THE HIGH COURT

[2023] IEHC 701

Record No. 2013/4745 P

BETWEEN

FRANCIS DAVEY

PLAINTIFF

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Stack delivered on the 8th day of December, 2023.

Introduction

1. There are two motions before the court, the first of which is the defendant's application to dismiss the plaintiff's claim pursuant to O.122, r.11 of the Rules of the Superior Court for want of prosecution or alternatively to strike out the plaintiff's claim against the defendant on grounds of inordinate and inexcusable delay. The applications were made pursuant to the inherent jurisdiction of the court in accordance with the well-known principles in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. (Counsel for the defendant has confirmed that he does not rely on the exceptional jurisdiction recognised in *Ó Domhnaill v. Merrick* [1984] I.R. 151).

2. The principles in *Primor* were summarised by the Court of Appeal (*per* Irvine J.) in *Millerick v. Minister for Finance* [2016] IECA 206, as requiring the court to address its mind to three issues: first it must be considered whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay in prosecuting the proceedings is to be considered inordinate. If the court is not satisfied the delay is inordinate, then the application fails.

3. On the other hand, if the Court considers the delay inordinate, it must then decide whether that delay can be excused. If the delay can be excused, then once again the application must fail. But should the Court conclude that the delay is both inordinate and inexcusable, it should nevertheless refrain from dismissing the proceedings, unless it is also satisfied that the balance of justice favours dismissal.

4. Before turning to those three issues, it is necessary to set out some matters by way of background, as well as referring to the nature of the plaintiff's claim.

Factual background

5. The proceedings arise from a number of facility letters, issued during the period from 2002 to 2009, on foot of which the plaintiff drew down certain sums of money. I think it is fair to say that the plaintiff has put the defendant and its successor-in-title, as well as the joint receivers, who were appointed by the defendant and subsequently reappointed by the defendant's successor-in-title, on strict proof of all matters relating to the facility letters. It is not necessary for me to resolve any matters relating to the validity of the facility letters, any questions of fact as to whether the monies referred to therein were in fact advanced, or whether – and to what extent – the plaintiff is in default on his loans.

6. These proceedings issued 13 May, 2013, shortly after the issue of certain letters of demand dated 26 March, 2013 and 2 May, 2013, in which the defendant demanded repayment of certain sums said by the defendant to be owning on three separate facilities. In the letter of 2 May, 2013, these were said to amount to €5,175,571.86. The facility letter referred to in those letters of demand was one dated 6 August, 2009, but this appears to be a restructuring of earlier facilities dating back to 2002.

7. The plenary summons claimed damages for: breach of contract, "failure in allowing the plaintiff exercise his right to have redemption", liable and slander, breach of trust, and nervous shock. In addition, there is a claim for "special damages" for breach of duty of care owed to the plaintiff by the defendant "especially as the plaintiff is in a professional capacity in his occupation". In addition, "severe damages", costs, interest pursuant to statute and further relief was claimed. That summons issued on 13 May, 2013, but was not served for some time. An appearance was entered on 1 November, 2013.

8. A statement of claim was delivered on 12 March, 2014, and the defendant raised particulars on 29 May, 2014. Replies were furnished on 10 October, 2014, and a defence and counterclaim was delivered on 12 January, 2015.

9. The counter claim was one seeking judgment in the sum of €5,516,647.35 in respect of the monies advanced on foot of the facility letter dated 6 August, 2009, together with the sum of €203,179.68 in respect of a guarantee given by the plaintiff on 31 July, 2009. However, it was not made clear until the replying affidavit of 8 October, 2020 that this counterclaim was not now being maintained, the reason being that the plaintiff's loans were transferred to Promontoria Aran Ltd by Global Deed of Transfer and related documentation on 12 February, 2015.

10. The statement of claim was amended on 27 April, 2015 and is a lengthy document consisting of 75 paragraphs with further lengthy particulars of some of the alleged breaches,

together with particulars of personal injury and special damage. The central plea in the amended statement of claim is that the plaintiff in 2006 proposed to repay all of his loans to the defendant by means of the sale of the properties in respect of which the defendant held securities. He says that, at that time, the sale of his properties would have cleared his indebtedness and, indeed, left him with a surplus.

11. However, he claims that the defendant wrongfully advised and encouraged him to roll over his existing facilities and in fact to purchase further investment properties. While a general criticism could be levelled at the amended statement of claim to the effect that it was extremely vague in identifying the legal basis for its claims – there are, for example, bald references to "EU law", to an unidentified Code of Conduct, and to unidentified "regulatory controls" appears throughout the document – it is quite clear that the only advice complained of is said to have been given in 2006. That appears from paras. 19-22 and para. 26 of the amended statement of claim.

12. In effect, it is said that the defendant's advice, encouragement and persuasion in 2006 was such as to induce the plaintiff to refrain from taking advice from his own financial advisors and to take on more loans. As a result, he says the relationship between the parties changed from one of *"mere banker customer relationship"* and *"assumed a more expansive role of professional advisory/investor status and adopted the role partly occupied by the Plaintiff's own former financial advisors"* : see para. 26.

13. The paragraphs of the amended statement of claim relating to this central complaint appear to be: 3, 4, 10-53, and 70. As the statement of claim is 75 paragraphs long, this makes the complaint about the alleged advice given in 2006 by the defendant's employee to the plaintiff, without any shadow of a doubt, the central complaint in the lengthy statement of claim. Paragraphs 54 to 64 are directed at the appointment by the defendant of receivers and their actions, as well as a general complaint that the appointment of receivers after the

institution of proceedings was a contempt of court. However, in the main, the matters pleaded at paras. 54-64 would not seem to give any cause of action against the defendant, given the very high probability that the security documents executed by the plaintiff, which were not put in evidence, contain the usual provision deeming the receiver to be an agent of the plaintiff rather than the defendant.

14. There are some general complaints about the transfer of the plaintiff's loans to Promontoria at paras. 65-68, though it is difficult to know what relief was claimed on foot of these very general pleas.

15. Finally, there are some miscellaneous complaints. First, there is an alleged data protection breach where an email intended to be sent by one of the defendant's employees to the plaintiff was instead sent to Davy stockbrokers, and secondly, there is an allegation that one of the defendant's employees made derogatory remarks about the plaintiff (which the papers demonstrate has been conceded and has resulted in an apology). It is not clear how the making of derogatory remarks gives rise to any cause of action. There is a claim for damages for libel, slander and defamation but the words complained of are not pleaded, as is generally required where the cause of action is defamation and derogatory remarks in themselves are not actionable.

16. Finally, there is a complaint that the defendant engaged in deliberate false accounting and manipulation of interest rates which the plaintiff says resulted in the defendant defrauding him. There is no detail given in the amended statement of claim as to how it is said that any miscalculation of interest rates amounts to fraud, again contrary to O. 19 r. 5(2) of the Rules which requires full particulars of an allegation of fraud to be given. Short of an allegation of fraud, any dispute about the amount of interest due and owing is irrelevant to the proceedings as the counterclaim has been abandoned and this can only be an issue between the plaintiff and Promontoria.

17. When this motion was brought, the grounding affidavit stated that the plaintiff had never identified the employee or representative of the defendant who is alleged to have given the defective advice in 2006. That was certainly accurate insofar as the pleadings go because he is not identified in the statement of claim or the amended statement of claim. The identity of this employee was sought at paras. 14 and 15 of the Notice for Particulars and the plaintiff went no further than to say (in reply to para. 14) that this was a matter of evidence and (in reply to para. 15) that the employee had already been identified.

18. In fact, the employee in question had been identified to the defendant by the plaintiff in his letter of 5 November, 2012, and this is acknowledged in correspondence from the defendant to the plaintiff dated 10 June, 2013. While it is incorrect to say, therefore, that this employee had never been identified by the plaintiff to the defendant, it remains the case that he should have been identified in replies to particulars, as the purpose of a notice for particulars is to allow a defendant to prepare for a case by eliciting the fundamental facts relied on, insofar as they are not already pleaded in a statement of claim. Therefore, even if identified in correspondence, particulars of the incident or conversation being relied upon by the plaintiff *for the purpose of the proceedings* should be identified in the particulars. A defendant is entitled to know from the pleadings, and to elicit from the particulars if necessary, the full extent of the case being made. A defendant is not obliged to trawl back through its own files in order to see if there is anything in them that might cast light on the case being made. In fact, the plaintiff in his particulars did not even refer specifically to the letter in which he identified the employee in question.

19. Before proceeding to consider whether this claim should be dismissed for delay, it is of course necessary to give an overview of the conduct of the proceedings to date.

Steps taken in proceedings

20. After delivery of that amended statement of claim on 27 April, 2015, an amended defence and counterclaim was delivered on 7 May, 2015, and the plaintiff delivered a reply to that defence on 18 May, 2015.

21. The most significant step taken thereafter was that the parties apparently agreed to cross orders for general discovery which were made 17 April, 2015. An affidavit of discovery was sworn on behalf of the defendant on 18 June, 2015. The plaintiff swore his affidavit of discovery on 30 June, 2015.

22. The plaintiff also served a notice to admit facts, dated 18 June, 2015, none of which were admitted, and an undated notice to produce, to which the defendant replied on 6 July, 2015. The defendant served its own notice to produce on 16 October, 2015.

23. The issue of whether there is inordinate delay by the plaintiff in this case turns on steps taken subsequent to that and relate to: the setting down of the proceedings for hearing, whether further discovery was required, and the plaintiff's wish to further amend to the statement of claim. In order to set the scene, it should be noted that the proceedings are not, at this time, set down for hearing, and the plaintiff says that they cannot be until he amends his statement of claim and until further discovery is ordered.

Whether there has been inordinate delay

24. The plaintiff set the matter down for hearing on 14 July, 2015, but that date was vacated on consent as the loans had been transferred to Promontoria shortly beforehand.

25. A further hearing date of 9 March, 2016 was obtained by the plaintiff, but this had to be vacated because the defendant served a supplemental affidavit of discovery on 1 March, 2016 and the plaintiff required time to consider the additional documents. I think it is fair to say that the hearing date in March, 2016, was lost due to default by the defendant in fully complying at an earlier time with the order for discovery.

26. The matter then obtained a hearing date of 11 May, 2016It seems that an application was made by counsel for the plaintiff to vacate that hearing date on a number of grounds, including that the amended statement of claim required further amendment. This is said to arise out of documents discovered by the defendant, and given that the defendant's supplemental affidavit of discovery of 1 March, 2016, appears to have discovered quite a few new documents, I do not think that the plaintiff could be faulted if this had been the cause of the hearing date of 11 May, 2016, being lost. However, in any event, the case did not get on for hearing because there was no judge available, and it was listed for mention on 1 June, 2016.

27. The plaintiff then issued a motion on 1 June, 2016, seeking to amend his statement of claim, and that was returnable for 15 June, 2016. It was refused by O'Regan J. on 17 June, 2016, apparently on grounds that the proposed amendment was prolix, but the plaintiff was given liberty to reapply on production of an appropriately drafted statement of claim.

28. O'Regan J.'s decision was hardly surprising given that the 75-page statement of claim expanded, in the proposed amendment, to 132 paragraphs — a further 58 paragraphs. A motion for discovery, which had been issued by the plaintiff on 16 May, 2016, returnable for 1 June, 2016, was adjourned by O'Regan J. generally with liberty to re-enter. It must be noted that the request for this additional discovery was quite onerous, running to 26 categories, all of which seem to have been drafted in quite general terms. Given that the initial order for discovery was for general discovery, it is not apparent why any fresh categories of discovery are required. In any event, that motion appears never to have been re-entered.

29. The plaintiff appealed the refusal of the application to amend, but this appeal was withdrawn on 20 October, 2016, and the appeal was struck out on that date and the plaintiff was ordered to pay the Defendant's costs. No formal steps of any kind have been taken in the proceedings between that date and the issue of this motion on 24 July, 2023, a period of almost seven years.

30. At the hearing of the motion on Tuesday, 21 November, 2023, I was informed by counsel for the plaintiff that the plaintiff still wishes to amend his statement of claim and still wishes to pursue discovery. However, the plaintiff has never issued a motion to amend his statement of claim, nor has he issued a motion to compel the defendant to make further discovery, and this issue has only been pursued in correspondence.

31. The primary onus is on a plaintiff to bring the proceedings to hearing. I have no hesitation in finding – and it was not seriously contested by counsel for the plaintiff – that the plaintiff is guilty of inordinate delay in the prosecution of these proceedings. Notices of intention to proceed were served on 18 September, 2018, and again on 29 July, 2020. However, no steps were taken thereafter.

32. An application to join Promontoria Aran Ltd and Royal Bank of Scotland to the proceedings was issued on 7 September, 2020, but this motion was withdrawn by consent on 2 November, 2020. An Order was made on 3 November, 2020, striking out the motion and ordering the plaintiff to pay the defendant's costs.

33. The plaintiff also retained solicitors during the period from 9 March, 2016 to 25 July, 2018**,** but only instructed his current solicitors on 20 April, 2023.

34. It is hardly surprising that, in view of the above, counsel for the plaintiff did not seriously dispute at the hearing of the defendant's motion that the plaintiff was guilty of inordinate delay. Indeed, he could hardly have done otherwise.

35. That being the case, I now turn to consider whether that delay is excusable and, if it is not, whether the balance of justice favours dismissal of the proceedings.

Whether the delay is excusable

36. The plaintiff puts forward a number of potential excuses for his delay. Central to his submissions on this issue were, first, the relationship between these proceedings and proceedings brought by the joint receivers who had been originally appointed by the defendant and subsequently, by virtue of a Deed of Novation dated 12 February, 2015, acted on the appointment of Promontoria (Record No. 2014/5323P) ("the Receivers' Proceedings"). The other principal ground relied upon is alleged acquiescence or delay on the part of the defendant. Before turning to consider those two substantive submissions, I will first consider a variety of other reasons propounded by the plaintiff for his delay.

37. The first one of these is the impact of the COVID-19 pandemic. The plaintiff is of somewhat advanced years and probably felt that he did have to cocoon during the pandemic, though no real detail is given by him in his replying affidavit on this matter. His main objection is that he struggled with the technology required to conduct litigation during the pandemic. I would certainly be prepared to accept that in the early part of the pandemic, certainly from March to June, 2020 — a lot of people legitimately decided to *"cocoon"*, particularly those like the plaintiff who are of somewhat more advanced years, and this may have impacted the plaintiff's ability to progress his proceedings. However, it absolutely does not explain the delay from October, 2016, to March 2020, or indeed any delay from approximately August, 2020, by which time online hearings were well established and those involved in litigation had adapted to electronic and remote communications. Other than a few months, the impact of the COVID-

19 pandemic does not, in my view, excuse the failure of the plaintiff to take the opportunity he was given by O'Regan J. on 17 June, 2016, and to redraft his statement of claim in a more acceptable manner and to bring a motion to amend in a timely fashion after withdrawal of his appeal form her refusal.

38. Similarly, the period of time that must be afforded to the plaintiff by reason of the tragically premature death of his son in early 2022, cannot excuse the entire period of delay. Again, no specific evidence has been given, but I would be prepared to assume that, for a period of approximately six months around the time of the death of the plaintiff's son, the plaintiff could not have been expected to progress the proceedings. However, even taken together with the potential impact of the COVID-19 pandemic, I do not think those two periods taken together would be more than one year which, in the context of the delay of seven years, is not very meaningful.

39. The plaintiff also relies on the fact that he is a litigant in person. In fact, he has been represented from time to time by three sets of solicitors from 2018 to the present day, for various periods. I accept the submission of the defendant, in reliance of the judgment of the Court of Appeal (per Power J.) in *Kirwan v. Connors* [2022] IECA 242 that the status of a litigant, as a litigant in person, does not entitle the plaintiff to be treated in a manner preferential to that of other litigants who are not represented: see para. 165. This, therefore, is not a reason to excuse the plaintiff's inordinate delay.

40. Turning then to more substantive excuses offered by the plaintiff, I will deal first with the relationship with the Receivers' Proceedings.

- *Potential excuse: Receivers' Proceedings*

41. The Receivers' Proceedings are relied upon quite heavily in the plaintiff's replying affidavit as the reason why the within proceeding should not be dismissed.

42. Both sides rely on an Order of Gilligan J. made in those proceedings of 15 April, 2015, in which Gilligan J. granted an Order to the Joint Receivers restraining the plaintiff in these proceedings from impeding them, their servants or agents from collecting their rents and licence fees associated with the properties secured, and requiring the plaintiff (who is the defendant in those proceedings) to account forthwith to them for all rents and/or licence fees received by him, his servants or agents in respect of the secured property on the date of appointment of the joint receivers.

43. However, the substance of that Order is not particularly relevant. What is material is that this plaintiff gave an undertaking on oath to Gilligan J. that he would expedite the within proceedings so as to ensure that they were heard as soon as possible. Gilligan J. also listed these proceedings and the Receivers' Proceedings for mention at the same time on 17 April, 2015, but he did not consolidate the proceedings or formally link them in any way. Furthermore, it is quite clear that, since at least October, 2016, the plaintiff has been in default of his undertaking, as he simply has not expedited these proceedings.

44. Gilligan J. was subsequently informed on 9 July, 2015, that the plaintiff's loans had been sold by the defendant to Promontoria. From that point onwards, the Receivers' Proceedings really diverged from the proceedings which are before me. I take the plaintiff's point that it would have been preferable if the defendant in these proceedings had indicated firmly to him prior to filing affidavits in this motion, that they were not pursuing the counterclaim in their amended defence and counterclaim in these proceedings dated 7 May,

2015. They no longer seek to enter judgment against the plaintiff, because they are no longer entitled to do so, having sold the loan and related security.

45. But apart from that small criticism, I think it is quite clear that any issues the plaintiff has now about his liability on foot of the facility letters, or the entitlement of the joint receivers to possession of the secured properties – or indeed the validity of the appointment of the joint receivers – has nothing whatsoever to do with this case. This case is a claim for damages against the defendant, primarily for allegedly assuming the role of financial advisor to the plaintiff in 2006.

46. It was established in *Millerick v. Minister for Justice* that a litigant is not, in general, entitled to prioritise one set of proceedings while leaving the defendant in another set of proceedings – even if related – to suffer undue delay.

47. It is of course the case that, in *Comcast International Holdings Inc. v. Minister for Public Enterprise* [2012] IESC 50, a majority of the Supreme Court excused delay where plenary proceedings had been allowed to lie formant as the plaintiff was awaiting the outcome of a Tribunal of Inquiry. However, as explained by the Court of Appeal (*per* Butler J.) in *Diamrem holdings Ltd. v. Clare County Council* [2023] IECA 49, at para. 23, that the circumstances in that case were unique, featuring a combination of allegations of covert behaviour and a situation where the Tribunal had wide-ranging powers which were not a feature of normal litigation.

48. Those circumstances are not material here and the situation is governed, in my view, by the approach of the Court of Appeal in *Millerick*. The plaintiff has relied on his activity in the Receivers' Proceedings, and on his action in complaining the receivers to the gardaí in connection with the drafting of a facility letter in 2007, but these are separate from the prosecution of these proceedings which should have been set down for hearing many years ago. However, as pointed out by Butler J. in *Diamrem* (at para. 39), that the logic of leaving

one set of proceedings aside while prioritising another is that the proceedings which are prioritised would determine the others. However, the principal claim in these proceedings cannot be determined in the Receivers' Proceedings, which concern the exercise by the Joint Receivers of their powers. Furthermore, the sale of the loans means that the complaints against the defendant in these proceedings are now entirely separate from the issues in the Receivers' Proceedings as the Receivers are now appointed to enforce the security on behalf of the defendant's successor-in-title. The enforcement of that security is no longer the concern of the defendant.

49. In those circumstances, and particularly given the undertaking given by the plaintiff to Gilligan J. some years ago, the plaintiff cannot excuse his delay by reference to his decision to focus on the Receivers' Proceedings.

50. Applying *Millerick,* I do not think that this offers any kind of valid excuse to the plaintiff for leaving these proceedings in abeyance.

- *Alleged acquiescence and/or delay by defendant*

51. I do not agree that the defendant has acquiesced in the accumulation of delay in these proceedings, nor do I think the defendant has been guilty of any delay in or about the conduct of the proceedings since October, 2016. (In fact, only the late delivery of discovery on 1 March, 2016, could attract that criticism, in my view.)

52. It is true that the defendant wrote to the plaintiff on 20 October, 2020, after the plaintiff had indicated that he would not proceed with his motion to join Promontoria and Royal Bank of Scotland to the proceedings, asking the plaintiff to set the case down for hearing. The response of the plaintiff was to seek voluntary discovery, which the defendant understandably

refused – I say understandably, because the discovery process was completed some years before on the basis of general discovery and this was a fresh, very extensive claim for discovery which I think was rightly categorised by the defendant as a "fishing expedition".

53. Notwithstanding that, the plaintiff did absolutely nothing throughout 2021 to set the proceedings down for hearing. I have not lost sight of the fact that the plaintiff's son was unwell, ultimately dying prematurely in early 2022. Nevertheless, given the delay, which was already in existence at that time, it was simply not open to the plaintiff not to progress proceedings.

54. The first warning that an application to dismiss for delay would be brought was by letter dated 2 August, 2022, and the motion did not issue for almost another year. However, within that year, the plaintiff yet again took no steps to progress his proceedings. He did not apply to amend. He did not bring a motion to seek further and better discovery. Even in response to the directions of O'Moore J. given in connection with the hearing of this motion on 28 July, 2023, the plaintiff failed utterly to comply. The plaintiff failed to deliver his legal submissions by 15 September, 2023, and he failed to issue two notices seeking leave to cross-examine the deponents by 15 September, 2023, all of which were required to be done in compliance with those directions.

55. It appears these motions were only issued on 14 November, 2023, two days before the call over of the motion, and have never been served, with courtesy copies being supplied between counsel on the call over only, but no formal service being effected, so that they are not formally before the court at all. To this day, it appears that no fresh amended statement of claim has been drafted.

56. I cannot see how any of this amounts to acquiescence on the part of the defendant or encouragement by the defendant of the plaintiff in taking steps and incurring expense, only to be met with an application to dismiss. On the contrary, the plaintiff has simply taken no steps

at all, and despite fair warning, has done nothing even to head off the motion in the year before it did issue.

57. In those circumstances, I think it is clear that the plaintiff's delay is not excusable.

Balance of justice

58. The third, and perhaps most important, inquiry is whether the balance of justice favours dismissal of the proceedings. Very significant emphasis was placed by senior counsel for the defendant, during the hearing of the motion, on the fact that the proceedings largely turn on a conversation in 2006. He properly conceded that the affidavit was incorrect in saying that the individual concerned had never been identified. As outlined above, the plaintiff had made this known by letter dated 5 November, 2012, and Ulster Bank acknowledged this in writing on 10 June, 2013. Clearly, therefore, the grounding affidavit for this motion is inaccurate to that extent.

59. This correspondence therefore seems to have been overlooked in preparing the affidavit – which possibly was drafted in reliance on the notice for particulars and the replies thereto but is worded in broader terms. Possibly as a result of that, the grounding affidavit does not advise any steps taken by the defendant, after notification as to the identity of this individual, to get his account of the alleged conversation with the plaintiff in 2006 and perhaps preserve any documents that might be disposed of or not retained if it were not realised that they were required for court proceedings.

60. Nevertheless, on the evidence in this application, the first mention of this individual is over six years after the alleged conversation, and at a time when there were no proceedings in being. Even if Ulster Bank had taken steps at that time to ascertain from this individual – who apparently no longer works for the defendant, though this is not on affidavit either – what was

his recollection (if any) of the conversation with the plaintiff in 2006, the nature of the case being made by the plaintiff is that oral evidence at trial would be hugely significant.

61. Without commenting on whether there is any legal basis for the claim, the plaintiff, in order to succeed, has to show that the defendant's employee went above and beyond the recommendation of the taking out of further loans and somehow assumed the role of the plaintiff's financial advisor even though it appears that the plaintiff already had such an adviser, or at least had one until shortly before that conversation.

62. It also appears that the plaintiff had, by 2006, a number of property investments and he was of course himself an auctioneer and therefore presumably familiar with property transactions and property values in general. To succeed in that claim would, I think, require a fairly detailed cross-examination of the precise terms of the conversation.

63. The fact of the matter is that, given the delay by the plaintiff, even if the defendant had taken steps with that employee to record his recollection in late 2012/early 2013 of a conversation in 2006, the court would still be left in the extremely unsatisfactory position of trying to assess what is likely to be disputed issue of fact on the basis of the cross-examination of a witness, as to his recollection of conversation which had taken place in 2006.

64. As the plaintiff asserts that he needs to amend his statement of claim and pursue issues of discovery, it seems very unlikely that any trial could now take place prior to 2025 — a period of approximately nineteen years after the conversation took place. That is simply not consistent with fairness of procedures for the defendant.

65. Had the plaintiff acted more promptly after issuing his proceedings, he might well have some form of complaint that the defendant should have taken steps to explore with this employee the alleged nature of the conversation but, given the further delay of approximately seven years from 2016 onwards, I think it is now virtually impossible for a fair trial of this issue to take place.

66. Furthermore, from an outline of the contents of the statement of claim set out earlier in this judgment, it is quite clear that this is the main focus of the plaintiff's complaint, and the complaints about the joint receivers – which in any event appear to be litigated in the Receiver Proceedings (and possibly the 2019 proceedings which have been issued against the plaintiff by those receivers also) – and the complaints about the loan transfer are not real issues between the parties in these proceedings, now that the loans have been actually transferred. The only other claim in the statement of claim is a data protection breach which occurred in 2011, which will itself be a period of approximately fourteen years before any likely trial could take place.

67. In my view the extensive delay since 2016, coupled with the central significance of oral evidence about a particular conversation in 2006, and the delay in instituting proceedings themselves, all point to dismissal of the proceedings in the interests of justice.

Conclusion

68. For those reasons, it is my view that the plaintiff's claim should be dismissed pursuant to the inherent jurisdiction of the court for inordinate and inexcusable delay.

69. As alluded to above, the plaintiff's attempt to cross-examine the deponent of the grounding affidavit in this motion and to cross-examine the defendant's solicitor on his affidavit of 19 May, 2023, filed in reply to the plaintiff's application for injunctive relief against the defendant, must be refused as they were not issued in compliance with the directions of O'Moore J. and therefore were not formally before the court.

70. However, had the application to cross-examine the deponent of the affidavits in the motion to dismiss for delay been properly before me, I would in any event have refused it, as the only issue of fact arising from those affidavits which is material to this motion is whether

or not the plaintiff had in fact advised the defendant of the identity of the employee with whom he had a conversation in 2006, leading to the gravamen of his entire statement of claim. As it was conceded at the hearing of the motion that that had been done in correspondence (though not in particulars), there is no need to cross-examine to establish that fact.

71. Any remaining issues of fact really related to the plaintiff's dispute with the joint receivers and are not material to this motion.

72. In circumstances where the plaintiff's claim is to be dismissed, the plaintiff's application for an injunction compelling the defendant to continue to defend the proceedings – which appears to be based on a misconception that, because the defendant has withdrawn the retail banking in this jurisdiction, it is no longer a legal person capable of being sued in this jurisdiction – and for related Mareva relief, does not need to be considered, and I accordingly dismiss that application as a consequence of my decision on the motion to dismiss.