THE HIGH COURT

[2025] IEHC 75

Record No. 2007/689S

Between

EVERYDAY FINANCE DAC

Plaintiff

and

JEREMIAH O'SHEA

Defendant

Ex tempore Judgment of Mr. Justice Conor Dignam delivered on the 12th day of February 2025

INTRODUCTION

1. On the 29th July 2024, while sitting in the Common Law Ex Parte Motion List, I made an Order substituting Everyday Finance DAC ("Everyday") for Allied Irish Banks Plc as plaintiff in these proceedings. That Order was made on the basis that there was prima facie evidence that Allied Irish Bank's interest in the underlying loan facilities had transferred to Everyday (*Permanent TSB v Doheny [2019] IEHC 414* and *IBRC v Comer [2014] IEHC 671*).

2. The application by Everyday was made ex parte (Order 17 Rule 4 of the Rules of the Superior Courts) and the Order contains what are now usual provisions arising from *Permanent TSB v Doheny*, i.e. that a copy of the Order be served on the defendant and that he be informed by notice in writing that a copy of the affidavit and exhibits grounding the application are available on request, that an application may be made to Court on notice to set aside the Order, and that he be informed of his entitlement to contest the transfer of the loan and/or security involved to Everyday at the hearing of the action.

3. The defendant applies to have the Order set aside. In the same Notice of Motion he also seeks Orders striking out the proceedings as an abuse of process and on the grounds of inordinate and inexcusable delay. While the focus of the application in the very helpful written submissions on behalf of the defendant and at the hearing was the application to set aside, it was made clear that the applications to strike out the proceedings was maintained. In the event that I was satisfied that the substitution Order should be set aside, I would have to adjourn the strike out applications in order to give AIB an opportunity to deal with them (if they wished to). However, for the reasons set out below, I am of the view that the Order should not be set side. While it appears to make more sense to deal with the set aside application first, for the purpose of discussion it is more convenient to deal with the application to strike out the proceedings as an abuse of process first, then the application to set aside the substitution Order, and then the application to strike out the proceedings on the grounds of delay.

4. Before doing so, I will set out in short form the procedural background as it is key to the defendant's application.

(i) On the 25th April 2007, AIB issued a Summary Summons for the sum of €119,552.41 together with interest on foot of three loan accounts;

(ii) AIB issued a Notice of Motion on the 22nd June 2007 seeking liberty to enter final judgment against the defendant in that amount;

(iii) The defendant delivered a replying affidavit which was sworn on the 4th October 2007;

(iv) The application for liberty to enter final judgment or the Summary Summons proceedings in their entirety were adjourned generally on the 19th November 2010. (There is lack of clarity in respect of precisely what was ordered on this date as no Order has been exhibited. For the purpose of this judgment I am proceeding on the basis that the proceedings were adjourned generally with liberty to re-enter. As will appear from later in this judgment, this is an issue which remains to be determined).

(v) On the 8th August 2018, AIB issued a Civil Bill for Possession of the defendant's lands grounded on the security in respect of the same loan facilities;

(vi) Between the issuance of the Civil Bill and the 24th April 2024 there were various application in the Circuit Court Possession proceedings which are not directly relevant to the current dispute;

(vii) On the 24th April 2024, Everyday applied to be substituted for AIB as plaintiff in the Circuit Court proceedings;

(viii) On the 30th May 2024, the County Registrar made an Order for substitution;

(ix) The defendant appealed the County Registrar's substitution Order and issued a motion seeking to strike out the Circuit Court proceedings;

(x) These matters came before the Circuit Court on the 25th July 2024 and both matters were adjourned to the Judge's List on the 8th October 2024 with Everyday to file an affidavit addressing whether AIB had transferred the relevant loan to Everyday prior to or subsequent to the application for an Order for Possession, by whom and by whose authority the sale of the defendant's lands for auction was authorised, whether proceedings had been issued in the High Court, and the actions of the plaintiff(s) between 2007 and 2018;

(xi) By ex parte docket of the 25th July 2024, Everyday sought to be substituted for AIB as plaintiff in the instant proceedings;

(xii) On the 29th July 2024, the Order of the High Court was granted ex parte.

5. It is common case that there was no reference to this procedural background, including the delay in these proceedings between 2010 and 2024, the existence of the Circuit Court proceedings or the substitution application in the Circuit Court, in the affidavits grounding the ex parte application.

APPLICATION TO STRIKE OUT PROCEEDINGS AS ABUSE OF PROCESS

6. The defendant's core point as to why the proceedings must be struck out as an abuse of process is that it is abusive to maintain both the High Court and Circuit Court proceedings. It is submitted that the plaintiff decided in 2018 to proceed for an Order for Possession and that the continuance of the High Court proceedings was an abuse of process from then on. The defendant relies on paragraph 13 of the replying affidavit of Mr. John O'Brien. It was submitted that this was evidence of a conscious decision by AIB (the then plaintiff) to proceed for an Order for Possession rather than for an Order for judgment in the High Court proceedings. Mr. O'Brien stated at paragraph 13, inter alia, "…*I can confirm that this firm was instructed by Allied Irish Banks plc to issue possession proceedings in the Circuit Court in 2018 as it wished to proceed by way of the sale of the Defendant's security property by way of the sale of the Defendant's security property in*

diminution of his indebtedness…" At paragraph 20, he said that "*…it is correct for Mr. O'Donoghue to suggest that Allied Irish Banks plc made a decision in 2018 to prioritise Circuit Court possession proceedings brought on foot of the agreed security, over the existing summary debt proceedings…*"

7. There would, of course, be considerable force in the defendant's argument if the proceedings in both courts were the same but they are not. The High Court proceedings are summary proceedings on foot of an alleged debt. The Circuit Court proceedings seek an Order for Possession on foot of a mortgage. The mere fact that they both arise from the same loan facilities is not sufficient as different considerations arise as to whether the plaintiff is entitled to those reliefs.

8. In *Ulster Bank Ltd v Lyons [2003] 4 IR 28* the plaintiff had been granted an order for possession against the defendants by way of special summons following the defendant's default under a mortgage agreement. The plaintiff later sued by way of summary summons for the amount which was claimed to be due and owing on foot of the same facilities plus interest. In the High Court the claim was defended solely on the ground that the plaintiff, having previously successfully sought an Order for possession of the property in the special summons proceedings, was now precluded from maintaining the subsequent proceedings by the operation of the doctrine of res judicata. In the Supreme Court it was argued on the basis of two authorities that only one set of proceedings can be brought in such circumstances, and that the court should stay the second set of proceedings on the ground that the court should not encourage a multiplicity of actions. The arguments differed slightly from the arguments in this case in that what was advanced on behalf of the defendant in that case was that both claims should have been brought in one plenary summons or the two sets of proceedings should have been consolidated. Nonetheless, the principles set out by Keane CJ apply here. He said:

> "The plaintiff was perfectly entitled to institute both sets of proceedings. They are clearly different forms of proceedings, one solely concerned with the order for possession and there is a special procedure prescribed for it and a mortgagee's right to possession may not depend on his being owed any particular amount. Indeed there may be circumstances in which he is entitled to possession even without there being any default on the part of the mortgagor, but it is unnecessary to consider those ramifications of the relevant law in this case. It is sufficient to say that the rules clearly envisage that proceedings in which a mortgagee seeks an order for possession properly brought by a special summons, and those in which he seeks relief in the form of a judgment for a liquidated sum are properly brought by way of summary summons and there is no reason why a mortgagee seeking an order for possession should seek to join with it an order which is properly brought by way of a summary summons, in the case of a claim for liquidated sum."

9. Keane CJ went on to say:

> "In any event, the cause of action giving rise to the possession proceedings brought by way of special summons is entirely different from the cause of action which arises because the money is simply owed as a contract debt between the defendants and the plaintiff. Accordingly, no question of estoppel, cause of action estoppel or any application of the doctrine of *res judicata* arose in the present case."

10. This position is reinforced by the provisions of section 3(2) of the Land and Conveyancing Law Reform Act 2013 which provides that in certain circumstances proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates must be brought in the Circuit Court.

11. Thus, I am not satisfied that the maintenance of these High Court proceedings is an abuse of process on the grounds that Circuit Court possession proceedings were also issued.

12. One consideration is whether it may be said to be abusive to expose a defendant to the risk of two sets of costs. However, it seems to me that the courts' discretion in respect of costs is broad enough to address the question of costs appropriately.

APPLICATION TO SET ASIDE SUBSTITUTION ORDER

13. The defendant raises a number of grounds upon which he says the Order substituting Everyday for AIB should be set aside. There is a degree of overlap between the different grounds. Nonetheless, it is possible to deal with them separately for the purpose of discussion.

No application to re-enter

14. As noted in the procedural background above, either the motion for liberty to enter final judgment or the summary summons proceedings themselves were adjourned generally in 2010. Unfortunately, it has not been possible to produce the relevant Order. In those circumstances, it is unclear whether it was the motion or the proceedings that were adjourned generally. More importantly, it is also unclear whether liberty to re-enter

was given when the matter was adjourned generally. As stated above I am proceeding on the basis that liberty to re-enter was given.

15. A central part of the case made by the defendant in respect of the substitution Order is that no application to re-enter the proceedings was made and that Everyday is proceeding on the basis that the ex parte application had the effect of reinvigorating long dormant proceedings and that they did not require to bring an application to re-enter the proceedings.

16. This a stand-alone basis for the application but it is also a thread running through the other grounds. The defendant submitted that this 'short-circuited' the proper procedure and deprived the defendant of the opportunity to resist an application to re-enter the proceedings. The argument that it was the plaintiff's position that the effect of the ex parte application was to re-start or reinvigorate the proceedings without the need for an application to re-enter is based on the fact that Mr. O'Brien states in his affidavit that "*It is furthermore respectfully submitted that it is in the interests of justice to permit the Plaintiff's summary debt proceedings to continue…*" (paragraph 20) and that he refers to "*…the present High Court proceedings*" (paragraph 14). At the hearing, Counsel on behalf of Everyday confirmed that Everyday is not of the view that an application to re-enter is unnecessary.

17. As far as I am aware, the question of whether a substitution Order has the effect of recommencing proceedings without the need for a motion to re-enter has not been decided. Irrespective of whether Everyday's statements in the affidavit mean that it is of the view that a motion to re-enter is not necessary, I am entirely satisfied that the effect of an Order substituting one plaintiff for another in the circumstances of this case can not have the effect of restarting or reinvigorating the proceedings or of obviating the need for an application to re-enter the proceedings.

18. I am reinforced in this view by the following. If an interest in the subject matter of proceedings has transferred to another party, the original party/plaintiff will no longer have sufficient interest in the proceedings to maintain the proceedings. This includes the bringing of an application to re-enter the proceedings. The party who has taken the transfer of the interest but who has not yet been joined as a party to the proceedings will have no standing to bring an application to re-enter. Thus, it seems to me that an application for the new party to be joined to the proceedings or to be substituted in as plaintiff must be taken as a preliminary step. That can not determine the question of whether the adjourned proceedings should in fact be re-entered. That remains to be determined when the proper parties have been joined to the proceedings.

19. Everyday will have to bring such an application if they wish to progress the proceedings. The defendant's rights in respect of any such application remain fully intact and are not diminished by the substitution of one plaintiff by another. The defendant will be fully entitled to make such arguments as might be appropriate, including, for example, the question of whether liberty to re-enter was given in 2010, and whether, if so, such liberty should be given in light of the delay since the matter was adjourned generally.

Substantive and procedural injustice

20. The defendant submitted that the combination of the failure to bring an application to re-enter and the substitution application being made ex parte gave rise to a procedural and substantive injustice because it meant that the defendant was not in position to bring to the Court's attention matters which could have been raised if there had been an application for re-entry, e.g., the delay in the proceedings or the fact that proceedings had subsequently been issued in the Circuit Court.

21. I do not accept that this is correct. Firstly, for the reasons set out above, Everyday will have to bring an application to re-enter the proceedings and the defendant will be fully able to raise those issues. Secondly, for the reasons set out below, I am not satisfied that the delay or the issuance of Circuit Court proceedings are sufficiently material to the question which had to be determined, i.e., whether there was prima facie evidence that AIB's interest in the loan facilities had transferred to Everyday. Thirdly, even if they are material, the express provisions in the Order, including that the defendant may apply to have the ex parte Order set aside, ensures that there is no procedural or substantive injustice to the defendant. This would, of course, be different if the defendant did not have the opportunity to have the substitution Order set aside or if the effect of that Order was to deprive the defendant of the right or ability to resist an application to re-enter the proceedings.

Parallel applications

22. In addition to the defendant's argument that the maintenance of the two sets of proceedings are an abuse of process, he also argues that the bringing of a substitution application in the High Court proceedings when such an application had already been made in the Circuit Court proceedings is an abuse of process. It is submitted that the Order should be set aside on that basis.

23. It follows from the logic of *Ulster Bank v Lyons* that such an application to ensure that the correct parties are in the case is not an abuse of process and is not a ground for setting aside the Order. A substitution application is directed to ensuring that the correct parties are in the proceedings. If, as in this case, both sets of proceedings can be maintained then applications to ensure the correct parties are in the proceedings can not be an abuse.

24. It was also argued that it was an abuse to bring the application on an ex parte basis in the High Court when the parallel application in the Circuit Court had been brought on notice and where Everyday knew there was opposition to it in the Circuit Court.

25. I can not find that bringing the application ex parte is an abuse of process merely on the basis that a similar application was brought on notice in the Circuit Court. Order 17 Rule 4 of the Rules of the Superior Courts permit such an application to be made ex parte. Of course, the mere fact that something is permitted under the Rules does not preclude it being an abuse of process. Nor am I satisfied that bringing the application ex parte when Everyday knew the similar application in the Circuit Court was on notice and was opposed was an abuse of process. The purpose of the Rules permitting such applications to be made ex parte is a streamlined way of dealing with what is very frequently a procedural matter while also vindicating the defendant's right to oppose such an Order by way of bringing a motion to set aside the Order made ex parte. Thus, it does not seem to me to be abusive to bring the application ex parte even if there is a good chance that an application to set aside the Order will subsequently be made. It may be, for example, that the opposition to a substitution Order in possession proceedings will be on the basis that there is not prima facie evidence that the original plaintiff's interest in the relevant mortgage was transferred to the proposed new plaintiff. That would not apply to a related debt claim in the High Court. However, even if the same grounds of opposition are likely to be raised that does not, in my view, render the application being made ex parte an abuse of process requiring the Order to be set aside purely on that ground.

Non-disclosure

26. It was submitted on behalf of the defendant that Everyday's failure to tell the Court about the delay in these proceedings, the existence of the Circuit Court proceedings, and the substitution application in the Circuit Court, amounts to material non-disclosure such that the substitution Order and the entire proceedings should be set aside. It was submitted that the application, as an ex parte application, must be made uberrima fide.

The failure to disclose these matters is described in various terms in the grounding affidavit, including "poor litigation conduct", "lack of practicality" and a lack of "frankness and candour."

27. Everyday, in its replying affidavit, states that "*I do not believe that any of these averments have any merit, I consider it unfortunate that Mr. O'Donoghue has expressed himself in such a manner and it seems to me that he has confused the principles applicable to an ex parte application seeking substantive relief (where the principles of uberimma fides are applicable) with those applicable to an ex parte application of a procedural nature, such as that made on the 29th July 2024.*" Counsel on behalf of the plaintiff clarified at the hearing that it was not the plaintiff's position that the application did not have to be made uberimma fides but that what had to be disclosed depended on the nature of the application. There appears to be a discordance between that and what Mr. O'Brien says in that passage.

28. I could not accept any suggestion that an ex parte application, even one of a procedural nature such as this, could be made other than on the basis of full disclosure of all material matters. When a party is applying for a Court Order in the absence of the party who will be affected by such Order it is essential that there be full disclosure of all relevant matters. That is a very long-established rule and was described by Sir Nicholas Brown Wilkinson VC in *Tate Access Floors Incorporated v Boswell [1990] 3 All ER 303* (cited and approved in *Bambrick v Cobley [2005] IEHC 43* and *RJG (Holdings) Limited v The Financial Services Ombudsman [2012] IEHC 452*) as "the golden rule". He said:

> "No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for *ex parte* relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the *ex parte* order and may, to mark its displeasure, refuse the plaintiff further *inter partes* relief even though the circumstances would otherwise justify the grant of such relief."

29. However, what needs to be disclosed and culpability for non-disclosure is impacted by the nature of the particular ex parte application.

30. The obligation on the moving party is to "*…disclose all matters which might in any way affect the mind of the court in exercising the court's discretion…"* (*RJG (Holdings) Limited v The Financial Services Ombdusman [2012] IEHC 452*). Clarke J in *Bambrick v Cobley* held that the test by reference to which "materiality" was to be judged is an objective one based on reasonableness. Clark J said:

> "…Taking those authorities it would seem that the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material wit (sic) materiality to be construed in a reasonable and not excessive manner."

31. I am not satisfied that the delay in the proceedings, the existence of the Circuit Court proceedings, or the parallel substitution application, were material to the Court's determination in the substitution application. What had to be determined was whether there was prima facie evidence that AIB's interest in the loan facilities was transferred to Everyday. The fact of a delay in the proceedings, the existence of the Circuit Court proceedings, or that there was also an application in the Circuit Court, were not material to that determination.

32. The defendant also submitted that these facts were material because the Court might have decided not to deal with the application on an ex parte basis and to put the defendant on notice of the application. There is an initial attractiveness to that submission. However, on further consideration, that initial attractiveness falls away. If those matters are not material to what the court had to decide then there would be no reason to put the defendant on notice to deal with those matters.

33. Even if I am wrong and these matters were material to the decision which the Court had to make (or indeed to whether it should be dealt with on an ex parte basis), the Court then has to consider whether the failure to disclose them should lead to the Order being set aside. That the Court has a discretion is clear from *Bambrick v Cobley*. Clarke J held:

> "Therefore it seems to me that the court has a discretion, in cases where failure to disclose has been established to refuse to grant the interlocutory injunction and to discharge the already granted interim injunction but is not necessarily obliged to do so."

34. Clarke J went on to say:

> "It is therefore necessary to consider, in general terms, the criteria which the court should apply in the exercise of such discretion. Clearly the court should have regard to all the circumstances of the case. However, the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:-
>
> '1. The materiality of the facts not disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an

injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless significantly culpable in failing to disclose.

3. The overall circumstances of the case which lead to the application in the first place.'"

35. Herbert J applied a similar approach in respect of some aspects of the non-disclosure in *RJG (Holdings) Limited*. He held in respect of two letters that "*[V]iewed objectively…these letters, if disclosed, might have been material to the exercise by the court of its discretion to grant or to withhold leave to seek judicial review, as pertinent to the issue of whether the application was or was not made within time…*" He went on to say that he did not find the applicant's failure to put the letters before the Court "*culpable and significant*" and that "*…the failure to disclose these letters, though blameworthy, was not a deliberate attempt on the part of the applicant to mislead the court. I am also satisfied that this non-disclosure, viewed objectively, was not significant.*" On that basis he declined to set aside the leave to apply for judicial review notwithstanding the applicant's non-disclosure.

36. Applying the principles set out by Clarke J in *Bambrick* quoted above, I am satisfied that even if the matters were material and therefore should have been disclosed, it would not be appropriate or proportionate to set aside the substitution Order.

37. At their height, those facts, if material at all, would be of limited materiality to the issue which has to be determined in a substitution application and therefore also to the question of whether the Court should have dealt with the application on ex parte basis. I would be of a different view if the substitution Order had the effect of reinvigorating the proceedings or of obviating the need for an application to re-enter.

38. Secondly, I am satisfied that the failure to disclose was not a deliberate decision to withhold material which Everyday knew, or ought reasonably to have known, was relevant to the application. It seems clear from the affidavit of Mr. O'Brien that there was a decision not to include reference to the delay or the Circuit Court proceedings in the application to this Court. Thus, there was a deliberate decision not to inform the Court of these matters. However, for the reasons set out above, it seems to me that even if the decision not to do so on the basis that those matters were irrelevant was wrong it was nonetheless not an unreasonable decision to have made. Therefore, the plaintiff's level of culpability, if any, was slight.

39. The third factor are the overall circumstances of the case. These include the fact that the defendant has not disputed that there is prima facie evidence that AIB's interest has been transferred to Everyday (or even, indeed, that the interest has in fact been transferred). This is significant in circumstances where the consequence of setting aside the Order would be that Everyday, whose interest, at this stage, has not been disputed, would not be entitled to seek relief against the defendant. This, of course, would not be a weighty factor if there was a significant and culpable non-disclosure.

40. Thus, balancing all of those factors, even if the matters should have been disclosed, I am not satisfied that the Order should be set aside on the basis of that non-disclosure.

INORDINATE AND INEXCUSABLE DELAY

41. The defendant submits that the High Court proceedings should be dismissed on the grounds of inordinate and inexcusable delay. As noted above, the focus of the application was on the set aside application but at the hearing it was confirmed that the application to strike out on the grounds of delay was being pursued.

42. I was not referred to any particular authorities. The principles are well-established.

43. It was held in *Primor v Stokes Kennedy Crowley [1996] 2 IR 459*:

> "(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
>
> (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."

44. The approach was summarised by Irvine J in *Millerick v The Minister for Finance [2016] IECA 206* and by Barniville J at paragraph 79 of his judgment in *Gibbons v N6 (Construction) Limited & Galway County Council [2022] IECA 112* as:

(a) that the delay on the part of the plaintiff in prosecuting their claim has been inordinate;

(b) that the delay has been inexcusable;

(c) where the defendant has established that the delay is both inordinate and inexcusable, the court must exercise its judgment whether, in its discretion, the balance of justice is in favour of or against allowing the proceedings to continue.

45. Overarching these principles is the constitutional and, indeed, European Convention on Human Rights imperatives to ensure access to the Courts and to ensure the timely administration of justice and the determination of civil proceedings within a reasonable time. These imperatives, particularly the second one, are reflected in a number of judgments in which the court signalled a greater emphasis than had previously been the case on the need to ensure that proceedings are progressed with reasonable expedition. These include *Comcast International Holdings Inc & Ors v Minister for Public Enterprise & Ors [2012] IESC 50* and, more recently, *Doyle v Foley [2022] IECA 193* and *Gibbons v N6*

(Construction). In that case, Barniville J approved the comments of Butler J that the general principles are still those set out in *Primor* but there has been a recalibration in the weight to be attached to the different factors relevant to the balance of justice.

46. However, it is important to note the comments of Collins J in his recent judgment for the Court of Appeal in *Cave Projects v Gilhooley [2022] IECA 245* where he said at paragraph 36:

> "An order dismissing the claim is on any view a far reaching one. In *Barry v Renaissance Security Services Limited*, Faherty J endorsed the High Court's characterisation of such an order as "*a very serious remedy*". In *Granahan t/a CG Roofing and General Builders v Mercury Engineering* [2015] IECA 58, Irvine J (Peart and Mahon JJ agreeing) referred to the "*terminal prejudice*" to the plaintiff whose claim is dismissed (at para 46). Similarly, in *Mangan v Dockeray* [2020] IESC 67, McKechnie J (Clarke CJ, MacMenamin, Dunne and Baker JJ agreeing) referred to the "*enormous*" prejudice to the plaintiff in those proceedings should his claim be dismissed (at para 146). That being so, 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 v N6 (Construction) Limited*, 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*."

47. He also said at paragraph 37:

> "It is entirely appropriate that the culture of "*endless indulgence*" of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the *Primor* test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. 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."

48. The onus of proving the three limbs of the test rests on the defendants (Barniville J at paragraphs 79 – 80 of *Gibbons v N6 (Construction)*).

49. It is accepted by Everyday that the delay was inordinate and inexcusable. It is extremely difficult how that could be seriously contested where nothing has happened in the proceedings since 2010 and where no explanation for that delay has been offered.

50. The question is whether the defendant has established that the balance of justice favours the dismissal of the proceedings. A fundamental part of the balancing exercise is the assessment of the respective prejudice to the parties. Everyday will suffer terminal prejudice in these proceedings if the proceedings are struck out. As against that, a relevant consideration is that they will, unless the Circuit Court orders otherwise, be able to continue the possession proceedings. The only prejudice that has been specifically pointed to by the defendant is that he will have to defend two sets of proceedings. He says at paragraph 92 of his affidavit that "*I say that the Defendant will be manifestly prejudiced if required to fight the Plaintiff in two Courts, or even if he obliged to dispute his case in the Circuit Court with a 'weather eye' to the High Court and this Honourable Court should exercise its discretion against allowing 'dormant' or 'zombie' High Court proceedings to 'lurk in the shadows'*". That is not a prejudice which is caused by the delay on the part of AIB/Everyday but rather by the fact of two sets of proceedings. For the reasons set out above, the plaintiff is entitled to maintain two sets of proceedings. No other specific prejudice is relied upon, such as the inability to recollect relevant matters due to the passage of time or the loss of documents or witnesses. The defendant's solicitor does say in his affidavit that the defendant does not recall being served with the proceedings or their passage in the Masters Court. However, this is not relied upon to say that the defendant will not be able to deal with the proceedings due to the passage of time. The defendant does contend in his affidavit that the plaintiff has elected to proceed with the Circuit Court proceedings and is therefore not entitled to maintain the High Court proceedings. For the purpose of this discussion I understand this to mean that the plaintiff's choice to issue the Circuit Court proceedings must be taken into account in assessing the balance of justice.

51. In my view, where there is no prejudice to the defendant which was caused by the inordinate and inexcusable delay and the plaintiff is entitled to maintain two sets of proceedings, the balance of justice has not been shown to favour the strike out of the proceedings.

52. I should make clear that it remains open to the defendant to argue that the Court should not exercise its discretion to permit the re-entry of the proceedings in light of all of the circumstances, including the fact that the proceedings have lain dormant for so long since they were adjourned generally.

53. In all of those circumstances I will refuse the relief sought.

54. As this judgment is being delivered electronically, it may be helpful to indicate that my preliminary view in respect of costs is that there should be no Order. I am of this preliminary view due to the novel point that arose in the application in relation to the interaction between an ex parte substitution application and an application to re-enter a matter which has been adjourned generally against the background of a very significant period of inaction. In addition, while I did not read the plaintiff's replying affidavit as saying that the proceedings or the motion for liberty to enter final judgment could be reinvigorated without the need for an application to re-enter, it was capable of being read in that way. I emphasise that this is a preliminary view only and, if either party wishes to make an application in respect of costs or to make submissions in relation to this view I will give the parties an opportunity to do so.