THE HIGH COURT

[2024] IEHC 553

[Record No. 2020/6709P]

BETWEEN

THOMAS FARRELL & THOMAS FARRELL & SONS (GARAGES) LIMITED

PLAINTIFFS

AND

THE REVENUE COMMISSIONERS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Kennedy delivered on the 30th day of September 2024.

1. The two applications before me are grounded on the same affidavit evidence and concern whether these proceedings should proceed to trial or be struck out. The Plaintiffs' motion seeks declarations that the claim is not statute barred and may go to trial, whereas the First Defendant's ("Revenue's") motion seeks, *inter alia*, orders striking out or staying the proceedings by reason of their having been brought outside the applicable limitation periods or pursuant to the Court's inherent jurisdiction on grounds, *inter alia*, of delay, or pursuant to Order 19, rule 28, of the Rules of the Superior Courts ("RSC").

The Plaintiffs' Claim

2. The plenary summons seeks the rescission of two settlement agreements which the parties entered into on or about 9 October 1995 ("the Settlement"), an order for the return of sums paid thereunder (IR£136,553 and IR£364,812), plus interest, damages for negligence, negligent misstatement, breach of duty, misrepresentation and breach of contract and, if necessary, a declaration declaring that section 865 of the Taxes Consolidation Act 1997, as amended ("section 865") is invalid and repugnant to the provisions of the Constitution of Ireland or incompatible with the provisions of the European Convention on Human Rights, pursuant to section 5 of the European Convention of Human Rights Act 2003. The Plaintiffs' pleadings, affidavits and submissions raise serious allegations which the Defendants deny. In brief, the Plaintiffs claim that:

(a) the Plaintiffs agreed to the Settlement as a result of Revenue's demands during a tax audit but such taxes were not due, the demands being based on a false premise as to the Plaintiff's liability for a particular bank account ("the 051 Account");

(b) Revenue knew that no taxes were owed or had no proof such taxes were owing;

(c) the Settlement was procured under duress, due to a threat to withdraw tax clearance certificates which would have been "*catastrophic*" for the Plaintiffs' business, constituting an unconscionable and unlawful threat to compel an unjustified settlement;

(d) the Plaintiffs reluctantly agreed to the Settlement subject to a Revenue commitment to provide further details of its computation ("the Payment Condition") but Revenue failed to provide such further details despite repeated requests over the years;

(e) in 2013 (for the purpose of a subsequent tax audit), the Plaintiffs' then tax advisors obtained details from the Plaintiffs' bank of all accounts in the Plaintiffs' names. The list furnished by the bank enabled the Plaintiffs to identify 14 accounts fraudulently opened in the Plaintiffs' names without their authority, knowledge, or involvement,

including four accounts – one being the 051 Account - for the benefit of another party for the payment of rebates;

(f) after the Plaintiffs raised the issue, both Revenue and the bank accepted that the four accounts were not opened by the Plaintiffs – the party responsible for the accounts made a substantial settlement with the Revenue, but the Plaintiffs received no compensation;

(g) in December 2014/January 2015, the Plaintiffs' advisors obtained access to and copies of the First Plaintiff's Revenue file for the 1995 Settlement (although the Plaintiffs claim certain documents are still being wrongfully withheld). As a result, the Plaintiffs concluded that the 1995 Settlement amount was an arbitrary figure demanded by Revenue as a matter of convenience, rather than a genuine assessment of liability. They also concluded around this time that the 1995 Settlement concerned funds that had passed through the 051 Account and other "*bogus*" accounts in the First Plaintiff's and his wife's name; and

(j) the Plaintiffs contend that the Settlement:

> "*was unconscionably, fraudulently and wrongfully both demanded and forced by Revenue, by threat, extortion, coercion, unlawful and abusive duress and the exertion of undue influence…in addition, there was the subsequent non-compliance with the Payment Condition and the misrepresentation on account of Revenue's related assurances and representations which Farrell relied upon*".

Revenue's Response to the Claim

3. Revenue has a different version of events, claiming that:

(a) it was the Plaintiffs' tax advisors who - at the start of the 1994 tax audit - disclosed issues and initiated the engagement that led to the Settlement, based on the plaintiff's disclosures, including a substantial sum in a previously undisclosed deposit account;

(b) on 27 May 1994, the Plaintiffs offered Revenue IR£501,365 in settlement of the liabilities arising from their disclosures and the audit. Negotiations continued over an extended period with payments in instalments, commencing 17 August 1995, until February 1996, when Revenue formally accepted Mr Farrell's 2 October 1995 offer of phased payments;

(c) the *Payment Condition* was never agreed - no such stipulation appears in the Settlement correspondence or documents. Such a term would have made no sense because: (i) the agreement was based on the *Plaintiffs'* disclosure, rather than Revenue's initiative; (ii) Revenue would not have agreed in principle to such a condition which would run counter to the taxpayer's self-assessment and disclosure obligations; and (iii) there would have been no logic to such a provision since, by definition, a settlement is intended to resolve outstanding issues for both sides;

(d) no steps were taken, by proceedings or otherwise, to enforce the alleged condition;

(e) a copy of the file relating to the 1994-1995 audit was indeed made available to the Plaintiffs' advisors (at the Plaintiffs' request) during the 2013 audit (which concerned other issues), but: (i) the Plaintiffs provided no details to Revenue, at that time, of their alleged discovery that monies which were the subject of the 1995 Settlement had passed through the four allegedly unauthorised or "*bogus*" accounts; and (ii) no proceedings were issued when the file was made available;

(f) in September 2018, Revenue issued an extensive response to the Plaintiffs' concerns, treating the communication as a complaint within the Revenue Complaints and Review Procedures. The Plaintiffs did not avail of their right to an independent internal or external review of the response. Nor did they issue proceedings;

(g) in July 2019, Revenue again furnished a copy of the First Plaintiff's file (in response to a Freedom of Information request), other than documents that would identify third

parties. The Office of the Information Commissioner rejected the Plaintiffs' appeal against the withholding of such documents; that decision has not been appealed; and (h) no compensation or remuneration is payable to taxpayers arising from actions taken by Revenue in relation to other citizens or entities.

Genesis of the Settlement

4. The Revenue affidavit referred to its notification of the 1994 audit, stating that:

> "*(9) The day after the audit commenced, 19th May 1994, two advisers from Cooper & Lybrand together with Mr Farrell, called to the offices of Revenue by prior appointment and indicated that they wished to make a disclosure in relation to monies on which tax had not been paid, including a sum of IR£300,000 that was held in an undisclosed deposit account with the TSB….*
> *(10) On 27th May 1994, Mr Farrell and his agents met with Revenue to discuss this case*".

5. Revenue exhibited contemporaneous notes of both the 19 and 27 May 1994 meetings, which confirm that, at the 27 May 2024 meeting, Mr Farrell and his companies:

> "*offered a sum of IR£501,365 in settlement of the liabilities arising from these disclosures and the Revenue official's examination of the books and records of the entities that were the subject of the audit*".

6. The affidavit exhibited the documents evidencing the Plaintiffs' offers. The Plaintiffs' replying affidavit did not challenge Revenue's account, but stated at para. 6*:*

> "*One discussion centred around a TSB account which the then agent, Mr Hayes, said it was his impression would probably have been disclosed in previous submissions. Mr Dalton said that this was not the case. However, Mr Kennedy has overlooked the memo prepared by Mr Dalton on 1st November 1995 particularly Paragraph 2 of that Memo "Findings" in which he said that*
> *"It was clear from an examination of this deposit account that many of the transactions had been taxed previously as they were reflected in the statement of affairs submitted for previous years. Some of the lodgements to this account would also have been of a non-taxable nature" …*

(7) It is also noted at paragraph 10 that one of the undated memos that Mr Kennedy refers to records a discussion on 27th May 1994 in which Mr Dalton says he advised the meeting of his calculations which he had prepared, in a very short time, he says from books and records which he has previously stated were clearly deficient and unrealisable. The response was, he said, an offer of IR£501,365 to be made by Tommy and his companies..."

7. The replying affidavit took issue with the Revenue affidavit on various grounds, mainly on the basis that: (a) the deponent lacked first-hand knowledge of the 1994 audit; (b) the remainder of the Plaintiffs' file should be released; and (c) appeals would have been futile, in light of Revenue's continued ignoring of breaches of procedure and criminality. The First Plaintiff says, at para. 8 of his second affidavit, that:

"*Mr Kennedy denies that any duress was used to secure agreement. This ignores the fact a withdrawal of the Tax Clearance cert would have closed my businesses*".

8. No evidence was forthcoming from the Plaintiffs' current or original advisors and it appears that no expert report was obtained before commencing proceedings. The First Plaintiff did not exhibit all underlying documents or correspondence which he referenced in his affidavits and submissions. Likewise, the submissions contained factual assertions which are not supported on affidavit. They also assert that, following the Plaintiffs' tax advisers' inspection of the Revenue file in 2013/2014, the Plaintiffs' advisers raised their long-standing concerns with Revenue about the basis for the Settlement and the issue as to the bank accounts. Although the Plaintiffs do not give precise dates, it appears that at the outset of the tax audit in 2013, the Plaintiffs' adviser, Mr O'Brien, suggested to Revenue's Ms Foley that she should conduct an investigation into another party and the First Plaintiff claims that that resulted in a substantial tax settlement with that party, apparently in respect of rebates issues which are not relevant to the Settlement. The Revenue commencement of the separate, tax audit in 2013 seems to have revived the First Plaintiff's concern as to the Settlement, 18 years earlier. His submissions state that, in 2013, he and his then advisor, Mr O'Brien, complained to a Revenue

officer (Ms Foley) that he had been taxed on accounts which had "nothing whatsoever" to do with him following which the Plaintiff's then advisor, Mr O'Brien investigated the accounts:

> "*After his investigation, he provided me with letters from AIB's data department, confirming these accounts had no association with me or my companies.*
> *Mr O'Brien shared these findings with Ms Foley which included four bank accounts linked to ESSO Ireland and AIB, as during Mr O'Brien's investigations he was able to identify that these four bank accounts linked to ESSO were inaccurately associated with me and my companies despite these bank accounts being in my name. Mr O'Brien was further able to confirm to Ms Foley that the funds that transacted through these bank accounts had no connection whatsoever to do with me and my companies. I can clearly recall Ms Foley questioning Mr O'Brien and suggesting that I might be losing it by claiming that these bank accounts were opened to defraud the State.*"

Contemporaneous Documents

9. In view of the nature of the Plaintiffs' allegations, it is important to examine the contemporaneous documentation exhibited by the parties.

(a) <u>Commencement of 1994 Tax Audit</u>

10. By letter dated 4 May 1994, Revenue notified the First Plaintiff and related companies of the tax audit which was to commence on 18 May 1994. Three May 1994 file notes exhibited by the parties confirm the content of the discussions and the Plaintiffs' submissions encouraged the Court to have regard to the totality of those documents.

(b) <u>19 May 1994 File Note</u>

11. This file note records the Plaintiffs' initiation of the negotiations. The First Plaintiff was accompanied by his advisors, Michael Hayes and Jim Harty of Coopers & Lybrand (who had contacted Revenue the previous day to request the meeting). The First Plaintiff had driven

to Coopers & Lybrand immediately after his initial meeting with Revenue the previous day at the commencement of the 1994 audit. Mr Hayes told the Revenue that:

"*Mr Farrell wanted to make a full disclosure and was inhibited from doing so the previous day due to his ignorance of the audit procedure and also that if he had disclosed the undisclosed deposit account that we would take all the monies immediately…If the Revenue were to "grab" these monies it would leave all of his businesses in a very tenuous and unsustainable position*".

12. The Plaintiffs' disclosures focused on:

"*a substantial undisclosed deposit account with the TSB with funds of approximately £300,000. This account had previously been held with the Allied Irish Bank and was transferred to the TSB some two and a half to three years ago. This account was in place for a long number of years and the monies accumulated would have been as a result of non-disclosure of car sales, other business takings and the excess of grants from Esso and other amounts expended on premises*".

13. The attendances noted issues raised by the Plaintiffs, including that the First Plaintiff:

"*could not write. He did not realise the distinction between the different legal entities and did not realise the necessity to keep his own and each of the individual companies' affairs separate from one another. His modus operandi appears to have been that he treated all of the various business activities as one concern and as and when required monies would be transferred from one business to the other. The major difficulty in this area was that there is no record of all of these transfers*".

(c) <u>Meeting on 27 May 1994</u>

14. A further attendance note records a meeting on 27 May 1994 between the First Plaintiff and one of his advisors and Revenue which discussed Revenue's concerns as to difficulties obtaining documentation for the audit. The file notes document Revenue's contemporaneous concern that the books and records produced to them by the Plaintiffs were "*clearly deficient and had been produced to us on a piece meal basis*" and there were also references to the difficulties experienced by the previous auditors "*regarding the lack of records*". The auditors

were not in a position to reconcile or verify the flow of monies in and out of the various businesses and the accounts were therefore "*heavily qualified*". The meeting adjourned following what appears to have been a detailed discussion. Having discussed Revenue's concerns, Mr Hayes asked Mr Dalton if he had had an opportunity to look at the overall position. He and the First Plaintiff were apparently shocked by the figures which Mr Dalton presented in response. The meeting immediately adjourned but the same file note records further developments later that day, again instigated by the Plaintiffs:

> "*Mr Hayes telephoned me directly after lunch and asked if we could reconvene to negotiate a settlement. We reconvened shortly thereafter and Mr Harty of Coopers & Lybrand was also present, Mr Billy Sweeney H.T.O. was also present at the meeting.*
>
> *In the intervening period I had computed underpayments based on the apparent discrepancies arising (see computations attached).*
>
> *These computations were then discussed in detail particularly the areas of estimation, the question of whether V.A.T. arose on self-supplies, the level of interest and penalties etc. Mr Farrell appeared quite stunned throughout this meeting, particularly at the level of the liability arising.*
>
> *After discussing the matter for a considerable period of time and having regard to the matters addressed in our discussions, I issued a revised computation for their agreement (computation attached).*
>
> *At this stage Mr Hayes requested that the meeting be adjourned to enable them to discuss the position in detail with their client.*
>
> *The meeting then adjourned.*
>
> *We reconvened at approximately 5.00 p.m. My revised computation indicated the liability of £605,184 including interest and penalties.*
>
> *Mr Hayes made the following points:*
>
> > *1. His client wanted to settle the matter.*
> >
> > *2. The major problem attaching to the settlement was the means by which it could be funded, in this connection he mentioned that whilst his client had circa £300,000 on deposit with T.S.B., this stood back to back against borrowings of circa £400,000 plus. He could not see his client being in a position to put his hands on those funds.*

3. He requested that the settlement be deemed to cover the following liabilities…. Subject to the above his client wished to offer £501,345 in full and final settlement of the liabilities for the above periods.

Following on further discussions on the matter, I agreed to recommend acceptance of this offer, subject to my examination of the undisclosed deposit account and anything arising thereon.

My decision to recommend acceptance of this offer is based on the following:

1. Of necessity my computations incorporated considerable estimations and there is also an element of doubt as to the question of V.A.T. on self supplies on some of the garage premises.

2. Having regard to the nature of the records retained, it is quite clear that a refusal to bring the case to a conclusion at this stage would mean considerable work for both the agents, Mr Farrell and ourselves over a long period of time with no certainty that we would be anywhere nearer the real liability or agreement.

3. With regard to the settlement covering the period for Corporation Tax to 31/12/1993, V.A.T. to Jan/Feb '94 and P.A.Y.E./P.R.S.I. to 5/4/1994, I had previously examined the position here and I am satisfied that there would be no loss to the Revenue in this respect due to the following, both V.A.T. and P.A.Y.E./P.R.S.I. returns have been lodged up to Feb/March 1994 for all business entities and the total arrears on record amount to circa £5,000.

(b) whilst accounts have not been furnished for 31/12/1993 it is clear that:

1. in the case of Thomas Farrell as a sole trader the likelihood of an income tax liability arising is negligable. This would be his first years trading at both the Park Road and Youghal and being a start up situation in addition to capital allowances the likelihood of a liability arising would be small.

…

4. It is apparent that a major difficulty in this case will be the payment of the liability and the financing of this payment. I took due cognisance of this aspect of the case in deciding to recommend their offer.

Mr Farrell then signed a certificate of full disclosure. A strong case was then made by Mr Hayes that publication should not arise in the case by virtue of the disclosure by his

client, his co-operation and desire to finalise the matter and the speedy conclusion of the case. I told Mr Hayes to put his proposals in writing and that I would consider these. To conclude the audit I will require a copy of the undisclosed deposit account, copied balance sheets for all of the companies and Mr Farrell as at 31/12/1993 and a schedule of all properties held by Mr Farrell." [*sic*]

(d) Plaintiff's disclosure statement dated 27 May 1994

15. As part of the usual disclosure process, the First Plaintiff furnished a letter to the Inspector of Taxes in the course of the 27 May 1994 meeting, confirming that:

a. he certified his completed disclosure of all "*banking accounts, whether current or deposit, business or private*"; and

b. he had read and understood a formal Revenue warning which advised him, as the person completing the form, to carefully consider its wording before completing it:

> "*and if you consider that there are any facts relating to your tax affairs about which you have not informed the Inspector, or any assets you have not disclosed to the Inspector, then inform the Inspector of these facts or assets before signing this certificate*".

The warning warned of the consequences if the disclosures were materially incorrect. There was no suggestion that the First Plaintiff's advisors, who accompanied him, failed to explain to him the significance of the Plaintiffs' obligations and the disclosure statement.

(e) Letters of Settlement dated 2 October 1995

16. The First Plaintiff's letter of settlement dated 2 October 1995 (on the Second Plaintiff's letter head) discussed arrangements for the payment by instalment of the balance of the Settlement monies, noting the severely limited ability to make such repayments and concluded:

"*I trust that the foregoing, together with the arrangements already in place, will enable the Collector General to issue Tax Clearance Certificates for Hydrocarbon Oil and LPG Vendor's Licences so that the various businesses can continue to trade.*"

There were also formal settlement letters from the two Plaintiffs dated 2 October 1995, confirming the terms of the Settlement, essentially as agreed at the 27 May 1994 meeting. Acceptances were signed by the Inspector of Taxes in respect of each letter on 9 October 1995. A further Revenue letter, dated 13 February 1996, also confirmed acceptance of the offer in full settlement of the tax, charges, interest and penalties.

(f) Revenue File Note dated 1 November 1995

17. The First Plaintiff exhibited another Revenue file note prepared by Mr Dalton on 1 November 1995, which stated that:

"*These cases were selected for audit following on information received regarding a deposit account held by Mr Farrell.*

1. History

Mr Farrell, who is illiterate, operated the trade at a low level for a number of years. The businesses were incorporated and the trade expanded rapidly without due regard being paid to either the financing or the taxation affairs of the businesses. It is apparent that he received both bad taxation and financial advice down through the years. The tax position in previous years was finalised by way of statements of affairs. It is a typical case of no distinction being made between either the director and his companies.

2. Findings

A full disclosure was made in connection with the undisclosed deposit account which was held with the Trustee Savings Bank and other matters prior to the commencement of the examination of the books and records. It was clear from an examination of this deposit account that many of the transactions had been taxed previously as they were reflected in the statements of affairs submitted from previous years. Some of the lodgements to this account would also have been of a non-taxable nature.

3. Settlement

Full co-operation was received from Mr Farrell, his staff and the auditors and settlement was agreed at an early date. I am satisfied that the overall settlement arrived at adequately covers the liabilities arising. As the funds from the undisclosed deposit accounts were subsequently appropriated by the banks and set against personal borrowings, all efforts in the post settlement period have been directed at securing financing for the settlement..."

(g) Letter dated 8 January 2001

18. The First Plaintiff exhibited a letter from the Revenue Commissioners dated 8 January 2001, which confirmed that no further information would be forthcoming as to the Settlement:

"*As previously explained the Collector General's Office is not in a position to furnish the relevant information as requested by you, i.e. a breakdown of the tax liability under the various headings & for the specific periods involved. The terms of the tax settlement were agreed by yourself and Mr John Dalton, Inspector of Taxes, Waterford on the 06 October 1995. I attach for your information a copy of the agreements signed by both parties.*"

(h) AIB Letter to the Plaintiff's Advisors dated 12 September 2014

19. This letter from AIB states that certain accounts including the controversial 051 Account, have no connection with the First Plaintiff.

(i) Revenue's 28 September 2018 Response to the Plaintiffs' August 2018 complaint

20. Since the First Plaintiff's complaint was on similar lines to his allegations in these proceedings, it is worth examining Revenue's response in detail. It stated, *inter alia*, that:

"*…Due to the lapse of time since the 1994 audits, a number of the officers referred to in your submission that were involved with the carrying out of the audits and subsequent correspondence and discussions in connection with same are now retired and not available to me in carrying out the review. In the circumstances my review is based on an examination of the documentation on the Revenue files relating to the 1994 audit, all*

of which has been supplied to you with the exception of a small number of documents on which Revenue has claimed public privilege.

…

Revenue's statutory functions include the assessment, collection and management of taxes and duties and it is therefore essential in regularising a taxpayer's affairs that Revenue can reach settlements, let alone those expressed as "full and final", secure in the knowledge that attempts will not be made in future years to unravel them. Such settlements allow Revenue maximise their use of limited resources, while at the same time encouraging compliance. They also give taxpayers the benefit of mitigated penalties and it brings finality to the audit. If an offer in settlement is accepted by Revenue the matter that is the subject of the audit is closed and will not be reopened where there has been a full disclosure.

Certainty and Finality in Law.

The need for finality is present in all legal and administrative systems and it operates for the benefit of all parties so that they can conduct their affairs with a degree certainty and rationality. By definition, once the matter is settled one gives the value of certainty but loses the opportunity of keeping one's option open.

The law recognises this necessity for finality in a number of ways but it is the concept of offer and acceptance in contract law which is, in my view, most relevant here. Where two parties have reached and agreed a settlement, it is binding on both parties notwithstanding the fact that at some later stage one of the parties may be dissatisfied with the outcome.

…

Settlement of 1994 Audit

You have already been provided with copies of the relevant notes and correspondence for this audit. The audit commenced on the 18 of May 1994. The day after this you and your agents called to see the Revenue auditor Mr Dalton (please see note of interview dated 19 May 1994). You informed him that you wished to make a full disclosure in relation to a previously undisclosed deposit account at TSB with funds of €300,000. The monies in the account at TSB had previously been held at AIB. Mr Dalton confirmed at this meeting that this account had not been returned previously.

My examination of the file, indicates that the settlement agreed at the meeting with yourself and your agent on May 27 1994 was computed on the basis of an examination

of the records made available by Mr Thomas Farrell and Thomas Farrell and Sons Garages Limited. Examination of the records revealed tax under-statements as follows:

- *Mr Thomas Farrell: comparison of known income to known expenditure for the two years ended 5 April 1993*
- *Thomas Farrell & Sons Garages Ltd: application of correct mark-ups to purchases*
- *VAT understatements in relation to development of garage premises*

The total liability including interest and penalties calculated on these understatements was £549,691 made up as follows:

CT, VAT, IT arising from examination of records	*£427,629*
VAT arising from development of garage premises	*£122,062*
Total	*£549691*

You will note that the above amount does not include an amount for the undisclosed deposit accounts. Full details in relation to these had not yet been provided by you. If liability arising from those accounts was computed total audit liability would be well in excess of £549,691.

It became apparent at the interview that you would have serious difficulty in paying out such an amount. In this context and cognisant of the requirement to keep the cost of the audit for you as low as possible, a compromise settlement was agreed with you on 27 May 1994 as follows:

CT, VAT and IT arising from an examination of records	*£256,997.*
VAT arising from development of garage premises	*£105,787.*
Undisclosed deposit accounts €300,000 @ 80%	*£242,400*
	£605,184
Less amount to settle	*£103,839*
Total	*£501,345*

It is clear from this that your statement that the 1994 settlement was based entirely on the undisclosed deposit accounts is not correct. Indeed, because the total understatements computed in respect of the other components of liability i.e., £549,691 exceed the compromise settlement, it would have been possible to construct the compromise settlement in such a way that it excluded the deposit accounts altogether.

The compromise settlement that was agreed was stated to be subject to an examination by Mr Dalton of the deposit account when full details were supplied by you. The bank

records were subsequently provided by your agent with the explanations and reconciliations. Mr Dalton examined what was provided. Having excluded inter-account transfers he identified un-taxed lodgements including interest of £596,804. To mitigate the liability arising from this he was prepared to consider the possibility that some withdrawals may have been reflected in the statement of affairs and company accounts and therefore could be excluded from the computations of tax liability. Even allowing for exclusion of all such withdrawals there was still €284,000 of untaxed lodgements to be taken into account. In this scenario it was clear that the original estimate of tax outstanding relating to the undisclosed deposit account was reasonable and therefore no adjustment was required to the settlement agreed on 27 May 1994.

I note that your formal letter of offer to settle the liability (in accordance with the disclosure made by you and your agent on 19th May 94) was received by the Revenue Commissioners on 30th September 1994. There was further correspondence around the arrangements to clear this liability which were finalised in October 1995 and our records show that your final offer was accepted by the then Chairman of the Revenue Commissioners on 23rd November 1995. It is clear from this that you had ample time to consider the settlement until the final offer was made.

You do state that Mr Hayes, your agent, advised you to accept the liability and outlined potentially serious consequences should you fail to do so. Revenue were not party to those discussions and therefore I cannot comment on them. However there is no indication from any of the documentation on file that Revenue exerted any pressure upon you to accept the settlement figure.

As advised I cannot comment on your recollections as to your conversations with Mr Gerry Foley of AIB and there is no record on file of the alleged visit by Mr Dalton to AIB Tramore on 23rd May 1994. However it is worth noting that you state that Mr Dalton was accompanied to the bank by your agent, who it is fair to presume had already been in discussion with your on the relevant audit issues. If that is not the case then your issue in connection with this lies with your agent at the time and not with the Revenue Commissioners. I would add that it is a requirement of any audit that the taxpayer cooperates fully with the Revenue intervention. In this regard, and in the context of the 1994 audit, full explanations were required of any bank accounts held by you…

…

Issues related to bank accounts

I cannot comment on any of your statements made in relation to the various bank accounts held by you as this is a matter between you the banks themselves. Neither can I comment on or take into account in my review any issues raised in the course of litigation between AIB and you ….

However I think it is opportune as part of this review to set out the events that led to the Revenue audit and the material that was discovered by the auditor in relation to various bank accounts.

The audit was initiated on the basis of information received by Revenue that you had an account with TSB which should not be returned in your tax return for previous years. The day after the audit commenced, the existence of this previously undisclosed TSB account was disclosed to the auditor by you/your agents. Part of the subsequent audit inquiries was to determine the source of monies lodged to this account. Your agents investigated this matter and provided information to the Revenue to show that the money in the TSB account came from a number of accounts held in AIB. The documentation provided by Coopers & Lybrand in respect of two of these accounts 07575-051 and 07666-017 indicates that as well as funding the TSB account (via transfers to other AIB accounts) they were also used to fund the acquisition of life policies (Irish Life and Prudential), and to pay off loans for you (AIB), and to acquire properties. They were also used to lodge proceeds of matured life policies for you (Prudential and Canada Life).

I note from your statement you contend that a number of the accounts in AIB were never held by you and were opened by AIB without your knowledge and authority. I have examined your statement, that of your accountant Mr O'Brien, and also the information on file about these accounts and my view is that I can see nothing there that would lead me to conclude that these accounts were not your accounts. Furthermore, I would suggest that even if that were the case that the accounts had nothing to do with you, the question would then arise as to where the funds lodged to the TSB account came from.

I also note that in your statement you state that you were never informed of the existence of bank account 051. My review of the case and the Revenue documentation clearly indicates that you were given details of bank account 051 by Revenue in a letter to you from John Dalton dated 7th February 2003. This letter gave a detailed schedule of all AIB accounts furnished by your agents as part of the audit in 1994.

…

Access to your file

Your submission indicates on a number of occasions that you were refused access to the Revenue file despite making a number of requests for same from 1994 onwards. From my examination of the Revenue papers, I am unable to find any requests from you for access to your file post the 1994 audit and prior to the access that was granted to you in 2014. It appears to me that your request for information from Revenue all related to a breakdown of the liability agreed in the settlement of the 1994 audit. Revenue provided a breakdown of the liability on several occasions post settlement and also held a number of meetings with you in relation to same.

There is however nothing on file to indicate that you sought access to the Revenue file on this matter or that Revenue refuse to hand over the file to you. In your statement you allege that Mr Tom Dilleen District Inspector, instructed Mr Dalton to release a file to you and he failed to act on these instructions. This is not the case. The note instructed Mr Dalton to comply with your request to supply a breakdown of the audit settlement figure which he subsequently did. His note regarding the Freedom of Information Act was simply a statement that you were entitled to access you file under the act.

In your statement your draw attention to Mr Dalton's note that he had kept the files locked away for sensitivity and security reasons and that he regretted not giving them to Mr Farrell. This is an incorrect reading of Mr Dalton's note. What Mr Dalton says in the note is that he had locked the file away for sensitivity and security reasons (which would be normal practice for revenue audits) and that he had failed to return business records relating to the 1994 audit to you. It is this failure to return the business records that Mr Dalton refers to in his expression of regret. It is normal practice during an audit for business records examined during the audit that is not required for the file, to be returned to the taxpayer on completion of the audit. It is not normal practice for an auditor to give the taxpayer the audit file after completing the audit."

The letter concluded:

"*I regret the apparent distress this incident has caused you but my view of Revenue records in relation to the 1994 audit indicate that:*

- *Following your discussion with your agent you made a voluntary disclosure in relation to an undisclosed Bank account.*
- *A formal letter of offer was submitted by you on 30th September 1994. Therefore you had 4 months to consider, and discuss with your agent, the accuracy of the disclosure which was made by you.*

- *Your proposals for payment were not finalised until October 1995 and at anytime during the period September 1994 to October 1995 you could have withdrawn your disclosure and/or expressed your concerns about its accuracy to either your agent or Mr Dalton directly. This was not done, nor is there any correspondence on Revenue's file to suggest that you or your agent were dissatisfied or unhappy with Mr Dalton's calculation on the liability arising at that time.*
- *Mr Dalton carried out his inquiries fully in accordance with the legislation enforced at that time.*

I have now therefore concluded my review and found no evidence to support a contention that:

(i) the Revenue Commissioners failed to consider your viewpoint

(ii) they were unreasonable in their approach

(iii) any Revenue official behaved inappropriately

(iv) Revenue powers were applied unfairly

(v) the technical approaches adopted to conclude the audit were manifestly incorrect or

(vi) you were coerced in any way to agree to the liability arising from the disclosure voluntarily made by you.

I am satisfied that the 1994 Revenue Audit Statement correctly calculated underpayments of tax by yourself and your company.

I am satisfied that Revenue afforded you ample opportunity to discuss and consider both your tax position and your options with your agents prior to making your disclosure. As pointed out previously, you also had sufficient time and opportunity to reconsider the disclosure and withdraw it, if at any time, before agreeing to discharge the liability, you felt it was excessive.

I have already outlined the Revenue Commissioner's position in relation to the finality of agreed Audit settlements and it is my view that there are no grounds on any objective basis for any alteration to the settlement agreed between Revenue and you in 1995."

21. The letter informed the Plaintiffs of their right to seek a review. They did not do so.

(j) Letter dated 8 January 2021

22. The Revenue has made its position clear with regard to the Payment Condition. For example, its letter dated 8 January 2021 stated that:

> "*As previously explained the Collector General's Office is not in a position to furnish the relevant information as requested by you, i.e., a breakdown of the tax liability under the various headings & for the specific periods involved. The terms of the tax settlement were agreed by your self & Mr John Dalton, Inspector of Taxes, Waterford on 06 October 1995. I attach for your information a copy of the agreement signed by both parties.*
> *Again I would like to bring your attention to the fact that of the agreed settlement figure of €636602.23 (£501365) our records indicate that a payment of €436789.90 (£344000) has been made leaving a balance due of €199812.33 (£157365) outstanding.*
> *I have been in contact with Mr John Dalton of the Inspector of Taxes Office in Waterford who has stated that he will be writing direct to you within the next two weeks concerning details of the Tax Settlement & he has agreed to forward a copy of the letter to me.*"

(k) Letter from the First Plaintiff to Revenue dated 23 December 2022

23. The First Plaintiff's letter recounts a meeting with Revenue "*approximately three to four months*" after the Plaintiffs allegedly paid the 1995 Settlement monies to Revenue, which, according to the Plaintiffs' pleadings, means a date prior to mid-1998. The purpose of the meeting appears to have been to inquire about outstanding tax liabilities and, according to the letter, the First Plaintiff told Revenue that:

> "*the IR£501,365.00 obviously cleared up everything, making this remark to* [*a Revenue official*] *knowing that amount was not due from the start.*"

The Plaintiffs' Submissions

24. The Plaintiffs' written submissions set out a detailed account of the 1994 and 2013 audits, urging the Court to allow the case to progress and to afford him "*the opportunity to present all pertinent information and facts*". In their oral submissions, the Plaintiffs submitted

that, although settlement was reached in 1994-1996, they didn't obtain the file relating to the audit until 18-20 years later, at which point "*what really happened*" came to light. They argued that the withholding of the file was the reason for the delay in bringing proceedings - until 2013, they didn't know about the fraudulent accounts from which the tax liabilities identified in 1994 arose. The Plaintiffs recalled receiving the file "*in the middle of* [*2014*]".

The Defendants' Submissions

25. The Defendants took issue with the factual premises of the claim but, for the purposes of these applications, submitted: (a) that the proceedings were clearly statute barred, relying on section 11 of the Statute of Limitations 1957, and, in respect of s. 11(9), on authorities such as *Komady Ltd and Anor v Ulster Bank Ireland Ltd* [2014] IEHC 325 ("*Komady*") and *European Property Fund plc and Anor v Ulster Bank Ireland Ltd* [2015] IEHC 425 ("*EPF*").

The Relevant Legal Principles

26. Order 19, rule 28 RSC provides that:

"*(1) The Court may… strike out any claim or part of a claim which:*

(i) discloses no reasonable cause of action, or

(ii) amounts to an abuse of the process of the Court, or

(iii) is bound to fail, or

(iv) has no reasonable chance of succeeding.

…

(3) The Court may, in considering an application under sub-rule (1) or (2), have regard to the pleadings and, if appropriate, to evidence in any affidavit filed in support of, or in opposition to, the application.

(4) Where the Court makes an order under sub-rule (1), it may order the action to be stayed or dismissed, as may be just, and may make an order providing for the costs of the application and the proceedings accordingly."

27. The relevant provisions of the Statue of Limitations 1957 are as follows:

a. Section 11, in the relevant part, provides as follows:

> "*(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued –*
>
> *(a) actions found on simple contract;*
>
> *(b) actions founded on quasi-contract;*
>
> *...*
>
> *(2)(a) ...an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.*
>
> *...*
>
> *(9)(a) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief.*
>
> *(b) Paragraph (a) of this subsection shall not be construed as preventing a Court from applying by analogy any provision of this section in like manner as the corresponding enactment repealed by this Act has heretofore been applied.*"

b. Section 71(1) of the Statute of Limitations provides:

> "*Where, in the case of an action for which a period of limitation is fixed by this Act, either –*
>
> *(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or*
>
> *(b) the right of action is concealed by the fraud of any such person,*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.*"

Komady

28. *Komady* dealt with a similar submission to invoke s. 71 to establish that a (misselling) claim was not statute barred, because the plaintiffs had not obtained all information from the defendants. Peart J. robustly dismissed the submission, observing at para. 55 that:

> "*...everything that the plaintiffs needed to know in order to get any advice on these Swaps was known to them by the 18th July 2006.... In my view if they had gone to a solicitor at any time after July 2006, and sought advice as to whether these Swaps met their conservative financial objectives, they would have been in a position to provide all the*

necessary information in order to get such advice, and to decide if the Swaps had been mis-sold. Instead, they did nothing until they ran into financial difficulties in 2012 whereupon a financial review was undertaken and they received advice to the effect that these Swaps had not been suitable for the purposes in July 2006. …

56. The plaintiffs in my view are confusing the emergence of further facts during the course of an action, with facts sufficient for the accrual of a cause of action. They had ample facts at their disposal in order to commence an action for negligence/negligence misrepresentation in relation to these Swaps. A process of discovery might in due course have strengthened their hand in terms of their ultimate success at trial – or indeed might have weakened their case. But it is not necessary that every fact be known in order to commence proceedings. Sufficient facts are necessary in order to know that a cause of action has accrued. In the present case more than sufficient was known in the immediate aftermath of July 2006, or at any time before the Swaps came to an end some five and a half years later. The plaintiffs did not have to wait until April – August 2012 before seeking and receiving advice in relation to their suitability. As I have said already, section 71(1)(b) of the Act must not be equated with some sort of discovery test. That is not the intention of the section. No such provision as has been made in relation to discoverability in the context of personal injuries, has been made in respect of other types of tort."

EPF

29. Costello J. (as she then was) cited *Komady* reaching the same conclusion in a similar claim, observing at para. 54 that the plaintiff had the relevant information, adding that:

"*… to rely upon the previous s. 71(1)(b) of the Statute of 1957, the onus is on the plaintiff to satisfy the Court: (a) that the cause of action has been concealed; and (b) the date the plaintiff discovered the fraud; or (c) the date the plaintiff with reasonable diligence could have discovered the fraud…*

56. …I am not satisfied that EPF has established that the date it could have discovered the alleged fraud exercising reasonable diligence was later than 20th June, 2008, and therefore within the six year limitation period. On the contrary, had it exercised reasonable diligence and requested a copy of the novation contract (always assuming that it did not have it) it could have discovered the fraud it alleged at that time.

> *57. ...the acts and omissions alleged against Ulster Bank are not capable of constituting concealment by fraud within the meaning of s. 71(1)(b) on the part of Ulster Bank of the plaintiffs' rights of action. It follows therefore that the limitation period is not extended by virtue of the provisions of s. 71(1)(b) of the Statute of 1957. The plaintiffs' claims in relation to the alleged mis-selling ... based on contract, misrepresentation, negligence, negligent mis-statement, breach of a fiduciary duty or deceit or fraudulent concealment are all statute barred ...*".

30. In *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459 ("*Primor*"), the claim was dismissed, not only for want of prosecution, but because a fair trial was impossible. Hamilton C.J. observed, at pp. 486-487, that proceedings may be dismissed:

> "*where the length of time which has elapsed between the events out of which it arises and the time when it comes for hearing is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself.*"

Discussion

31. The claim faces formidable factual and legal hurdles. Two of the most obvious concern, firstly, whether there is any basis for the Plaintiffs to impugn a settlement and, secondly, whether, if there were a basis for such a challenge, it is now time barred. I will deal with the latter point first.

Is the claim statute barred?

32. Even if the claim is stateable, the Court might determine that it was time barred either: (a) because it was not commenced within the applicable statutory limitation periods; (b) for want of prosecution; or (c) because a fair trial of the proceedings would now be impossible.

Limitation Periods

33. The essence of the claim concerns events alleged to have occurred in 1994/1995, or in the years shortly thereafter. The first 29 paragraphs of the Statement of Claim, at least, concern that period. Accordingly, viewed in isolation, the claim raises obvious limitation issues. Even if the Plaintiffs' claims had any substance - which the Defendants deny - they are clearly statute barred (unless there is a basis to extend the period) for the following reasons:

a. The parties concluded the Settlement in October 1995.

b. The claims are brought in contract and tort. A six-year limitation period generally applies to such claims, commencing when the cause of action accrues. Contract claims accrue when the contract is breached, whereas tort claims accrue when substantial damage first occurs.

c. The contract claim rests on the allegation that the 1995 Settlement contained a "*Payment Condition*" which was immediately breached. The Plaintiffs say that they knew of the breach at the time. The proceedings only issued in 2020. Accordingly, all contractual claims are *prima facie* statute barred.

d. The period in tort runs from when the loss was suffered by the Plaintiffs, which was when the monies were paid on foot of the settlement, i.e 1995. Accordingly, any claim in tort (including breach of duty, negligence and misrepresentation) was *prima facie* commenced outside the applicable period.

e. The Defendants submitted that the claim for "*Abuse of Statutory Authority*" (which I take to encompass the claims of duress or undue influence) should be subject to the exacting periods applicable to judicial review applications in public law contexts. However, it is at least arguable that such a claim may be subject to the limitation period in tort. Alternatively, s. 11(9) of the Statute of Limitations (which deals with rescission, restitution or other equitable relief) may apply. I need not resolve that issue because, on

the Plaintiffs' case, the alleged abuse occurred in 1994 and the loss from 1995, whereas proceedings were issued in 2020. The claim is out of time in any event.

Is the Limitation Period extended by alleged fraud/fraudulent concealment?

34. Limitation periods can of course be extended in cases of fraudulent concealment pursuant to s. 71. However, as I have explained below, the Plaintiffs have not alleged facts or matters which would provide a statable basis on which to invoke s. 71. Although they have asserted (unparticularised) fraud on the part of those responsible for establishing the bank accounts, they have not put forward any basis on which to allege fraud by Revenue or its agents. If the Plaintiffs wished to plead such fraud, their vague and generalised assertions would not suffice. Parties advancing such serious allegations must provide proper particulars. No such particulars appear in the Plaintiffs' pleading.

35. In any event, even if there had been a basis for the Plaintiffs to advance such a plea of fraud or fraudulent concealment on the part of Revenue or its agents, it would not still avail the Plaintiffs, as it would only delay the commencement of the limitation period until the Plaintiffs either became aware, or should with reasonable diligence have become aware, of facts sufficient to support the accrual of a cause of action. In my view, on the Plaintiffs' own case, they were (or could with reasonable diligence have been) aware of sufficient facts on which to issue proceedings at the time of the Settlement or very soon thereafter. As my detailed summary of the contemporaneous documents and correspondence demonstrates, their awareness was repeatedly reinforced and underscored over the years.

36. Paragraph 42 of the Statement of Claim sets out the Plaintiffs' core argument, that they and their advisors first secured copies of (or access to) their revenue files "*in or about*" December 2014 or January 2015 (and, even then, not the whole file). However, as appears from the above summary, any suggested lack of awareness of the true position is contradicted various

statements on the Plaintiffs' behalf over the years. In any event, even if (which I doubt) a genuine lack of awareness could be established, lack of awareness does not, of itself, extend the limitation period. As *Komady* and *EPF* illustrate, in seeking to invoke s. 71, the Plaintiffs must show that the right of action was based on or concealed by the fraud of Revenue (or their agents). In either scenario, the period would be triggered when the Plaintiffs actually discovered the fraud or could with reasonable diligence have discovered the basic facts giving rise to the claim. Accordingly, the claim faces a high bar. The Plaintiffs must show either that Revenue acted fraudulently in respect of the Settlement or that they fraudulently concealed the Plaintiffs' right of action. I have seen no evidence or particulars to support either contention.

37. In fact, the Plaintiffs' pleadings, affidavits and correspondence undermine their case in this regard. For example, paragraph 2 of their replies to particulars state that they made seven unsuccessful attempts to obtain information as to the Settlement between 27 May 1994 and 26 July 1998. It follows from this, and from the First Plaintiff's own affidavits, and from the other contemporaneous documents summarised above, that the Plaintiffs were dissatisfied as to the basis for the Settlement from the outset and also dissatisfied by the rejection of their requests for information. They could have issued proceedings then but did not do so. Nor did they undertake their own investigations or review their own records, including the statutory books and records which the Second Plaintiff would have been required by law to maintain or, for example, by making the enquiries of their own bank in relation to the various accounts. They only took that latter approach in 2013 (and only then in response to a later revenue audit). The essence of the claim appears to have been that the Settlement was based on liabilities which, according to the particulars of claim, were:

> "*based entirely on Account 07575-051 according to the inspector's memo and the lodgment detail that went through that account… That Account was never connected with Thomas Farrell as confirmed by AIB Bank on a number of occasions.*"

However, the Plaintiffs plead that the First Plaintiff became aware of accounts having been "*fraudulently and wrongfully opened in his name*" in 2013. Furthermore, the correspondence attached to the Plaintiffs' replies to particulars included a letter dated 12 September 2014 from AIB, which states that the 051 Account had "*No connection with Thomas or Christina Farrell*".

38. Bearing in mind the observations of Peart and Costello J.J. as cited above, I see no reason why these proceedings could not have been instigated in the 1990's rather than in 2020, in which event the Plaintiffs could immediately have sought discovery of the Revenue file. In the circumstances, and in the light of the Plaintiffs' own replies to particulars, any claim for breach of the alleged Payment Condition is necessarily statute barred. The attempt to impugn the Settlement itself is similarly statute barred in circumstances in which the Plaintiffs were clearly agitating the issue in the 1990's and could have issued proceedings at that point; they have failed to identify specific facts "concealed" by Revenue that could not have been identified by the Plaintiffs with reasonable diligence and which prevented their issuing proceedings. Such reasonable diligence would have involved completing the work which was curtailed (at the Plaintiffs' instigation) during the 1994 audit, with the Plaintiffs' undertaking their own enquiries based on their own statutory records to make their own assessment of their tax liabilities. This would also have included enquiries which the Plaintiffs committed to make in their disclosure undertaking to Revenue such as enquiries of their own banks.

39. Although there is some controversy as to exactly when the Plaintiffs and their advisors finally secured access to the revenue file, the delay in that regard does not explain or justify the delay in launching these proceedings. The Plaintiffs and their advisors were well aware of the basis of the 1995 Settlement (having instigated those discussions and having proposed the Settlement terms). They could have clarified the status of the 051 Account with their bank back in 1994. In any event, the issue had been clarified by the banks' 12 September 2014 letter (if not before), but more than six years were to elapse before proceedings were commenced.

Fraud or Fraudulent Concealment

40. Because the start of the applicable limitation period may be extended in the event of fraud or fraudulent concealment by Revenue or its agents, it is appropriate to consider this aspect in further detail. The Plaintiffs' pleadings are poorly particularised, falling far short of providing the particulars required to ground a plea of fraud. Insofar as I can understand the current plea, fraud seems to be asserted in three ways: firstly, as to the opening of the bank account which the First Plaintiff sees as the basis for the liability underpinning the Settlement; secondly, he claims that Revenue acted fraudulently by agreeing to the Settlement in the absence of a genuine belief that the Plaintiffs owed such monies; and, thirdly, that the failure to make revenue files available sooner constituted fraudulent concealment. The First Plaintiff's submissions confused these distinct allegations, for example stating that:

> "*there was fraud committed which stemmed from the fraudulent bank accounts opened in my name without my knowledge or consent. Unfortunately, the defendant became entangled in the situation and imposed taxes wrongfully on me.…I cannot think for the life of me why they haven't undertaken a thorough investigation into all of these accounts.*"

I do not consider that these arguments withstand scrutiny.

41. As to the first point, the Plaintiffs have not provided sufficient particulars to enable me to understand the circumstances in which the various bank accounts – and the 051 Account in particular – were opened or why such transactions were fraudulent. However, there is no suggestion that Revenue were a participant in or responsible for the opening of the accounts. Accordingly, even if the accounts were indeed fraudulently opened by other parties, that would not provide a basis for the extension of the limitation period *against Revenue*. The Plaintiffs' recourse, if any, would be against the parties responsible.

42. As for the second point, the First Plaintiff's submissions encouraged me to review the contemporaneous Revenue file notes and the correspondence between the parties and I duly

did so. I have seen no basis in the contemporaneous documents or in the pleadings, affidavits and exhibits before the Court on which it could fairly be suggested that Revenue and its representatives were acting other than in good faith in entering the Settlement.

43. As for the third point, there was no fraudulent concealment by Revenue, which was entitled to conclude that the Plaintiffs were not entitled to further information. Indeed, even the nature of the demand demonstrated the Plaintiffs' lack of understanding of their own responsibility to disclose their taxable income. They should have been able, with their advisors' help, to assess their own liabilities– indeed, that seemed to be exactly what they had purported to do when initiating the talks that led to the Settlement.

44. I have seen no basis to allege conduct on Revenue's part that could possibly be characterised as constituting or concealing a cause of action. If the Plaintiffs believed that the basis for the Settlement was flawed, their own investigations could have confirmed the position at the time. They could have confirmed their taxable income and expenditure, etc. They could have put their analysis to Revenue if there was an issue. I have seen no basis for the First Plaintiff's contention that evidence emerged which was so significant as to require Revenue to reopen the basis for the Settlement or that Revenue's alleged failure to undertake further investigations into the 051 Account constituted fraudulent concealment in the circumstances.

45. I should also note that, although the Plaintiffs say that they only established the true position when they finally won access to the file, this is inconsistent with their other claims and their explanation does not justify their delay. They proposed the Settlement in May 1994, reiterating it thereafter and finalising it in October 1995. This can only have been on the basis that, as at that time, they and their advisors believed that it was a fair reflection of the exposures, including in relation to the bank accounts. If there was any uncertainty, then the Plaintiffs could and should have undertaken the necessary investigations at the time.

46. The Plaintiffs' criticism of Revenue for failing to justify the Settlement figure ignores the fact that that figure was proposed by their advisers and also ignores their own responsibilities to file accurate and comprehensive returns – they should have been in a positoin to challenge the Settlement figure at the time, if necessary. Furthermore, there was nothing to prevent the Plaintiffs from undertaking in 1995 the enquiries which they only undertook in 2013. Indeed, the Plaintiffs expressly, but, apparently, inaccurately, represented to Revenue that they were investigating all bank accounts. If they had done what they promised, then the position as to the 051 Account could have been clarified earlier.

47. I cannot determine the true position with regard to the controversial bank accounts or their ownership. Nor is it appropriate that I should make any assessment at this stage as to what the appropriate settlement of the Plaintiffs' tax liability should have been back in 1995. The important point is that the Plaintiffs voluntarily instigated a settlement proposal to which Revenue acceded. Such a voluntary settlement could only be set aside in exceptional circumstances. No plausible basis has been asserted for any entitlement to do so on this occasion. I have seen no basis to suggest that there was any fraud or concealment by Revenue or their agents. Nor can it be alleged that the agreement was reached in error, since the First Plaintiff says that he always knew the figure was wrong but paid it, essentially under protest, to secure tax clearance. His own averments are fatal to his claim from a limitation perspective. He was not paying under a mistaken misapprehension or because the true position was concealed but rather because he did not want to risk jeopardising tax clearance. That was the Plaintiffs' decision. They must live with its consequences.

48. In any event, as I have noted, the Plaintiffs could have clarified the position at the time. They had ample opportunity before the Settlement was concluded. If there had been genuine uncertainty, then the Plaintiffs and their advisors could have sought to agree that they would

reserve their rights on a particular issue (such as the 051 Account). There was no such provision nor was any such "without prejudice" arrangement proposed by the Plaintiffs.

49. Although the Plaintiffs say they only learnt of the 051 Account when they requested a list of accounts from their bank for the purpose of the 2013 audit, the various accounts were very much in issue and, in any event, they could and should have obtained that information from their bank at any time over the previous two decades. Furthermore, although the First Plaintiff claims to have only become aware of the 051 Account in 2013, the contemporaneous records of the 1994 negotiations revealed that much of the discussion was based on the Plaintiffs' disclosure of a TSB account, and the funds in the TSB account appeared to have come from AIB accounts. It is difficult to credit that the Plaintiffs and their advisers did not check the position with regard to all TSB, AIB and indeed any other bank accounts at the time of the Settlement. If they had done so, they would presumably have become aware of the 051 Account. If they failed to do so, then the Plaintiffs were in breach of their declaration to Revenue. They confirmed as part of the Settlement that they were checking details of all of the Plaintiffs' accounts. Revenue was entitled to take them at their word. It seems improbable that the Plaintiffs and their advisers would have agreed to enter into the Settlement unless they believed that there was a reasonable likelihood that their exposure would be at least that figure, and possibly even more. The only explanation proffered by the Plaintiffs was by reference to the need to preserve the tax clearance certificates. However, if there had been a *bona fide* issue, the Plaintiffs could have at least proposed arrangements to protect both parties' position until such issues were resolved. They did not do so.

50. For completeness, one ground of the Plaintiffs' criticism of the Settlement was the contention that Revenue had no proof that the particular taxes were owing. However, this is not a basis to set aside a voluntary settlement. It might be different if either party was proceeding in bad faith and knew that information or figures were false. That is not the position

here. The contemporaneous documents show that both parties agreed that there was a substantial tax liability. Revenue had commenced a tax audit. The Plaintiffs sought to avoid the necessity for that investigation by reaching an early settlement. By definition, settlements involve concessions on both sides, reflecting legal and factual uncertainty and the pragmatic, prudent and mutual acceptance of the desirability of avoiding further effort and expense or risk. These are legitimate reasons for a settlement and are not a basis to subsequently impugn it, even if later events might suggest that, with the benefit of hindsight, a different figure might have been appropriate.

51. I am not convinced that, even with hindsight, the Settlement was unreasonable. However, hindsight would be irrelevant in any event. The Plaintiffs have not identified a plausible basis to assert that, *when it was entered into*, the Settlement was anything other than an appropriate assessment of the Plaintiffs' tax liability, proposed by the Plaintiffs themselves and their advisors, presumably with a view to minimising the Plaintiffs' exposure to interest or penalties (including publication). Even if it later turned out to be a bad deal, that would not be a basis to impugn the Settlement or the motives of the principals.

52. Furthermore, having asked Revenue to settle, rather than continue, the 1994 audit to its conclusion, it is not open to the Plaintiffs to criticise Revenue for acceding to their proposals. In any event, Revenue's calculation suggested a greater taxpayer liability than the Settlement figure (and that figure could have increased further if the audit had been taken to its conclusion). Accordingly, the Revenue file note dated 27 May 1994 contradicts the criticisms advanced by the Plaintiffs and I have seen no evidence to impugn the legitimacy or appropriateness of Revenue's approach. The evidence suggests that Revenue's acceptance of the Plaintiffs' proposal was sensible, pragmatic and fair.

Choice of Deponent

53. I do not consider that there is any substance to the Plaintiffs' criticism of the Defendants' choice of deponent, given the time elapsed since the events and since the key individual has died and others have retired. He was giving evidence as to the Revenue file. The Plaintiffs did not dispute the substance of his testimony and encouraged me to review the contemporaneous documents which he and they exhibited. Accordingly, the choice of deponent was appropriate in the circumstances of the nature of the evidence and of the application. Furthermore, the same evidence would be admissible at plenary hearing, but subject to undertaking, the procedure provided for pursuant to s. 14 of the Civil Law and Criminal Law (Miscellaneous) Provisions 2020.

54. In summary, my conclusion that, even if the Plaintiffs had been able to particularise a basis to invoke section 71, the claim was still statute barred by the time the proceedings were issued is based on the fact that, *inter alia*, in 2013, the First Plaintiff and his then advisor, Mr O'Brien, complained to Revenue that he had been taxed on bank accounts which had "*nothing whatsoever*" to do with him. The Plaintiffs' own submissions' comments in that regard reinforce the conclusion that the claims are statute barred, as does the fact that the First Plaintiff's receipt of a list from his bank in September 2014 which confirmed the existence of the 051 Account, more than six years before the proceedings were issued. In my view, the Plaintiffs knew - or ought to have known - all necessary facts to commence proceedings by that point (if not considerably earlier and, indeed, soon after the Settlement was entered into). The claim is therefore statute barred on the basis of the Plaintiffs' own pleadings and the undisputed evidence.

Dismissal for want of prosecution or on the basis that a fair trial was not possible

55. If I had been satisfied that the claim was commenced within the applicable limitation period, then I would not consider that there was sufficient "*post-writ*" delay to justify the Defendants submission that the proceedings should be dismissed for want of prosecution. However, I do consider that this was the sort of exceptional case in which the Court should invoke its inherent jurisdiction (also reflected in cases such as *O'Domhnaill* v *Merrick* [1984] IR 151 and *Primor*) to dismiss proceedings on the basis that a fair trial was impossible, in view of the time elapsed. At least one key witness has died – the Revenue officer who conducted the 1994-1995 audit. Other witnesses on both sides will presumably have retired in the ordinary course of events and may no longer be available to testify. In some cases, such prejudice is avoided because certain disputes may be largely "document cases", less dependent on oral testimony from original witnesses. However, after all these years, the Plaintiffs are advancing pleas, such as in respect of the "Payment Condition" which are not reflected in contemporaneous documents. Instead, they are based on the belatedly asserted alleged representations on Revenue's part, representations supposedly made over a quarter of a century ago. The potential prejudice to Revenue was actually demonstrated by the Plaintiffs' own objection to the Revenue deponent on these motions, on the basis that he lacked "*detailed knowledge of the case*". It would be invidious and unfair for the Plaintiffs to be allowed advance such broad, serious and unparticularised claims of misrepresentation or fraud so many years after the event in circumstances in which Revenue would be prejudiced in its inability to respond. It would also be unfair from the perspective of the reputation of the individuals involved, particularly those of the deceased witness. In the circumstances, it would be impossible for there to be a fair trial of these claims against any defendant, including an institutional defendant such as Revenue.

56. The prejudice to Revenue as a result of the Plaintiffs' delay is greatly increased by Mr Dalton's death. His significance is demonstrated by the fact that he is personally referenced in the Statement of Claim on at least 22 occasions, the only Revenue employee to have been singled out for individual mention. However, I have seen no basis to doubt his integrity in any respect. The integrity of his actions nevertheless appears to be the primary focus of the Plaintiffs' claim, albeit no factual basis has been advanced other than sweeping assertions.

57. In my view, it would be extremely unfair both to the Revenue Commissioners and to the memory (and family) of the late Mr Dalton to allow the proceedings to continue in such circumstances, particularly since these serious allegations do not appear to have been advanced in Mr Dalton's lifetime when he could have had defended his reputation.

58. There has been no evidence from the Plaintiffs as to any efforts to obtain testimony from Coopers & Lybrand. There was no indication as to what, if any, steps the Plaintiffs have taken to preserve Coopers & Lybrand's files. Since the negotiations took place almost three decades ago and Coopers & Lybrand is no more (having been subsumed into Price Waterhouse Coopers), there must be a serious risk that its files and witnesses will no longer be available. While the absence of any such records could make it difficult for the Plaintiffs to pursue their claim, there must also be a grave concern that the Defendants' ability to obtain a fair trial by demonstrating the extent to which the Plaintiffs and their advisers were contemporaneously aware of the points which, according to the Plaintiffs, only emerged two decades later.

Basis for the Plaintiffs' Claim

59. Although my decision is primarily made on the basis that the claim is statute barred, I would have been inclined to dismiss the proceedings, in any event, on the basis that the claim discloses no reasonable cause of action, amounts to an abuse of process, is bound to fail, or has no reasonable chance of succeeding. In this regard, and particularly given the sensational nature

of the Plaintiffs' claims and the fact that they relate to events which are alleged to have occurred many years ago and to people who are now deceased, it is appropriate to note the points emerging from the more contemporaneous correspondence and other documents as exhibited by either side. While that may not be the totality of relevant documents, they are the documents which the parties considered sufficiently relevant for the purposes of the applications. Having reviewed them, I see no basis to suggest that Mr Dalton's approach was other than professional. Indeed, he seems to have been as sympathetic to the Plaintiffs and as reasonable and pragmatic as circumstances allowed. He acted appropriately. His contemporaneous notes: (i) confirm the conclusion that the Settlement arose from the Plaintiffs' initiative, rather than Revenue's pressure; and (ii) explain his rationale for recommending a settlement although the taxpayer's actual liability could well have been higher (even leaving aside the time, effort and evidential challenges of investigating the issue in the hope of establishing a higher liability, it seemed that the Plaintiffs would not have been in a position to pay such a higher figure in any event).

60. Although the First Plaintiff refers to "*duress*", by which he apparently means the possibility of the withdrawal of his tax clearance certificate, two issues arise. Firstly, his complaints emphasise the pressure that he considers he was placed under was *by his own advisers*. We do not have the benefit of their testimony and can only assume that they gave advice which they believed to be in their client's best interest, recommending the Settlement as being the best outcome he was likely to achieve. They would have been negligent if they had proceeded on any other basis, and I have seen no basis to suggest that they were negligent. Nor would it be proper for any such allegation to be advanced against them in the absence of a detailed analysis and expert evidence.

61. More importantly, however, the communications between the Plaintiffs and Cooper & Lybrand were a matter for them alone. Revenue was not party to that professional relationship. The interaction between the Plaintiffs and their advisers could not constitute duress. Even if

there was a deficiency with regard to the professional advice – and, in fairness to the advisors, I should note that I have seen no evidence to support such a suggestion – it would not avail the Plaintiffs. Revenue dealt with the Plaintiffs and their advisers in good faith. There is no suggestion that they had any reason to consider that the Plaintiffs were inappropriately prevailed upon in any way. At its height, the Plaintiffs' position would be analogous to that of the defendant in *Everyday Finance DAC v Flood* [2024] IEHC 252. In that case, Stack J. determined that the defendant remained liable pursuant to a guarantee despite the fact that she had been badly advised in relation to entering into the guarantee. The lender had insisted that she received independent legal advice; it was not responsible when it transpired that, unbeknownst to it, the advice was negligent. That was an issue between her and her advisor. The position would be the same here if there was any basis to impugn the advice received by the Plaintiffs at the time of the Settlement (however, there has been no evidence in that regard).

62. Furthermore, I accept Revenue's submission that the granting of tax clearance certificates is governed by statute, with Revenue being required to certify compliance with the legislation. In circumstances in which the Plaintiffs themselves had disclosed that they were not compliant, the risk to certification arose from the Plaintiffs' own acts and omissions rather than from any Revenue action. Revenue's reference to the certification issue did not constitute duress or undue influence.

63. I agree with and endorse the principles summarised by Revenue in their 28 September 2018 letter, including as to the legitimacy of the Revenue's concern to ensure finality with regard to any settlement – such arrangements can generally not be reopened save in exceptional circumstances such as where they are vitiated by fraud or perhaps by a fundamental factual misapprehension. Whereas the Plaintiffs may have had second thoughts over the years, "*buyer's remorse*" is not a basis to set aside a settlement. Although the Plaintiffs complain about confusion with regard to their liabilities, they must bear the responsibility for any such

confusion and/or any failure to exhaustively investigate the total extent of their liabilities at the time of the Settlement. Having had the benefit of assistance from expert tax advisers, the Plaintiffs made a considered decision to proceed with the Settlement. They have not shown any basis to resile from that agreement.

64. I am not unsympathetic to the fact the First Plaintiff's literacy issues which may explain, firstly, the problems which led to the issues arising in the first place and, secondly, his evident disagreements to what was agreed in 1994/1995 and the basis for such agreement. However, while it is clear that the Plaintiffs' affairs were in disarray at the time of the commencement of the 1994 tax audit, it appears that the First Plaintiff recognised this. He obtained expert help. His expert advisers, who were fully aware of his literacy issues, were evidently satisfied that, having consulted with the Plaintiffs, they were in possession of sufficient facts to make a proposal to Revenue, a proposal which they could not have made other than on the Plaintiffs' instructions. In addition, there was ample time for the Plaintiffs to reflect and to obtain further advice before the Settlement was eventually finalised months later. They were not subject to improper or unlawful pressure from the Revenue.

65. The Plaintiffs have not identified any stateable basis on which to impugn the agreement, particularly since the Plaintiffs were expertly advised and there is no suggestion of any deficiency in the quality of such advice.

<u>Other Issues</u>

66. Even leaving aside the limitation issues, the Plaintiffs' claims would be beset with fundamental factual and legal obstacles. These include:

a. The fact that the claims advanced seem to seek to place responsibility on Revenue for an alleged misapprehension as to the Plaintiffs' tax liabilities, without regard to

the Plaintiffs' own responsibilities both in respect of their original tax returns, their disclosures and their own actions in negotiating the settlement.

b. The extent to which the claim is premised on an undocumented term - the "Payment Condition". I agree with that it is inherently implausible that Revenue would ever have agreed to a settlement in the elastic terms apparently contended for by the Plaintiffs – it would make no sense to agree a settlement first and then to determine what was owed with a view to renegotiation. If that had been the intention, it is more likely that the Plaintiffs' advisors might, perhaps, have proposed alternative arrangements, such as an "*on account*", without prejudice payment to preserve each side's position while the issues were litigated.

c. In any event, the alleged Payment Condition was not referred to in the contemporaneous communications recording the terms of the 1995 Settlement. I agree with Revenue's submissions, (citing *Law Society of Ireland v MIBI* [2017] IESC 31) that the circumstances in which a court will re-draw a contract are "*strictly circumscribed*". It is not evident to me that there would be any basis to do so in this case (even if the claim was not statute barred).

d. Even apart from the limitation period, the Plaintiffs' delay for so many years in seeking to set aside the 1995 Settlement would give rise to an answerable defence of *laches*, to the extent that the Plaintiffs seek equitable relief.

e. The Plaintiffs' failure to exercise rights of appeal or to issue proceedings or take points at the relevant time would, in my view, estop them from doing so at this remove. I do not accept the explanation advanced by the Plaintiffs for their failure to do so on the basis that such appeals would have been futile, in light of Revenue's continued ignoring of breaches of procedure and criminality.

f. No express claim appears to be advanced on the basis of the compensation to which the First Plaintiff claims to be entitled, I do not understand that there is any basis to assert any entitlement to such compensation in any event.

g. Although the reference to "*compensation*" confuses matters, it may be that the Plaintiffs intended to articulate a claim that, with their help, Revenue identified the party responsible for the tax arising from the transactions referenced in the 051 Account and, on that basis, the Plaintiffs should have received a refund, to the extent that the 1995 settlement was based on a premise that they were liable for the tax in question. Otherwise, Revenue would have been paid twice. If that was the intended claim, it would need to be fully pleaded and particularised, but it would appear to be statute barred in any event.

67. For completeness, I should note the possibility that the First Plaintiff's understanding of a "*Payment Condition*" might be based on the contemporaneous references to the additional information and documents which Revenue required. If so, he has misinterpreted the position. I understand that any Revenue settlement will be expressed to be subject to their full disclosure *by the taxpayer*. Accordingly, it is not surprising that Revenue should have required additional information and documentation in respect of certain issues. However, such stipulations were for Revenue's benefit, to confirm that they had been told the full story. I do not believe that any such references could be reasonably interpreted as a contractual commitment by Revenue to provide information to the First Plaintiff to justify the basis for the Settlement. The converse was far more likely. I expect – and Revenue would be entitled to assume - that the First Plaintiff's professional advisers would have advised him of his disclosure obligations (particularly in the circumstances as outlined by them to the Revenue Commissioners). I believe that it is normal for Revenue settlements to stipulate that they can be reopened if it turns out that the taxpayer has withheld relevant information or has acted fraudulently.

However, any such provision is designed to protect Revenue, not the taxpayer. It is the taxpayer who should be in possession of the relevant information about his liabilities, and he is obliged to disclose the information. Accordingly, if this was the basis upon which the Plaintiffs contend for the Payment Condition then I believe they are mistaken – any such stipulation was clearly intended for Revenue's benefit, rather than for theirs.

68. It is impossible to glean from the pleadings any basis for the Plaintiffs' contention that section 865 is unconstitutional or incompatible with the European Convention on Human Rights and I have no hesitation in concluding that there is no substance to that claim.

69. For completeness, I am not convinced by the references in the Plaintiffs' submissions and affidavits to parts of the Revenue file having been wrongfully withheld. The Plaintiffs availed of their right to appeal in respect of that issue to the Information Commissioner, but the latter upheld the Revenue decision. There is no evidence before the Court of any basis to suggest the documents have been wrongfully withheld, nor have the Plaintiffs offered any specifics to justify their contention by indicating what documents have supposedly been withheld or by explaining the prejudice to their ability to initiate proceedings.

Conclusion

70. On the basis of the pleadings, affidavits and contemporaneous documents, the claim is clearly statute barred and there is no basis to extend the relevant limitation periods. In any event, the Plaintiffs' delay has been such as to render a fair trial of these proceedings impossible from the perspective of Revenue and in view of the nature of the Plaintiffs' allegations. In any event, I consider, for the multiple reasons outlined above, that even leaving aside issues of limitation and delay, I should strike out the claim on the basis that it discloses no reasonable cause of action, amounts to an abuse of the process of the Court, or is bound to fail.

71. Since Revenue has been wholly successful, I propose to direct, in accordance with Order 19, rule 28(4) RSC, that the Plaintiffs must pay Revenue's costs on the applications and in respect of the proceedings generally, such costs to be taxed in default of agreement. However, the parties have leave to file submissions (of 2,500 words or less) within 21 days of this judgment if they wish to contend that any other order may be appropriate.