *Cantrell* case was delivered on the 28th April 2017 and it was not until over three and a half years later on the 10th December 2020 that the appeal mechanism was exhausted and the Supreme Court delivered a final and conclusive determination of the issue. In the meantime, the First and Second Named Defendants pursued an application for trial of a preliminary issue on the statute in the *Sugrue and Farnes* case but this application was struck out following the decision of the Supreme Court in *Cantrell*. Accordingly, if were legitimate to await the determination of the *Cantrell* proceedings before taking a next step to progress these proceedings, it seems to me that the existence of the *Cantrell* proceedings is capable of excusing almost the full period of identified inordinate delay in both cases.

38. It is now well established that a party who wishes to put proceedings on hold for any reason should at a minimum, place on record with all other parties to the litigation that that course of action is being adopted (see Clarke J. in *Comcast v. Persona Digital Telephony Limited* [2012] IESC 50, at para 5.8 and 5.9 and Noonan J. in *Darcy v. AIB* [2022] IECA 230). I have also been referred on behalf of the Defendants to *Pugh v P.G.M Financial Services Ltd* [2020] IEHC 49 where Sanfey J. in the High Court found that there is an onus on the plaintiffs to apprise the defendants of any difficulties which are causing further delay such that the defendants are assured of the plaintiff's intention to proceed. Core to a requirement to keep parties informed of reasons for delay therefore is the need to avoid a situation where a defendant may be prejudiced by being lulled into a belief that the proceedings will not be pursued

combined with alerting a defendant to a plaintiff's intentions so that the defendant may deploy procedural tools available to expedite a hearing should it wish to do so knowing that the proceedings are delayed but not abandoned. It is, however, acknowledged through the case-law that while greater weight ought legitimately to be placed on explanations for delay which are tendered contemporaneously, thus affording other parties a reasonable opportunity to take whatever steps may be considered appropriate in the event that it is considered that the proposed course of action is not justifiable, this does not preclude weight also being given to reasons offered *ex post facto* to retrospectively explain or seek to excuse the same action taken unilaterally.

39. It seems to me that there are degrees of “*unilateralism*” and the term has only loose application here in circumstances where the existence of the *Cantrell* litigation was very well known. It is acknowledged in the judgment of Haughton J. in the High Court ([2017] IEHC 254) that it had wide implication for hundreds of other cases when he stated (para. 1.5):

“These eight sets of proceedings were chosen from a large number of related cases (in excess of 300) and are said to act as “pathway cases“ for proceedings yet to come before the courts. They are not test cases in the formal sense that findings or conclusions of this court will automatically apply to proceedings in other cases, but it would seem that they will have precedent value and in effect will determine similar issues arising in cases with similar facts.”

40. Ultimately, in the Supreme Court (*Cantrell v. Allied Irish Banks Plc* ([2020] IESC 71), O'Donnell J. held that Haughton J. was correct to find that it had not been established that the claims made by the appellants were statute-barred as it was not shown that the loan to value covenants had a negative impact on the valuation of the investment prior to August, 2008 in that case. The court further recognised the precedential value of the case, with O'Donnell J. stating as follows (at para. 25):

“However, since these proceedings are intended to provide guidance for a large number of other similar cases in respect of the Belfry funds, and since, moreover, the issue has been identified as one of general public importance, and therefore likely to

have an impact on many other cases, I think it is necessary to seek to identify the precise point at which the relevant causes of action accrued.”

41. Significantly, the Third Named Defendant’s solicitors were also acting in the *Cantrell* litigation and the Third Named Defendant must surely have been fully advised as to the importance of the decision in those proceedings for the cases brought against them. Further, it has not been contended on behalf of the Fourth Named Defendant that they were oblivious to the existence of the *Cantrell* proceedings and given that they were fully legally advised, it appears most improbable that they were unaware that the very same statute of limitations issue they were relying on in these cases was under consideration in other proceedings which were being progressed through the courts and had the potential to dispose finally of these cases without the need to incur any further cost or expend any further resources in these proceedings.

42. So, while the Defendants object now that the Plaintiff did not communicate an intention to take no further step in the proceedings pending the final determination of the *Cantrell* proceedings to deny that there is an acceptable excuse or explanation for delay, I do not consider that the Defendants were lulled into a false belief that the proceedings had been abandoned. Indeed, they do not make this claim. It seems far more likely to me that appreciating the significance of the issue under determination for the sustainability of these proceedings, the Defendants’ understanding with the benefit of legal advice available to them would have been that the proceedings were likely to only be capable of being pursued substantively if a decision was made in *Cantrell* that those proceedings were not statute barred. It seems to me that it must have been obvious to the Defendants that the *Cantrell* proceedings were not only very relevant to the prospect of maintaining these proceedings but also that common sense dictated that the issue, which also arose in these proceedings having regard to the terms of the defences delivered, would be determined in those more advanced proceedings.

43. There is no doubt in my mind but that the outcome of the application on the statute of limitations in the *Cantrell* case would likely have been determinative of these proceedings if the *Cantrell* case were found to be statute barred. Following the decision in the Court of Appeal the potential for the Defendants to dispose of these proceedings without any further costs would surely have illustrated to them the merit of allowing the issue to be determined in that case. It seems to me most unlikely that any party would have sought to advance these proceedings to hearing where there was a strong possibility of case being determined without further cost in

different proceedings. It is noted in the decision in the *Cantrell* proceedings in the Court of Appeal that the question arising was difficult as apparent from the depth of analysis and length of the judgment in the High Court following a hearing that took seven days. It is noted that the Court of Appeal arrived at a different decision to the High Court before being overturned in the Court of Appeal, itself an indication of the complexity of the issue of law. I am satisfied that the reality must have been that the Defendants silently acquiesced in the statute issue being determined in the *Cantrell* proceedings and if consulted, as certainly they ought to have been, would not have articulated any real objection.

44. In my view it defies common sense, given the well-known significance of the *Cantrell* proceedings to deal with this application on any other basis than that the Defendants were aware of the likelihood that the Plaintiffs were taking a “*wait and see*” approach. Rather than bringing on a motion of their own to have the statute issue determined or seeking to have the proceedings set down, instead they too adopted the very same “*wait and see*” approach because it was the sensible approach for all concerned. Had the Supreme Court decided the *Cantrell* proceedings in the same way as the Court of Appeal, it is difficult to see these proceedings being further maintained and the litigation would likely have been reduced to a question of costs.

45. It is also questionable whether a Court would have listed these proceedings for hearing in the face of an objection from any party or in the knowledge that such a significant preliminary issue on the Statute of Limitations, one which could be determinative of the proceedings, was being pursued in another Court. While the proceedings might have been listed notwithstanding the implications of the *Cantrell* case where a party was pressing to get the cases disposed of, the only circumstances in which a Court would have been happy that listing these proceedings for hearing would not have resulted in a waste of court time where an issue was already being advanced elsewhere in a manner likely to be determinative would have been in the unlikely event that the Defendants indicated an intention to abandon reliance on the Statute of Limitations. Such an indication by the Defendants would have avoided the necessity to decide the issue which was already at a more advanced stage in other proceedings. There is no basis whatsoever to suppose that reliance on the Statute of Limitations would have been abandoned in order to get the proceedings on expeditiously had the Defendants been consulted. In fact, the First and Second Named Defendants pursued their own motion seeking trial of a preliminary issue on the statute issue and only abandoned that application when the Supreme Court decision was handed down in the *Cantrell* proceedings.

46. Indeed, it is illustrative of the likely approach of a Court asked to list these proceedings for hearing that the First and Second Named Defendant's solicitors brought preliminary applications seeking to strike out the within proceedings as statute barred following the decision of the Court of Appeal in *Cantrell*. Those applications were not heard, it seems, pending the final determination by the Supreme Court of the issue but were adjourned several times in view of the pending decision of the Supreme Court. Following the delivery of the Supreme Court judgment, the motions were struck out on consent with costs reserved. This demonstrates both the relevance of the *Cantrell* litigation and the unlikelihood of meaningfully progressing these proceedings before a final determination of the statute question in *Cantrell*.

47. While the Defendant moving parties on the motions before me contend that the unilateral decision of the Plaintiff to await the outcome of the *Cantrell* litigation cannot be used to excuse the delay in the within proceedings and the authorities are clear that unilateral decisions to place litigation on hold are normally not acceptable, I do not agree with this submission in the particular circumstances in this case. While the Plaintiffs should properly have advised the Defendants of their proposed course of action in not further prosecuting the proceedings pending the determination of the issue in *Cantrell*, I cannot blind myself to the fact that had they done so the Defendants would likely have agreed in this approach either because it made sense from their own perspective also or because of a reasonable concern that were attempts made to progress the case, the Courts might independently consider it a misuse of court time and scarce resources to require the same issue to be determined in different proceedings.

48. The clear advantage of permitting the issue of principle to be determined in those other proceedings was that it avoided further court time and resources being directed to these proceedings at additional cost to all concerned. In short, it was sensible for all parties to await the outcome of the preliminary application in *Cantrell* and I am satisfied that this is what occurred almost through unspoken agreement.

49. In the very particular circumstances of this case, I am satisfied that delay arising while the statute issue was pursued and determined finally in the *Cantrell* proceedings between 2016 and 2020 was excusable delay. Given the close connection between the two cases, I would

also hold the additional delay in the *O'Sullivan* case between 2015 and 2016 (when the Plaintiff became aware of the application in the *Cantrell* proceedings), at a time when there remained a live discovery issue in the *Sugrue and Farnes* case, to be excusable. This is because it made sense that the proceedings be progressed together unless this approach would disproportionately delay a case which was more ready to proceed. The period of delay in question in the 2015-2016 period was not to my mind disproportionate in view of the savings to be achieved in bringing the two cases on for hearing around the same time and can be excused on the basis that it remained reasonable for the two cases to continue to travel together.

BALANCE OF JUSTICE

50. In view of my conclusion that the delay in these cases between May, 2016 and December, 2020 (with delay since then referable to the within applications) was excusable by reference to the *Cantrell* proceedings, it is perhaps not strictly necessary for me to proceed to consider the third limb of the *Primor* test, namely where the balance of justice lies in this case. However, I now do so for completeness in case I am wrong to excuse the delay for the reasons set out above.

51. In considering whether the balance of justice lies in favour of or against permitting the case to proceed, Hamilton C.J. in *Primor* stated that the court was entitled to take into consideration and to have regard to the following matters:

“(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the Defendant to allow the action to proceed and to make it just to strike out the Plaintiff’s action,

(iii) any delay on the part of the Defendant because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the Defendant in the Plaintiff’s delay,

(v) the fact that conduct by the Defendant which induces the Plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing

the Defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the Defendant,

(vii) the fact that the prejudice to the Defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a Defendant's reputation and business.” (per Hamilton C.J. at pp. 475 to 476)

52. In its very recent decision in *Gibbons v. N6 (Construction) Limited* [2022] IECA 112, the Court of Appeal (Barniville J.) approved of the High Court judge's view in that case (at para. 93) that:

“... while the fundamental principles to be applied have not changed since Primor, ‘the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to take account of the court's obligation to ensure that litigation is progressed to a conclusion with reasonable expedition.’”

53. Even if it is considered that I am wrong to equate likely understanding that the Plaintiffs were adopting a “*wait and see*” approach and a knowing forbearance or acquiescence on the part of the Defendants in the face of this approach pending the determination of a central issue in other proceedings as excusing delay, then it seems to me that it would nonetheless be unfair to ignore the reality that it was convenient for the Defendants too to have this issue determined in other proceedings. Significant cost savings were achieved by allowing the issue to be determined elsewhere. If delay resulted from a “*wait and see*” approach which was part of the litigation strategy of both Plaintiff and Defendants for good reason, then it seems to me that it would be unfair to penalise one side only. Both parties have benefitted from the issue being determined otherwise than in these proceedings.

54. It would be different were the delay the result of mutual inertia rather than for a real reason. Were this the case then in my view the obligation on the Court to ensure that litigation

is progressed to a conclusion with reasonable expedition would weigh heavily and could tilt the balance in favour of dismissing the proceedings. I do not consider this to be a case of inertia, however, and the benefits of a “*wait and see*” approach had advantages for all the parties. Insofar as the constitutional right to expedition is a constituent part of the right of effective access to the courts, then it seems to me that the objective of allowing the issue to be determined in other proceedings, which objective was served by delay in this case, aligns with the rights of the parties to access to a court by making it possible for a significant, complex and substantive legal issue to be determined in a manner which avoided unnecessary and potentially prohibitive costs being incurred in these proceedings.

55. It is necessary next to consider the question of prejudice noting that I do so on the basis that I may be wrong in concluding that the delay in this case is excusable, as I have found above. In *Millerick v. Minister for Justice* [2016] IECA 206, Irvine J. noted that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. Barniville J. in *Gibbons* acknowledged that the type of prejudice on which a defendant can rely can range from demonstrating that it was unable to obtain a fair trial to the general inconvenience of being subjected to protracted litigation and that the effect and significance of the prejudice claimed would vary from case to case.

56. In this case, almost 17 years have passed since the Plaintiffs made investments in the fund. More than 8 years have passed since the within proceedings were commenced. The state of the proceedings is that the pleadings have not yet closed and indeed the Plaintiffs have exhibited draft Replies in each case that it is proposed to deliver if leave were granted by this Honourable Court.

It has been submitted that it is prejudicial to ask the Third and Fourth Named Defendants to defend claims relating to an investment entered into more than 17 years ago. It is accepted that this case will require oral testimony as to what advice the Plaintiffs allege they were provided with by the Defendants in entering into the investment orally and as to what documents were available to them at the time of the investment. Thus, these cases are not documents-only cases. However, while general prejudice relating to the passage of time is asserted in both cases by the Third and Fourth Named Defendants, the said Defendants do not contend for any specific prejudice as might often arise in proceedings where, by reason of the passage of time, essential

witnesses or documents are no longer available in this case. In this regard the grounding Affidavits in both Defendant applications to dismiss are notably bare. Indeed, while Sanfey J. concluded in *Pugh v P.G.M Financial Services Ltd* [2020] IEHC 49 that where a defendant is not apprised of the reasons for delay it may be entitled to assume that the plaintiffs had thought better of going ahead and that they are prejudiced in the preparation of their defence by the unexplained delay, there is no evidence before me that the Defendants were misled by the failure to communicate a reason for delay into believing that the proceedings had been abandoned. It seems unlikely that such an averment could plausibly have been made in this case when there existed a good reason for delay in awaiting the outcome of the *Cantrell* proceedings, the significance of which could not have been lost on the Defendants.

57. The Affidavits sworn to ground the applications have been sworn by solicitors in both cases and there is no Affidavit sworn on behalf of the Third and/or Fourth Named Defendants to provide an evidential basis for a conclusion that damage to professional reputation has weighed on them or caused any particular difficulty. In the *Sugrue and Farnes* proceedings the solicitor for the Fourth Named Defendant simply swears (paragraph 12 of the Grounding Affidavit of Jamie Olden):

“The Fourth Defendant has inevitably suffered, and continues to suffer, prejudice in these proceedings, which relate to events dating back to over 15 years ago, particular where the proceedings are likely to give rise to evidential conflicts as to who said what to whom and when in relation to matters now so remote in time”.

58. An identical averment is made at paragraph 11 of the grounding Affidavit in the *O’Sullivan* proceedings.

59. In similar terms, the Third Named Defendant’s solicitor avers (paragraph 9 of Affidavit of Liam Collins) in the *Sugrue and Farnes* case:

“I believe that this delay in the prosecution of the proceedings by the Plaintiffs since their commencement in August 2014 is such that to permit the continuation of the within proceedings would be grossly unfair and prejudicial to the Third Named Defendant. It is now over 16 years since the Plaintiffs made the investment and any alleged wrongdoing of the Third Named Defendant.”

60. An identical averment was made at paragraph 8 of the Affidavit grounding the application on behalf of the Third Named Defendant in the *O'Sullivan* case.

61. It is an undeniable fact that the greater the lapse of time between the event in question and the hearing of the claim the more fragile and unreliable witness evidence becomes. Nonetheless, it seems to me that this is less an issue in these cases in the absence of any specific averments regarding prejudice because of the presence of documents in relation to the transactions and the fact that detailed instructions are likely to have been taken from the Defendants and relevant witness statements recorded following the service of the proceedings and in preparation of the detailed defences. It is noted that the Defences filed extend beyond mere denial and positive assertions and are made by reference to documents recording the advice given at the time and showing the information available to the Plaintiffs. The existence of the documents prayed in aid in the Defences filed will clearly be of significant assistance to the Defendants in that they are not reliant on human recall or frail memories but can rely on paper records pertaining to the transaction and will be in a position to cross-examine the Plaintiffs by reference to these documents.

62. Reliance is also placed by the Defendants on prejudice arising from a delay in clearing one's name and vindicating one's professional reputation. Nothing has been said on Affidavit to show that the existence of these proceedings has weighed on the Defendants in any particular way. These proceedings concern a commercial transaction and the defendants are commercial entities and while this does not mean that the proceedings do not have reputational consequences, it should mean that the Defendants, who are not human persons, are not subjected to the stress of protracted litigation. If there has been an impact on the professional reputations of the Third and Fourth Named Defendants which is exacerbated by delay, this has not been substantiated in evidence.

63. The Plaintiffs have urged on me the fact that Notices of Indemnity and Contribution have been served between all Defendants meaning that even if the Plaintiffs' actions were dismissed as against the Third and Fourth Named Defendants, the issue of liability remains live for so long as the case is extant as against the First and Second Named Defendants who have not pursued applications. It seems to me that this is not a factor which I should allow to tip the balance in favour of continuing proceedings which would otherwise be dismissed. Presumably,

were the proceedings dismissed on delay grounds as regards the Third and Fourth Named Defendants, the remaining Defendants would be likely to pursue their own applications to dismiss.

64. It would be remiss to conclude without recording a particularly remarkable feature of the *Sugrue and Farnes* proceedings, namely that the Second Named Plaintiff no longer exists. The Second Plaintiff, a former company, is pleaded to have contracted for the greater by far of the two investments involved in the *Sugrue and Farnes* proceedings, of €50k and ca. €7k. The Second Plaintiff was dissolved on the 7th of August, 2019 by Creditor's Voluntary Liquidation. The First Plaintiff offers no explanation for that liquidation and dissolution in the context of these proceedings. He now contends on Affidavit, however, that he personally can prosecute the claim for the investment made by the Second Named Plaintiff on the basis that he was the beneficiary of the relevant pension trust and pensions existing in the Second Named Plaintiff at the time of its dissolution were transferred out and into the First Plaintiff's name. He claims that it is open to him to recover and transfer any pension investment made on his behalf through the Second Named Plaintiff (since dissolved) as trustee.

65. I have concluded that issues which arise regarding the lawful basis for the First Named Plaintiff pursuing the claim in respect of funds invested on his behalf by the dissolved Second Named Defendant in his own right is only tangentially relevant and does not weigh in a balance of justice consideration. The adequacy of the pleadings in *Sugrue and Farnes* in the light of the dissolution of Second Named Plaintiff, any change to the legal nature of the claim, issues such as whether the changed circumstances necessitate new pleadings and whether any such new plea, if permitted, would in any event be statute barred at this remove are beyond the remit of this application. I consider them of some relevance only insofar as they indicate future potential complications which may impact on a time-line to conclusion of these proceedings. It is unfortunate that even at this remove I cannot be fully satisfied that the proceedings are now ready for expedited hearing in view of these issues. However, where timely action is now taken to advance proceedings to conclusion without further unnecessary delay, it seems to me that the balance of justice is not yet tipped in favour of dismissal of the proceedings in either case

CONCLUSION

66. For the reasons set out above, I will refuse the relief sought on the dismissal applications. I propose to grant liberty to the Plaintiffs to deliver a Reply in each case within 7 days from the making of the order refusing relief on this application. I will direct that any particulars which require to be raised on the said Reply be raised within a period of 21 days following delivery of the Reply and I will direct that replies to any request for particulars be provided within a further 21 days. The Defendants shall be at liberty to re-apply either in advance of the hearing or at the hearing of the within proceedings in the event of any further unexplained and unnecessary delay. The trial judge also retains a discretion to dismiss when it becomes apparent at the hearing of these proceedings that the right to a fair hearing has been violated consequent upon the Plaintiffs' delay.