THE HIGH COURT

[2021] IEHC 218

[Record No. 2016/3851 P.]

BETWEEN

ALTAN MANAGEMENT (GALWAY) LIMITED

PLAINTIFF

AND

TAYLOR ARCHITECTS LIMITED, HUGH GRIFFIN ASSOCIATES

AND

CORDIL CONSTRUCTION LIMITED (IN RECEIVERSHIP)

DEFENDANTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the 16th day of March, 2021

Introduction

1. This matter comes before the court in circumstances where, on 8th January 2020, the First Named Defendant issued a motion seeking an order pursuant to Order 8, rule 2 of the Rules of the Superior Courts setting aside an order of 24th June, 2019 renewing the plenary summons dated 29th April, 2016.

The Order of 24th June, 2019

2. The order made on 24th June, 2019 (Meenan J.) refers to the application which was made *ex parte* by the Plaintiff, grounded on the affidavit of Ms. Niamh Burke of 14th May, 2019. The operative part of the order states as follows:- *"And the Court being satisfied having regards to Order 8, Rule 1(4)* ***that the following special circumstances justify*** *the making of an Order extending the time for leave to renew the summons namely* ***the non-existence of an expert report*** *and it appearing that* ***the defendants were at all stages on notice of the issues in these proceedings****"* (emphasis added). The order provided that, pursuant to O. 8, r. 1, the plenary summons be renewed for a period of three months.

Order 8

3. O. 8, r. 1 of the Rules of the Superior Courts, 1986, as substituted by the Rules of the Superior Courts (Renewal of Summons) 2018 (S.I. No. 482 of 2018) came into operation on 11th January 2019. Sub-rule (1) of O. 8, r. 1 provides that no summons shall be in force for more than 12 months and a Plaintiff may apply, prior to the expiry of 12 months, to the Master for leave to renew. Sub-rule (2) provides that the Master may order the summons to be renewed for three months if satisfied that reasonable efforts have been made to serve or for other good reason. Sub-rule (3) provides that, after the expiration of 12 months and notwithstanding an order made under sub-rule (2), the relevant application must be made to the court. That is what occurred in the present case, resulting in the 24th June, 2019 order. For present purposes, sub-rule (4) is of particular relevance and states the following: *"The Court on an application under sub-rule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are* ***special circumstances which justify an extension, such circumstances to be stated in the order****."* (emphasis added)

4. There are two special circumstances stated in the order of 24th June, 2019, which I highlighted in bold in para.2 above, namely (1) "*the non-existence of an expert report*"; and (2) "*it appearing that the defendants were at all stages on notice of the issues in these proceedings*". At the heart of the application before this Court is whether, in light of the evidence before the court, there were special circumstances justifying the renewal. This is not an appeal against the order made on 24th June, 2019, nor is it an application for judicial review. Rather, it is an application made pursuant to O. 8, r. 2 which provides as follows:-

> *"In any case where a summons has been renewed on an* ex parte *application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."*

5. The First Named Defendant, being the Applicant, was not heard at the *ex parte* stage. Thus, this application constitutes a full *de novo* consideration of whether the summons ought to be renewed. For the purposes of the hearing which took place on 23rd February, 2021, I was provided with a book of pleadings, a book of motion papers, a book of correspondence and a book of authorities. No written submissions were prepared by either side but Counsel made very helpful oral submissions during the hearing. I have carefully considered all of the foregoing. An analysis of the evidence before the court reveals the following which I propose to set out in chronological order for ease of reference.

2004

6. A development was constructed at Altan, Western Distributor Road, Knocknacarra, Galway in or about January, 2004.

25th March, 2015 Letter from Plaintiff's Solicitors to Eamonn McCarney Esq

7. On 25th March, 2015, Messrs D.M. O'Connor & Co., solicitors for the Plaintiff, wrote to "*Eamonn McCarney Esq, Taylor Architects*" on behalf of their client, which was named in the said letter as "*Altan Management Company Limited*". The title of the letter was stated to be in relation to *"Development at Altan, Western Distributor Road, Knocknacarra, Galway"* and the letter stated the following:-

> *"We are instructed by Altan Management Company Limited in relation to a development at Altan, Western Distributor Road, Knocknacarra, Galway.*
>
> *We note that your client Mr. McCarney was involved while the project was being developed.*
>
> *We have been instructed by the management company to regularise all matters pertaining to the development insofar as it is possible and in this regard we are endeavouring to obtain whatever documentation we can to allow for this to be done.*
>
> *We should be very much obliged if you would review your files and confirm what papers if any you hold and further we should be obliged to receive copies of same.*

We are anxious to make progress in the matter and a response by return would be greatly appreciated."

8. A number of comments can fairly be made in relation to the foregoing letter. It was sent 11 years after the completion of the development in question. Although the letter states that the solicitors have been instructed "*to regularise all matters pertaining to the development",* it is not said what those matters are. For example, no indication is given in the letter as to whether those are legal matters or matters relating to title or matters concerning insurance or matters relating to development works. This letter could not possibly be interpreted as a letter of claim. None is identified and none is made. It was also a letter addressed to Mr. McCarney and one in which Mr. McCarney's involvement in the "project" was referred to. Thus, as well as not being a letter of claim against Taylor Architects, it is a letter directed to a named individual.

19th May, 2015 Letter from Plaintiff's Solicitors to Mr. Eamonn McCarney

9. Approximately two months later, D.M. O'Connor & Co. Solicitors wrote again to "*Mr. Eamonn McCarney, Taylor Architects*", naming their client and referring to the development. The letter stated the following:-

"Further to our letter dated the 25th March, we enclose herewith copy Certificate of Compliance and note your involvement in the development at Altan, Knocknacarra, Galway.

You will be aware that we are seeking copies of the designs and drawings and we should be obliged if you would furnish copies to us forthwith together with copies of all relevant contracts, terms of appointment relating to the development.

We await hearing"

10. As with the 25th March, 2015 letter, there was no identification, with any particularity, of the issues of concern to D.M. O'Connor & Co.'s client. Nor was any claim made, or intimated, be that against Mr. McCarney, to whom the letter was addressed, or against Taylor Architects. The Certificate of Compliance which is referred to in the 19th May, 2015 letter is a document dated 8th December, 2004 which was signed by Mr. McCarney in his capacity as a registered member of the Royal Institute of the Architects of Ireland. The Certificate comprises an opinion of compliance with planning permission and with building regulations in respect of what is described as "*Apartment No. 96, Altan Apartments, Western Distributor Road, Kingston, Galway".* It is given on the basis of the terms and details set out therein. Among these are *inter alia* the following:-

"This opinion is based on the Visual Inspection only of the Relevant Development carried out for the purpose of comparison of such with the Relevant Documents. It is solely for the purpose of providing evidence for title purposes of the compliance of the Relevant Development with Planning Permission within the meaning of the Planning Acts. Except insofar as it relates to such compliance it is not a report on the condition or structure of the Relevant Development.";

"On 18 October 2004 I inspected the relevant documents at the offices of Galway City Council";

"On 20 October 2004 (the "Inspection Date") I carried out a Visual Inspection of the relevant development for the purposes of comparison of the relevant development with the relevant documents."

11. Insofar as the architect's opinion on compliance with building regulations is concerned, the relevant certificate states, *inter alia*:-

"3. DESIGN – I am of the opinion that the Design of the relevant building or works is in substantial compliance with the building regulations. I have received confirmations from those detailed at Schedule A hereto stating that elements of the relevant building or works which they have designed are in substantial compliance with the building regulations. This opinion relies solely on those confirmations in respect of such elements."

The following page comprises "*SCHEDULE A: Confirmations*". These include confirmations by the building contractor, identified as Cordil Construction Ltd of Unit 4, Sean Mulvoy Road, Galway, the relevant element in respect of which confirmation was given being stated to be "*construction of the relevant building or works*". Further confirmations are given under the headings of structural engineer; mechanical ventilation; lift; fire alarm; smoke alarm; fire detection system; emergency lighting; fire doors; fire stopping/fire barriers; Schedule B: fire safety certificates; and Schedule C: commencement notices. For example, confirmations are given by the following parties in respect of the following elements:-

- Consultant/specialist: H&F Electrical;

  Element: design and installation of smoke alarm;

- Consultant/specialist: Apex Fire Ltd;

  Element: design and installation of fire detection system;

- Consultant/specialist: Shannon Boros Longford Ltd;

  Element: design and installation of fire doors;

- Consultant/specialist: Ardseal Ltd;

  Element: design and installation of fire stopping.

12. The 19th May, 2015 letter which enclosed the copy Certificate of Compliance dating back to 8th December, 2004, did not identify the particular issue or issues of concern. Thus, the 19th May, 2015 letter provided no clarity as to whether the issues were, for example, structural, or concerned ventilation, or related to fire alarms, or to lighting or concerned planning or building regulations or related to title or related to any other of a potentially

very large number of possible issues. Indeed, the request that Mr. McCarney provide "*designs and drawings*" as well as "*copies of all relevant contracts, terms of appointment relating to the development*" meant that the addressee could not possibly know what issue or issues were of concern to those seeking the designs, the drawings and all contracts and terms of appointment relating to the development.

11th August, 2015 Letter from Plaintiff's Solicitors to Mr. Eamonn McCarney

13. On 11th August, 2015, Messrs D.M. O'Connor & Co. Solicitors wrote again to "*Mr. Eamonn McCarney, Taylor Architects".* The letter again referred to their client and to the development and stated as follows:-

> *"Our letter dated the 19th of May refers and note that we have not had a response.*
>
> *Please note that we have firm instructions to take whatever measures are necessary to protect our client's interests and we reserve the right to do so without further notice to you if it is the case that a response is not forthcoming.*
>
> *We will afford you a further period of 14 days to comply with our request without further action being taken. We await hearing."*

14. There was no indication in this letter as to what issue or issues were of concern. The letter plainly repeated a request that copy documents be provided, but there was no indication as to the precise nature of the issues. D.M. O'Connor & Co. referred to their firm instructions to take "*whatever measures are necessary*" to protect their client's interests but it is not at all clear what those measures were or what "*interests*" required the taking of measures to protect. There was no claim made in this letter. There was no request that Mr. McCarney or, for that matter, Taylor Architects should contact insurers. This correspondence could not fairly be considered to be a "letter before action".

15. It is uncontroversial to say that, prior to instituting legal proceedings, it is typical for a Plaintiff's solicitors to write to an intended defendant setting out what is alleged to be the legal duty owed by that intended defendant and identifying what is said to be the breach of duty which allegedly occurred, as well as the loss said to have arisen for the intended Plaintiff and a call is typically made upon the intended defendant to compensate the intended Plaintiff for the alleged loss in default of which legal proceedings will issue. Had this been done, it would be fair to say that Mr. McCarney and the First Named Defendant would have been placed on notice of the issue or issues in subsequent proceedings. The evidence before this court demonstrates that this was never done in the present case.

16. Where no letter before action is sent prior to proceedings and where an intended defendant is not given any opportunity to understand the issues of concern and to engage, in advance of proceedings, with the intended claim, this can have consequences, in particular as regards costs, even where the Plaintiff is ultimately successful. That costs issue is not of concern in the present proceedings, but it will be recalled that the second of the "*special circumstances*" stated in the 24th June, 2019 order concerned the

defendants being "*at all stages on notice of the issues*" in the proceedings. The correspondence examined thus far paints an entirely different picture.

29th April, 2016 – Plenary Summons issued

17. On 29th April, 2016, the Plaintiff issued a plenary summons, the indorsement of claim to which provides as follows: "*The Plaintiff's claim is for damages for loss, damage and expense suffered and sustained by them as a result of the negligence, breach of duty, breach of statutory duty and breach of contract by the defendants, their servants or agents or one or other of them in or about the construction of Altan Apartments, Western Distributor Road, Kingston, Galway in or about January 2004*." In the three letters sent by D.M. O'Connor & Co. Solicitors, in 2015, their client was consistently described as *"Altan Management Company Limited".* The Plaintiff in the plenary summons which issued on 29th April, 2016 is described "*Altan Management (Galway) Limited*". Furthermore, the three letters sent by D.M. O'Connor & Co. in 2015 were addressed to "*Eamonn McCarney Esq", "Mr. Eamon McCarney"* and *"Mr. Eamon McCarney*", respectively. As well as not asserting any specific claim, it was never made clear whether such issues or concerns as Altan Management Company Ltd might have had, were issues directed to Mr. McCarney, to whom the letters were addressed, or constituted issues with Taylor Architects. This is appropriate to mention in circumstances where the plenary summons, which was issued unbeknownst to either Mr. McCarney or Taylor Architects, named *"Taylor Architects Limited*" as the First Named Defendant, not Mr. McCarney, the addressee in the correspondence.

18. In the general indorsement of claim a range of legal wrongs are asserted against the defendants, but no specifics are set out in the plenary summons with regard to the basis upon which the claims are made. It is uncontroversial to say that it is not possible to determine the precise nature of the Plaintiff's case against Taylor Architects Ltd. from the contents of the general indorsement of claim, insofar as the alleged duty, the alleged breach and the alleged loss are concerned. It is also appropriate to note that this plenary summons was not served on Taylor Architects Ltd at any point within 12 months of 29th April, 2016. There is no evidence before this Court of any effort made by or on behalf of the Plaintiff to serve the plenary summons within that period or indeed at any time until after the renewal, three years later.

24th May, 2016 Letter from Plaintiff's Solicitors to Taylor Architects Ltd

19. On 24th May, 2016, the Plaintiff's solicitors sent a letter, this time addressed to *"Taylor Architects Ltd*", not to Mr. McCarney. It is appropriate to set out the contents of that letter in full as follows:-

"Re: The High Court Record No. – 2016 3851P

Altan Management (Galway) Ltd. v. Taylor Architects Ltd, Hugh Griffin Associates and Cordil Construction Ltd (In Receivership*)*

Dear Sirs,

We refer to the matter noted above and we should be obliged if you would nominate a firm of Solicitors to accept service of High Court proceedings in this matter within seven days from the date hereof failing which we will arrange for same to be served on you directly.

We await hearing."

20. This is the first indication of the existence of a High Court claim, being a claim made against Taylor Architects Ltd (the addressee in the 24th May, 2016 letter), as opposed to being against Mr. McCarney (the addressee in all three letters sent in 2015). No explanation has been offered for the delay between the 11th August 2015 letter to Mr. McCarney and the 24th May 2016 letter referring to proceedings against Taylor Architects Ltd. The 24th May 2016 letter did not enclose a copy of the 29th April, 2016 plenary summons. The contents of the 24th May, 2016 letter provides no further clarity in relation to the precise nature of the claim. In other words, from the perspective of someone trying to understand the legal obligations asserted, the alleged breach of such legal obligations and the nature and quantum of loss allegedly sustained, this letter elucidates none of those things. Similar comments apply in relation to the three previous letters dated March, May and August, 2015. It is beyond doubt that no "letter before action" which gave adequate notice of the issues in dispute was ever sent and I am entirely satisfied that this 24th May, 2016 letter did not put the First Named Defendant on notice of the issues in dispute in the proceedings either.

21. It is clear from the contents of this 24th May, 2016 letter that Taylor Architects Ltd were asked to nominate a firm of solicitors to accept service of proceedings within seven days, in default of which the Plaintiff's solicitors "*will arrange to be served on you directly*". The foregoing is an explicit statement made to the effect that service "will" be arranged. Service was not arranged. Service was never effected on the First Named Defendant, despite the fact that it did not nominate a firm of solicitors to accept service.

22. In para. 7 of the affidavit of Ms. Niamh Burke, sworn 10th May, 2019 to ground the Plaintiff's *ex parte* application, she makes, *inter alia*, the following averment:-

"I say and am advised that the Plaintiff could not serve the Plenary Summons until it had a report detailing the defects and damage in the apartments. The proceedings have not therefore been served upon the Defendant within the time prescribed by the Rules of the Superior Court."

It has to be said that the letter from D.M. O'Connor & Co. Solicitors dated 24th May, 2016 is impossible to reconcile with the foregoing averment made 3 years later in May 2019. The 24th May, 2016 letter neither states nor intimates that the Plaintiff "*could not serve*" the plenary summons by reason of the absence of a report, or for any other reason. On the contrary, the letter is explicit about the fact that, unless solicitors are nominated to accept service, arrangements *will* be made to serve the First Named Defendant directly.

23. Furthermore, in para. 8 of her 10th May, 2019 affidavit, Ms. Burke avers, *inter alia*, that "*I say and am advised that there is no prejudice to the Defendant as they are aware of these issues*". This averment is mirrored in para. 7 of Ms. Burke's affidavit sworn on 25th June, 2020 in opposition to the present application wherein she avers, *inter alia*, as follows:"*I say that the Defendants have always been aware of the claim being advanced against them*…" An analysis of the evidence before this Court wholly undermines those averments. In other words, having regard to the evidence, it could not be said that the First Named Defendant has always been aware of the claim being advanced by the Plaintiff or that the First Named Defendant was at all stages on notice of the issues in the proceedings. One of the special circumstances stated in the order dated 24th June 2016 is wholly unsupported by the evidence before this Court.

Mr. McCarney's contact with the Plaintiff's Solicitor and Engineer in 2016

24. In his affidavit sworn on 6th January, 2020 to ground the present application, Mr. McCarney makes the following uncontroverted averments in relation to what he did after receiving the 24th May, 2016 letter from the Plaintiff's solicitors:-

> *"On receipt of the aforementioned letter, your Deponent contacted the office of the Plaintiff's solicitors and inquired as to what the issue was grounding these proceedings. I spoke with the Plaintiff's solicitor who stated that the matter concerned the construction of the Altan apartments which, at that stage, had been completed over 11 years previous.* **I asked what the specific issue was but the solicitor said he was not able to tell me exactly what the issues were***. He said that the residents had commissioned an engineer to prepare a report and he said that I could talk to the engineer if I wished***. The Plaintiff's solicitor informed me that the engineer in question was Mr. Fergal Bradley of Eyre Square, Galway. I contacted Mr. Bradley thereafter who indicated to me that a report had in fact been prepared and that once his clients gave him permission to do so he would release the report to me***." (emphasis added)**

25. A number of comments can be made in relation to the foregoing. Despite going to the trouble of telephoning the Plaintiff's solicitor and asking what the specific issue was, Mr. McCarney was not provided with the information he requested. In other words, apart from being told that the matter concerned the construction of apartments completed 11 years previously, it could not fairly be said that the First Named Defendant was made aware, with anything like sufficient detail, of what constituted the issues in the proceedings. The Plaintiff's solicitor did not write any further letter detailing what the specific issue was, or what the issues in the proceedings were, and there is no claim made on behalf of the Plaintiff that any such letter was sent at any point. Nor does the Plaintiff assert that, during the aforesaid telephone conversation in 2016, a detailed setting out of the issues was provided by the Plaintiff's solicitor. No such claim is made, the foregoing being uncontroverted averments.

26. It is also clear that following receipt of the 24th May 2016 letter, Mr. McCarney also went to the trouble of contacting the engineer identified by the Plaintiff's solicitor, namely Mr. Fergal Bradley. It is not asserted on behalf of the Plaintiff that Mr. Bradley furnished,

verbally or in writing, details of the nature of the Plaintiff's claim or any duty the First Named Defendant was alleged by the Plaintiff to have breached or any loss the Plaintiff claimed to be the responsibility of the First Named Defendant. No such assertion is made on behalf of the Plaintiff. In short, the evidence undermines the proposition that the First Named Defendant was at all stages on notice of the issues in the proceedings. The contrary is the position. Even after speaking with both the Plaintiff's solicitor and the Plaintiff's engineer, in 2016, the issues in the proceedings were not explained to the First Named Defendant.

27. Furthermore, the evidence before this court is that Mr. Bradley, the Plaintiff's engineer, confirmed to Mr. McCarney during their conversation in mid-2016, that a report had been prepared for the Plaintiff and that once the Plaintiff gave Mr. Bradley permission to release same, the report would be provided to Mr. McCarney. This uncontroverted averment made in Mr. McCarney's 6th January, 2020 affidavit is entirely consistent with the contents of the letter he wrote to the Plaintiff's solicitor on 6th July, 2016, to which I now turn.

6th July, 2016 Letter from Mr. Eamonn McCarney to Plaintiff's Solicitor

28. On 6th July, 2016, Mr. McCarney of the First Named Defendant wrote to Mr. Brendan O'Connor of D.M. O'Connor & Co., solicitors for the Plaintiff, in relation to *"Altan Management Ltd"* and the text of that short letter stated the following:-

> *"We confirm receipt of your recent letter regarding the above and have requested a copy of the relevant report from Fergal Bradley, Eyre Square, Galway.*
>
> *We will be in contact when we receive the report.*
>
> *Yours sincerely"*

29. During the course of submissions at the hearing of this matter, it was acknowledged by counsel for the Plaintiff/Respondent that Mr. McCarney did contact Mr. Bradley in 2016 and that Mr. McCarney was never provided with Mr. Bradley's report.

The Report prepared by Fergal Bradley & Co. in 2016

30. Exhibit "NB4" as referred to in the affidavit of Ms. Niamh Burke, sworn 25th June, 2020 comprises a fifteen-page report by Fergal Bradley & Co. Ltd Chartered Building Surveyors – Chartered Building Engineers – Project Managers. It is stated on p. 1 to be ***"Fire Safety Audit Report; Property Inspected:*** *Altan Apartment Development, Western Distributor Road, Galway;* ***Report prepared on behalf of****: Altan Management Galway GLC".* On any analysis, this is a report by the Plaintiff's expert engineer. Nowhere does the report state that it is a "draft". It is appropriate to quote, *verbatim*, the following paragraphs which begin on p. 2 and continue into p. 3 of the said report:-

> ***"1.0 Introduction***
>
> *Fergal Bradley & Co. Ltd. have been retained by Altan Management Galway GLC to undertake a review of the Altan Apartment Development, Western Distributor Road,*

Knocknacarra, Galway (herein after referred as the relevant property) with respect to compliance with Part B of the Building Regulations 1997 and granted Fire Safety Certificates.

2.0 The Relevant Property

The relevant property comprises 3 no, (three story over basement carpark) apartment blocks constructed circa 2004.

3.0 Investigative Works

The schedule of works outlined at Section 6 of this report has been prepared following a number of opening up works undertaken by contractors appointed by Tarpey Maloney Properties (the managing agents) at various locations including…

1. *Compartment junctions on external elevations.*
2. *Compartment wall/floor junctions at ground, first, second and third floor levels.*
3. *Compartment wall/roof junctions at third floor level.*
4. *Compartment wall/fire door frame junctions.*
5. *Internal service risers.*

4.0 General Findings

It was generally observed that the relevant property has not been constructed in compliance with Part B of the Building Regulations 1997 nor the granted Fire Safety Certificates, for various reasons including…

1. *Inadequate and/or non-provision of compartmentation between apartments and common areas.*
2. *Inadequate and/or non-provision of compartmentation between apartments both horizontally and vertically.*
3. *Inadequate and/or non-provision of fire stopping at required location.*
4. *Inadequate and/or non-provision of fire rated door sets.*
5. *Inadequate protection of structural elements.*

5.0 Certificates of Compliance

We have been provided with various Certificates of Compliance/Conformance Certificates by the managing agents for construction elements including…

1. *Fire door assemblies.*

2. *Glazed fire screen assemblies.*

3. *Lift installations.*

4. *Fire detection and alarm systems.*

We have placed reliance upon this documentation, and therefore no remedial works, other than those listed, are included within this report for such components.

6.0 Works Required

See floor plan drawings at appendix 1 of this report for locations referenced below…"

31. The report goes on to detail works which are said to be required in relation to Block C (basement level, ground floor level, first floor level, second floor level, third floor level, roof level and generally) and to Block A (basement level, ground floor level, first floor level, second floor level, third floor level, roof level and generally) and to Block B (basement level, ground floor level, first floor level, second floor level, third floor level, roof level and generally).

32. Paragraph 9 of Ms. Burke's 25th June, 2020 affidavit begins with the averment:-

"I say and believe that a draft report was prepared by Mr. Bradley, the Plaintiff's engineer in 2016. However, as averred above, this only dealt with issues pertaining to the planning status of the development."

Although Ms. Burke describes the report as a "*draft*", there is no evidence in the report exhibited by Ms. Burke to support that description. There is no affidavit by Mr. Bradley in which he asserts that it was a draft, nor has Mr. Bradley said so in correspondence. Although the report is undated, it does not purport to be a draft. It is a report prepared by Mr. Bradley, engineer, in 2016 at the Plaintiff's request and in accordance with the terms detailed in paras. 1 – 6 of the report itself (quoted above). Furthermore, the averment by Ms. Burke that this report only dealt with issues pertaining to the *"planning status"* of the development is wholly at odds with the contents of the report, the very title of which is a "*Fire Safety Audit Report*". As a matter of fact, the report does not only deal with issues pertaining to planning status. The evidence before this Court confirms beyond doubt that this report was prepared in 2016 and was available to the Plaintiff and dealt with, *inter alia*, fire safety issues. Leaving aside Ms. Burke's claim that this was a "*draft repo*rt" and that it dealt only with planning status, her averments in para. 9 of her 25th June, 2020 affidavit constitute an acknowledgement on behalf of the Plaintiff that the Plaintiff's engineer prepared a report in 2016. This is important because, in Ms. Burke's affidavit sworn on 10th May, 2019 to ground the *ex parte* application, she makes the following averment:-

> *"I say that on or about the 26th February 2019 that the Plaintiff received a draft report dealing with the numerous defects in the apartments. I beg to refer to a copy of the said draft report upon which marked with the letter "NB1" I have signed my name prior to the swearing hereof."(emphasis added)*

Exhibit "NB1" to Ms. Burke's 10th May 2019 affidavit comprises the very same report (namely the Fergal Bradley & Co. Ltd "*Fire Safety Audit Report*") which comprised exhibit "NB4" to Ms. Burke's 25th June, 2020 affidavit. In other words, at the *ex parte* stage, the court was told that this report was provided to the Plaintiff on 26th February 2019 whereas, in opposing the Applicant's motion, this Court is told that the self-same report was prepared in 2016. In case there was any doubt about what the Plaintiff was saying, Messrs HOMS, Solicitors for the First Named Defendant wrote to the Plaintiff's solicitors, on 12th September 2020, a letter which stated, *inter alia*, the following*:"For the avoidance of any doubt, you might please confirm by return that the undated report of Fergal Bradley at exhibit "NB4" is the report which was received by the Plaintiff from Mr. Bradley in 2016 as referred to by Ms. Burke*." In response to that letter which was sent by email on 12th September 2020, the Plaintiff's solicitor replied as follows on 14th September, 2020: "*Your email of the 12.09.2020 refers. Yes, this is one and the same report and being the same report exhibited to the affidavit of Niamh Burke dated the 10 May 2019 and marked with NB1."* The foregoing exchange, which appeared in the booklet of inter partes correspondence, was opened to the court during the hearing.

Differences between what the court was told on 24 June 2019 and what this court is told

33. The foregoing is of fundamental importance to the present application. At the *ex parte* stage, the court was told that the report had only been received on or about 26th February 2019 (para. 6 of Ms. Burke's 10 May 2019 affidavit) and it was averred that the Plaintiff could not serve the plenary summons until it had such a report (para. 7 of Ms. Burke's 10 May 2019 affidavit). Relying on the foregoing averments, the first of the special circumstances stated in the court's 24th June 2019 order is *"the non existence of an expert report*". Despite this, it now appears that this report was actually prepared in 2016. Thus, the evidence before this Court utterly undermines the existence of what the court at the *ex parte* stage found to be the special circumstance.

34. Put simply, the Plaintiff is acknowledging before this Court, in an interlocutory application, that the report was available in 2016, having, at the *ex parte* stage, given Meenan J. to understand that there was no expert report available until February 2019. When one compares what Meenan J. was told at the *ex parte* stage with what this Court is being told, the result is that two mutually inconsistent averments appear to have be made in respect of the self-same report. It also has to be said that the Plaintiff has not even attempted to explain how this occurred. This is sub-optimal to say the least and I will return to this topic at the end of the judgment.

35. The existence of what was plainly a *report* prepared in 2016 by the Plaintiff's *expert* was a material fact of which the court should have been made aware at the *ex parte* stage. Returning the chronology of relevant events, the following is the position.

The 3 years from 7th July 2016 to 16th July 2019

36. Having contacted both the Plaintiff's solicitor and Mr. Bradley, the Plaintiff's engineer, and having written to the Plaintiff's solicitor on 6th July, 2016 to say that his firm would be in contact when Mr. Bradley's report was received, the First Named Defendant heard nothing further. Despite Mr. Bradley having informed Mr. McCarney that he would provide his report once the Plaintiff gave him permission, the report was never furnished. It is now clear that the report existed and the Plaintiff's failure to provide a copy to the First Named Defendant in 2016 or, for that matter, in 2017 or 2018, has never been explained. After sending the 6th July 2016 letter, over three years expired without the First Named Defendant receiving any communication from the Plaintiff's solicitor. That silence on the part of the Plaintiff was broken by means of the 16 July 2019 letter to which I will refer presently.

The Plaintiff's *Ex Parte* Application to renew the Plenary Summons

37. The relevant *ex parte* docket in respect of the Plaintiff's application to renew the summons pursuant to Ord. 8 is dated 10th May 2019, as is the grounding affidavit sworn by Ms. Burke in that regard. It is a relatively short affidavit, comprising just nine paragraphs, some of which I have already referred to. In para. 1 of same, Ms. Burke confirms that she is a director of the Plaintiff company and authorised to swear the affidavit on its behalf. In para. 2, she refers to the plenary summons which was issued on 29th April, 2016 and she repeats the wording found in the general indorsement of claim. It is appropriate to set out, *verbatim*, paras. 3-5 of Ms. Burke's 10th May 2019 Affidavit, in full:-

> *"3. I say and believe that the Plaintiff has instructed Fergal Bradley & Company Limited, Chartered Building Surveyors, Chartered Building Engineers and BER Assessors to inspect the apartments under the control of the Plaintiff. There are 110 apartments and two commercial units under the control of the Plaintiff. It has taken some considerable time to inspect all of these.*
>
> *4. I say and believe that the Plaintiff has also had to undertake substantial investigative works to ascertain the cause of the numerous problems with the apartments.*
>
> *5. I say and believe that the Plaintiff has had to undertake remedial works to the apartments."*

38. In para. 6, Ms. Burke goes on to aver that what she calls the "*draft*" report was received on or about 26th February 2019. It is now clear that this is not a wholly accurate averment, in that the very same report was prepared by Mr. Bradley, the Plaintiff's engineer, in 2016 (as Ms. Burke subsequently acknowledged in para. 9 of her 25th June 2020 affidavit). Furthermore, if one looks at paras. 3-5, inclusive, it is fair to say that they create the impression that the delay on the part of the Plaintiff was due to, *inter alia*, the inspection of numerous apartments, the undertaking of substantial investigative works and the undertaking of remedial works and that the foregoing is also of relevance to the "fact" that it was not until 26th February 2019 that the Plaintiff received the report

which, in para. 7, is averred as having been required before the Plaintiff could serve the plenary summons.

39. It is clear, however, from the contents of the Fergal Bradley & Co. report produced in 2016 that the investigative works had already been carried out *prior* to that report being issued in 2016. This is perfectly clear from para. 3.0 of the said report which is entitled "*Investigative Works*" and which lists the various locations at which "*opening up works*" were undertaken by contractors. In other words, the impression conveyed by the aforesaid averments is wholly undermined by the very contents of the engineer's report which was available, as is now acknowledged, in 2016, not 2019.

24th June, 2019 Order renewing Summons

40. To see its place in the chronology, it is appropriate to note that the Plaintiff's *ex parte* application was made on 24th June 2019, as is clear from the face of the order which was made on that date and perfected on 5th July 2019. The order provided for a renewal of the summons for a period of three months.

15th July, 2019 Fergal Bradley & Co. Ltd Report

41. Some three weeks *after* the order renewing the summons and over two months after Ms. Burke's 10th May 2019 affidavit grounding the *ex parte* application, Fergal Bradley & Co. Ltd. issued a report entitled "***Fire Safety Audit Report***; Property ***Inspected****: Altan Apartment Development, Western Distributor Road, Galway;* ***Date of Report****: 15th July 2019;* ***Report prepared on behalf of****: Altan Management Galway GLC*". A copy of same comprises exhibit "NB3" as referred to in Ms. Burke's 6th January, 2020 affidavit. It is clear from its contents that it addressed the very same issued which were dealt with in the report provided by Fergal Bradley & Co. in 2016. The title of the report is identical, as is clear from page. 1, save for the fact that this report includes a date. Furthermore, paras. 1.0 to 6.0 on the second and third pages, repeat, *verbatim*, the contents of the 2016 report. Employing the same approach as the 2016 report, the 15th July 2019 report proceeds, from p. 3 onwards, to detail works required in respect of Block C (basement level, ground floor level, first floor level, second floor level, third floor level, roof level and generally) followed by detailing works required in respect of Block A (basement level, ground floor level, first floor level, second floor level, third floor level, roof level, externally and generally).

42. It is perfectly clear that the 2016 and 2019 reports are both fire safety audit reports, prepared by the same engineer in respect of the same property, addressing the same issues and with no material differences between the reports as regards the nature of the recommendations. Fairly considered, they are the same report, with the 2019 report being a later version of the 2016 report. It is also appropriate to note that, in circumstances where s. 3.0 in the 15th July, 2019 report repeats, *verbatim*, the contents of s. 3.0 in the report prepared by Fergal Bradley & Co. in 2016, there is no evidence whatsoever of any additional investigative or "opening up" works having been undertaken between 2016 and 2019. In other words, to the extent that investigative or opening works were required to prepare a report, all such works were carried out prior to the 2016

report and no additional investigative or opening up works were done between the 2016 and 2019 reports.

43. In her affidavit sworn on 25th June, 2020 in opposition to the First Named Defendant's application, Ms. Burke makes the following averments in relation to the 15th July 2019 report by Fergal Bradley & Co. Ltd Engineers:-

> *"6. I say that since the date that the summons was issued further deficiencies in relation to the Development became known in 2019 and these are set out in the fire safety report of Fergal Bradley & Co. Ltd. I beg to refer to a copy of this report upon which marked with the letters "NB3" I have signed my name prior to the swearing hereof. It should be noted that this report was prepared following significant effort and indeed at great cost to the Plaintiff management company. The steps taken included* inter alia *significant opening up works which were undertaken by the agent of the Plaintiff to try and ascertain the extent of the deficiencies and we would respectfully refer to the content of the report in this regard."*

44. The evidence before this Court undermines the veracity of the foregoing assertions, in circumstances where the report prepared by Fergal Bradley & Co. Ltd in 2016 was a fire safety audit report. Moreover, what Ms. Burke describes as "*significant opening up works which were undertaken by the agent of the Plaintiff to try and ascertain the extent of the deficiencies"* were all works which were carried out *prior* to the first report being produced by Fergal Bradley & Co. Ltd, in 2016. The evidence also demonstrates that, insofar as there were deficiencies, these were known to the Plaintiff in 2016, as is perfectly clear if one compares the contents of both reports.

45. In order to see what the Plaintiff says is the significance of the 2019 report, it is appropriate to quote, *verbatim*, from para. 9 of Ms. Burke's 25th June, 2020 affidavit as follows:-

> *"9. I say and believe that a draft report was prepared by Mr. Bradley, the Plaintiff's engineer in 2016. However, as averred above, this only dealt with issues pertaining to the planning status of the development. Upon receipt of the fire safety report referred to at paragraph 6 above the Plaintiff took immediate and deliberate steps to protect its interests."*

46. With regard to the foregoing averments, it is *not* the case that the report prepared by the Plaintiff's engineer in 2016 only dealt with issues pertaining to planning and Ms. Burke's averment in this regard is simply incorrect. In truth, both the 2016 and the 2019 reports were, as they clearly state on the very first page, "*Fire Safety Audit*" reports. Both dealt with the very same issues. The clear impression given by the second sentence in para. 9 of Ms. Burke's 25th June, 2020 affidavit is that, until the engineer's 2019 Fire Safety report was available, the Plaintiff was prevented from progressing its claim, but as soon as the said report was received, the Plaintiff immediately took steps to progress the claim. The reality is otherwise. The steps taken comprised the bringing of an *ex parte* application

to renew the summons, following which the renewed summons was served on the First Named Defendant. The evidence demonstrates, however, that the availability of what was a second "*Fire Safety Audit Report*" from Fergal Bradley & Co. Ltd, played no part whatsoever in the application to renew the summons. This is because the *ex parte* docket and the affidavit grounding the *ex parte* application were prepared on 10th May 2019 and the report exhibited by the Plaintiff was, in fact, the Fire Safety Audit Report prepared by the Plaintiff's engineer in 2016, not the 2019 report. In fact, the second Fire Safety Audit Report is dated 15th July, 2019 and, thus, was provided by the Plaintiff's engineer three weeks *after* the order made by this Court on 24th June 2019 extending the summons. In other words, the evidence reveals the following:-

(1) On 24th June, 2019, the court was told that there had been no expert's report, when the reality was that the Plaintiff's engineer issued a Fire Safety Audit Report in 2016;

(2) The Plaintiff exhibited that very report which was produced in 2016, but described it as having been received on or about 26th February 2019, failing to mention that it was prepared by the Plaintiff's engineer in 2016;

(3) In opposing the First Named Defendant's motion, the Plaintiff exhibits the report prepared in 2016 and avers, incorrectly, that it only dealt with issues pertaining to planning status;

(4) The Plaintiff also exhibits a second Fire Safety Audit Report and suggests that steps were taken by the Plaintiff immediately upon receipt of same whereas, in reality, the second Safety Audit Report was wholly irrelevant to the *ex parte* application to renew the summons, being a report which post-dated the *ex parte* application and the order renewing the summons; and

(5) A comparison of the report prepared in 2016 and the report prepared in 2019 demonstrates that they address the self-same issues and that such investigative work as was carried out in the context of the preparation of reports was all carried out *prior* to the report being prepared in 2016 by Mr. Bradley, the Plaintiff's engineer.

47. In para. 10 of her 25th June, 2020 affidavit, Ms. Burke avers that *"the investigative works were very expensive and the Plaintiff was not in a position at that time to pay for them all at once thus they had to be undertaken on a piecemeal basis",* and in para. 12, she avers that: "*the investigative works were only completed in 2019. At that stage, the report was finalised and it became apparent that there are significant issues with the building regulations and serious fire safety issues with the premises. On receipt of this report the application to renew the plenary summons was issued*." I am satisfied that the foregoing averments are wholly undermined by the evidence before this Court. As noted earlier in this judgment, it is incontrovertible that the contents of s. 3.0 entitled "*Investigative Works*" appear in identical terms in both the 2016 and 2019 reports. Thus, such investigative works as were carried out in the context of the preparation of the 2019

report predated the report which was furnished by the engineer in 2016. Furthermore, the contents of the report which was prepared in 2016 (and is self-evidently a "*Fire Safety Audit Report*") undermines the assertion that it was not until 2019 that it became apparent that there were fire safety issues. A comparison of both reports reveals that they serve the same purpose and address the same issues. Indeed, the "*Introduction*" section which appears on the second page of each report is in identical terms and is explicit as to the fact that the report addresses both building regulations and fire safety issues. Nor is it the case that on receipt of the 2019 report, an application to renew the plenary summons was issued. As noted earlier in this judgment, the *ex parte* docket and affidavit grounding same were prepared on 10th May 2019, whereas the second fire safety audit report is dated 15th July 2019, over two months later.

Reasons offered as to why the Plenary Summons was not served

48. In para. 11 of her 25th June, 2020 affidavit, Ms. Burke makes a number of averments as to why the Plaintiff claims that the plenary summons was not served once it was issued. The first of these is as follows:-

> *"(a) While there were clearly issues relating to the planning status of the building it was decided by the members of the Plaintiff company that they would not incur the cost of proceedings in litigating these matters. In this regard it is important to note that each of the individual owners had paid multiple times what the individual units were worth in 2016 when they completed their respective purchases."*

49. Several observations can be made in relation to these averments. The foregoing does not comprise any part of the special circumstances stated in the court's 24th June, 2019 order. Furthermore, these are averments to the effect that the Plaintiff company decided *not* to proceed with litigation in relation to issues concerning planning status. I fail to see how a decision *not* to proceed with litigation can be deployed as a reason to justify renewing a summons, years later, to facilitate proceeding with litigation, particularly given the fact that the Plaintiff has only ever issued one plenary summons. Given that these averments are made as reasons why the plenary summons was not served once issued, it has to be said that a decision not to proceed with litigation is entirely consistent with a decision not to serve a plenary summons. That certainly appears to be what occurred but it is also fair to say that the court was not informed by the Plaintiff, at the *ex parte* stage, that "… *it was decided by the members of the Plaintiff company that they would not incur the cost of proceedings in litigating*…" any matters, be they relating to planning or otherwise. If the true reason for not serving the plenary summons was a decision by the Plaintiff not to incur the costs of litigation, the court should have been told this at the *ex parte* stage.

50. A Plaintiff is clearly entitled to decide to proceed, or not, with litigation, but it seems uncontroversial to say that a Plaintiff must live with the consequences of whatever decision it makes in relation to pursuing, or not, legal proceedings which it has issued. The contents of para. 11(a) appear to me to evidence a decision *not* to proceed with the claim in respect of which the plenary summons was issued on 29th April 2016. The evidence suggests that it was such a decision which resulted in the expiry of the relevant

12 month time period without the plenary summons being served and without any attempts having been made to serve it. I have no hesitation in saying, however, that any decision by this Plaintiff not to proceed with litigation is not a special circumstance justifying a renewal of the plenary summons which it previously decided *not* to proceed with.

51. Paragraph 11 of Ms. Burke's 25th June, 2020 affidavit continues as follows:-

> *"(b) It was suspected at this time that there may be further issues with the Development and it was agreed that further exploratory works be carried out so that a clearer picture as to what the status of the development including* inter alia *the planning status, the structural integratory and the fire safety compliance was,*
>
> *(c) The members of the Plaintiff company have over the last number of years voted to increase the annual service charge payment so as to provide funding for the investigation which was subsequently carried out by Fergal Bradley & Co., and whose report we refer to above."*

52. With regard to "*exploratory works*", it is appropriate to refer once more to ss. 1.0 to 6.0 of the report prepared by Fergal Bradley & Co. Ltd. in 2016. It will be recalled that this wording is repeated, *verbatim*, in the engineer's report furnished in 2019. Both are fire safety audit reports with no material difference between them as to their purpose or findings. Thus, the report prepared by the Plaintiff's engineer in 2016 (when service of the plenary summons could have been effected without the need for any application to renew) dealt with the self-same issues as the second fire safety audit report furnished by the Plaintiff's engineer on 15th July, 2019 (more than three years after the plenary summons issued, and more than two years after the plenary summons expired and more than two months after the preparation of the *ex parte* application to renew the plenary summons in question). No credible reason whatsoever has been offered by the Plaintiff to explain the failure to serve the plenary summons within 12 months of 29th April, 2016 (apart from a decision *not* to proceed with litigation) and no credible reason whatsoever has been offered to explain the Plaintiff's failure to apply to renew the summons in the months and years since it expired, whereas the evidence demonstrates that the very expert's report relied on by the Plaintiff to renew the summons in June 2019 was a report issued by the Plaintiff's engineer three years earlier in 2016.

17 July 2019 letter from the Plaintiff's solicitors to the First Named Defendant

53. It will be recalled that, on 06 July 2016, Mr. McCarney wrote to the Plaintiff's solicitor to confirm that he had requested the report from Mr. Fergal Bradley and would be in contact when this was received. It was never received and, over three years later, having made an *ex parte* application to renew the summons on foot of the self – same report which was produced in 2016 and which Mr. McCarney asked for in 2016, the Plaintiff's solicitor wrote to the First Named Defendant on 17 July 2019 enclosing the renewed plenary summons and the court's 24 June 2019 order. This letter was sent just two days after the second engineer's report prepared by Fergal Bradley & Co. Ltd. but, in the manner examined earlier in this judgment, the 15 July 2019 report was not before the court at

the ex parte stage and self – evidently was not required, insofar as the Plaintiff was concerned, in the context of an application to renew the plenary summons on 24 June 2019.

54. It can also be fairly said that, although receipt of a copy of the renewed plenary summons put the First Named Defendant on notice of the *fact* of a High Court claim, the First Named Defendant still had no specific details of what was said to be the *basis* for the claim. It can also be observed that the First Named Defendant is a firm of architects, whereas the reports of 2016 and 2019 were prepared by a firm of engineers. It is uncontroversial to say that, if a party is contemplating legal action against professionals, be they architects, doctors, or engineers, it is usual that an expert in the same field would be retained to provide advice as to whether the professionals in question met the standards one might reasonably expect of professionals in their field. Thus, another doctor would typically be retained to advise in a potential medical negligence action against a doctor. It is noteworthy that at no stage did the Plaintiff even attempt to retain an expert architect for the purposes of providing advice in relation to *inter alia* the scope or standard of such works as may be alleged by the Plaintiff to have been carried out by the First Named Defendant. Nor is any explanation given as to why this is so.

23 July 2019 letter requesting a copy of the *ex parte* application and expert(s) reports

55. On 23 July 2019 Messrs HOMS solicitors for the First Named Defendant wrote to the Plaintiff's solicitors in response to their letter of 17 July 2019. Having referred to the correspondence of 2015 and the failure to disclose the precise nature of the problems to Mr. McCarney and having referred to Mr. McCarney's conversation with Mr. Bradley who indicated that he would release his report once he received the relevant consent, the letter stated *inter alia*: -

> *"In order to take our client's instructions, please furnish us with a copy of the affidavit of Niamh Burke filed on 14th May 2019 and any exhibits thereto and the Motion/*Ex Parte *Docket you filed on 24th June 2019 by return.*
>
> *Please also furnish us with a copy of any expert's report(s) taken up by your client in the context of the above proceedings and please provide us with a detailed outline of the particulars of your client's claim against our client".*

56. Several comments arise in relation to the foregoing. The contents of the 23 July 2019 letter evidences the fact that Mr. McCarney of the First Named Defendant was never furnished with Mr. Bradley's 2016 report, despite the fact that it undoubtedly existed and despite Mr. Bradley's willingness to provide it, in 2016, subject only to receiving consent to do so. Why such consent was not given has never been explained by the Plaintiff. Moreover, the foregoing paragraphs evidence the fact that, as late as 23 July 2019, the First Named Defendant still did not have anything like sufficient detail as to the nature of the issues in dispute. Thus, the evidence demonstrates that even after the *ex parte* application had been made, the First Named Defendant was not, as a matter of fact*, on notice of the issue in these proceedings*, even though the foregoing is one of two special circumstance stated in the court's 24 June 2019 order.

06 August 2019 Plaintiff's refusal to furnish copy of *ex parte* application

57. By letter dated 06 August 2019, the Plaintiff's solicitors wrote to the First Named Defendant's stating *inter alia*: -

> *"We note that you have no instructions to enter an Appearance and in circumstances where that is the case we do not propose to forward a copy of any of the pleadings if it is the case that you are not going to come on record".*

58. In my view, this was an entirely unreasonable stance for the Plaintiff to take, having regard to both natural justice principles and the First Named Defendant's entitlement, pursuant to Ord. 8, r. 2, to bring a motion to set aside an *ex parte* order renewing a summons and to do so "***before*** *entering an appearance*" (emphasis added) as Ord. 8, r. 2 specifically provides.

21 August 2019 letter from First Named Defendant's solicitor to Plaintiff's

59. By letter dated 21 August 2019, the First Named Defendant's solicitors wrote to the Plaintiff's pointing out, once more, that they required sight of the *ex parte* application on foot of which the plenary summons was renewed and the letter made clear that this was required before instructions could be obtained to enter an appearance. The final paragraph of the letter stated:-

> *"We are instructed to reiterate our request for sight of the* ex parte *application papers by return and, on receipt of same, we will then take our client's instruction in relation to the filing of an Appearance on behalf of our client or indeed otherwise".*

The foregoing was an entirely reasonable request but one which was not complied with and the present motion, which issued in January 2020, grounded on the affidavit of Mr. McCarney sworn 06 January 2020, was an application made *without* the First Named Defendant having had sight of the Plaintiff's *ex parte* application.

The defendant's application grounded on Mr. McCarney's 6/1/20 affidavit

60. The present application is grounded on the affidavit of Mr. McCarney sworn on 06 January 2020. It is not necessary to set its contents out *verbatim*. Among the points made on behalf of the First Named Defendant are that the Plaintiff failed to deliver a substantive letter before action and Mr. McCarney avers that it is not clear what the claim being advanced by the Plaintiff against the First Named Defendant actually is (para. 4 of Mr. McCarney's affidavit). The evidence demonstrates, beyond doubt, the accuracy of the foregoing averments made on behalf of the First Named Defendant. Later, Mr. McCarney avers that the application is without prejudice to any contention which may be raised in future that the proceedings are statute barred as against the First Named Defendant and all liability to the Plaintiff is denied (para. 5). It seems entirely uncontroversial to say that the statute of limitations might well feature in respect of litigation concerning apartments which were, as both sides agree, constructed in 2004. Indeed, during the course of submissions, counsel for the Plaintiff acknowledged that it may be the case that there is a statute of limitations issue, while urging the court to refuse the application. From paras. 6 – 9 inclusive, Mr. McCarney deals with the 2015 correspondence and, at para. 10, he

refers to speaking with the Plaintiff's solicitor and with Mr. Bradley, the Plaintiff's engineer, following receipt of the 24 May 2016 letter. I have already looked closely at the foregoing and, in short, the evidence demonstrates that the First Named Defendant was not at all stages or at any stage *on notice of the issues in these proceedings* (being the wording used in the 24 June 2019 order).

61. In para. 11, Mr. McCarney refers to his 06 July 2016 letter and to the fact that, inexplicably, a copy of the engineer's report was never furnished to him. In para. 12, he refers to the 17 July 2019 letter and, in para. 13, he avers that the First Named Defendant is still unclear as to the exact case which is being advanced against it, an averment undoubtedly supported by the evidence before this Court which I have examined in this decision. At para. 14, reference is made to the plenary summons and it is averred that, for reasons unknown to Mr. McCarney, it was not served. That is undoubtedly the case. No reasons have been proffered explaining the original failure to serve, other than what appears to have been a conscious decision made by the Plaintiff not to pursue litigation. At para. 15, reference is made to the 24 June 2019 order and to the renewal of the summons on the basis of there being special circumstances "*namely the non-existence of an expert report and it appearing that the defendants were at all stages on notice of the issues in these proceedings"*. In the manner analysed in this judgment, the evidence entirely undermines both of those propositions.

62. At para. 16 of his affidavit, Mr. McCarney avers that it appears, and that he was so informed, that there did exist an engineer's report in June/July 2016. The evidence undoubtedly supports that averment. There was, in fact, such a report in 2016 and this now acknowledged by the Plaintiff, although this was not drawn to the court's attention in the Plaintiff's *ex parte* application. In para. 17, Mr. McCarney avers that the First Named Defendant was unaware in 2015, and remains unaware at the time of the swearing of his affidavit on 06 January 2020, what the case being advanced against the First Named Defendant actually is. Again, the evidence supports that averment. At para. 18, Mr. McCarney avers that the First Named Defendant is entitled to a copy of the affidavit and *ex parte* docket grounding the application to renew the plenary summons and he refers to the 23 July 2019 letter requesting same, which request was rejected, as Mr. McCarney avers at para. 19 of his affidavit. Mr. McCarney also exhibits the 21 August 2019 response from the Plaintiff's solicitor. In the manner explained earlier, the position adopted by the First Named Defendant on this issue was entirely unreasonable, having regard to the provisions of Ord. 8, r. 2 of the Rules of the Superior Courts and the principles of natural justice which, in my view required both parties to have access to a copy of an application which obviously concerned both parties. Mr. McCarney's affidavit concludes with an averment that there does not appear to have been any special circumstances as of 24 June 2019 to justify the renewal of the plenary summons and his concerns are further heightened by the refusal of the Plaintiff to provide an *ex parte* docket and at para. 20, the relief sought is prayed for.

Replying Affidavit by Ms. Niamh Burke sworn on 25 June 2020

63. During the course of this judgment, I have looked at the contents of the replying affidavit of Ms. Niamh Burke which was sworn on 25 June 2020. After confirming that she is a director of the Plaintiff company and swears the affidavit with its authority from facts within her own knowledge save where otherwise appearing, Ms. Burke avers, at para. 2, that in or about February 2015, the Plaintiff became aware of deficiencies in planning status of the development and that the solicitors on record, on advice from the Plaintiff's engineer, wrote to all parties involved in the construction and subsequent certification of the planning status. Ms. Burke exhibits, *inter alia*, three letters dated 25 March 2015 which were sent to Mr. McCarney, to Grant Thornton and to Ernst & Young, respectively. Earlier in this judgment, I looked closely at the 25 March 2015 letter send by the Plaintiff's solicitor to Mr. McCarney. It will be recalled that the said letter spoke of regularising all matters pertaining to the development. It is noteworthy that, on the very same day, each of the letters sent by the Plaintiff's solicitors to Grant Thornton and Ernst & Young respectively, stated the following in relation to the same issue: "*We have been instructed to regularise the affairs of the management company to include the transfer of the common areas . . .".*

64. It seems clear from the foregoing correspondence that, as of March 2015, the issue of concern was to a material extent to do with "*transfer of the common areas*" being the only issue specified. Similarly, in a letter exhibited by Ms. Burke which was sent to Messrs. Kavanagh Fennell on 18 July 2014, the Plaintiff's solicitors stated, *inter alia*, "*We have been instructed to pursue the transfer of the common areas into the name of the management company . . .*". In the manner analysed earlier in this judgment, is entirely unclear from the contents of the correspondence, sent by the Plaintiff's solicitor to Mr. McCarney in 2015, what the precise issue, or issues, was or were but the contemporaneous correspondence sent to two other parties certainly suggests that a material issue concerned the transfer of the common areas. That would also seem to be consistent with the averment made by Ms. Burke at para. 11 (a) of her affidavit, wherein she refers to the Plaintiff deciding not to proceed with litigation, having referred in that paragraph to what she described as "*…issues relating to the planning status of the building…".* Regardless of what the issues were or were not, the evidence demonstrates that the First Named Defendant was not put on notice of their precise nature at any stage prior to the plenary summons being renewed on 24 June 2019 and, even now, the first defendant cannot be said to be on notice of precisely what the issues in the proceedings are.

65. From paras. 3 to 8, inclusive, Ms. McCarney refers to the correspondence from 2015 and 2016 which I have examined in detail earlier in this judgment. In para. 9, she exhibits Mr. Bradley's report (which was prepared in 2016) being the self-same report which was exhibited in Ms. Burke's 10 May 2019 affidavit grounding the *ex parte* application (but described therein as a report which was received by the Plaintiff on or about 26 February 2019).

66. Earlier in this decision, I examined Ms. Burke's averments from paras. 10 to 12 inclusive, including averments that investigative works were very expensive and had to be

undertaken on a piecemeal basis, whereas the 2016 report, when compared to the 2019 report makes it perfectly clear that all investigative works were carried out prior to the first of the engineer's reports being issued by Fergal Bradley & Co. Ltd. Earlier in this judgment, I commented, in particular, on what are plainly inaccuracies in the averments made on behalf of the Plaintiff. The averment in para. 12 to the effect that, on receipt of what was the second report from the Plaintiff's engineer "*the application to renew the Plenary Summons was issued*" is simply not true. The only report exhibited with the renewal application is the report furnished by the engineer in 2016, whereas the second report is one dated 15th July 2019, which post-dated the issuing of the renewal application by over two months and, thus, can have played no part whatsoever in the renewal application which was brought on foot of the engineer's report prepared in 2016.

67. I have also commented, earlier in this decision, on the fact that there are no material differences between the 2016 and 2019 reports, both of which address the self-same issue on the basis of the self-same investigative works having been carried as part of the 2016 report and reached the self-same general findings, both being, in essence, the same "*Fire Safety Audit Report*", albeit two versions which issued 3 years apart. It is appropriate to repeat at this juncture that, although the First Named Defendant comprises a firm of architects, there is no evidence whatsoever before the court that the Plaintiff, at any stage, sought an expert's report from any architect. The expert retained was an engineer. The Plaintiff's engineer produced a report in 2016. The same engineer produced a further version of the same report in 2019.

68. Earlier in this judgment, I referred to Ms. Burke's averments in para. 11(a) to the effect that the members of the Plaintiff company decided that they would not incur the costs of litigating issues relating to "*planning status*" of the building. The evidence demonstrates, however, that the Plaintiff had in 2016 expert advice regarding far more that planning status, in that the engineer's report which was produced in 2016 explicitly comprises a review of the development "…*with respect to compliance with Part B of the Building Regulations 1997 and granted Fire Safety Certificates*". In para. 11(b), Ms. Burke avers that it was suspected that there may be further issues with the development and it was agreed that further exploratory works be carried out so that a clearer picture of the status of the development be obtained regarding planning, structural integrity and fire safety compliance with Ms. Burke making further averments at para. 11(c) that members of the Plaintiff company, over the last number of years, voted to increase the service charge in order to fund *"the investigation which was subsequently carried out by Fergal Bradley & Co.".* The impression is given by these averments that all of this took a considerable period of time and that the "*clearer picture*" only emerged in 2019, in circumstances where the investigative works "*were only completed in 2019*". The evidence utterly undermines these propositions. The evidence demonstrates that, as a matter of fact, the investigative works were carried out *before* Mr. Bradley's first report issued in 2016. Given the fact that such a report was prepared in 2016, Ms. Burke's reference to funding issues in respect of investigations can be of no relevance to the time period thereafter. Moreover, Mr. Bradley's first report (prepared in 2016) was the one and only report which the Plaintiff relied upon (in 2019) to secure a renewal of the plenary summons in an *ex*

parte application during which the court was given the very clear, but incorrect, impression that the 2016 report was one which had only become available in 2019.

69. In para. 13, Ms. Burke avers *inter alia* that "*…it is not unusual that the exact case being advanced against a defendant would not be set out in detail in the plenary summons as same will be particularised in the statement of claim*". The foregoing averment does not, however, alter the fact that at no stage was the First Named Defendant ever put on notice of the issues in these proceedings. This averment simply underlines the fact that, even at this stage, the First Named Defendant is unaware, with anything like sufficient clarity, of the issues in the proceedings.

70. In para. 14 of her 25th June, 2020 affidavit, Ms. Burke suggests that the present proceedings cannot be a "*surprise*" to the first named. In light of the evidence, I take an entirely different view. Mr. McCarney went to the trouble of contacting the Plaintiff's solicitor and the Plaintiff's engineer in 2016. The former could not tell Mr. McCarney what the issues in dispute actually were and the latter told him that a report had in fact been prepared and that once his client gave him permission, Mr. Bradley would release the report to Mr. McCarney. That was in the summer of 2016 and, by letter 6th July 2016, Mr. McCarney confirmed to the Plaintiff's solicitor that his firm would be in contact when the report was received. The fact of the 2016 report is not in doubt. The report was never received by Mr. McCarney and, never having been furnished with the report, it was not unreasonable for him to take the view, as the months and years passed, that the Plaintiff had decided against legal proceedings. Indeed, the fact that the Plaintiff decided *against* litigation emerges from the averments by Ms. Burke at para. 11(a) of her 25th June, 2020 affidavit.

71. It cannot be disputed that the letter from the Plaintiff's solicitor dated 17th July, 2019 enclosing the renewed plenary summons arrived over three years after Mr. McCarney's 6th July 2016 letter and in circumstances where the engineer's report of 2016 had never been provided. On any reasonable analysis, the 17 July 2019 letter serving the plenary summons can fairly be said to have been a letter which came "out of the blue" given the complete silence during the intervening three years. Thus, the evidence indicates that the present proceedings were very much a surprise.

72. In para. 15 of her 25th June, 2020 affidavit, Ms. Burke avers that the First Named Defendant received a copy of the *ex parte* docket and grounding affidavit on 18th February, 2020. This confirms the fact that the First Named Defendant was required to bring the present application without having had the benefit of seeing what the court was told by the Plaintiff when it granted the order on 24th June 2019.

Supplemental Affidavit of Eamonn McCarney sworn 28 September 2020

73. On 28th September 2020, Mr. McCarney swore a second affidavit. It is unnecessary to comment on a paragraph by paragraph basis on its contents. Suffice to say that Mr. McCarney highlights the availability of Mr. Bradley's first report in 2016 and avers that this was a material fact in the context of the Plaintiff's application. In my view, this was undoubtedly so, and a fact which should have been brought to the attention of Meenan J.

but which was not brought to the court's attention in the *ex parte* application. Mr. McCarney also refers to the Plaintiff's failure to explain its refusal to provide a copy of the *ex parte* application and, to date, this has never been explained by the Plaintiff. As well as exhibiting the copy Certificate of Compliance issued by the First Named Defendant in December 2004, Mr. McCarney comments on what he believes the Plaintiff's grievances appear to be, having regard to the contents or Mr. Bradley's report. Among other things, Mr. McCarney avers that Taylor Architects Ltd (or "TAL"): *"…was retained after the design of the property, and after the grant of planning permission. TAL did not design the construction of the property. Cordil Construction Ltd constructed the property from the design plans that were the subject of the grant of planning permission. If a design issue arose in the course of construction TAL would provide additional detail if required. However, as is apparent from the terms of retainer of TAL, TAL was not charged with the responsibility of inspecting works through the progression of the development. Other contractors were retained by Cordil Construction Ltd for the purpose of attending to various aspects of the development, e.g. mechanical, or electrical, and fire safety. This is reflected in the Opinion on Compliance issued by TAL and exhibited herein. As is expressly stated at several points in that Opinion on Compliance, TAL did not provide a site inspection service nor did it administer the building site. A visual inspection only was carried out of areas readily accessible. TAL did not provide an opinion on the substance of the fire safety measures applied in the development. The opinion is expressly dependent upon certificates provided by other contractors who are identified therein. As is apparent from Schedule A of the opinion a number of other entities were responsible for fire safety measures. In relation to fire stopping/fire barriers that was the responsibility of Ardseal Ltd and I beg to refer to a copy of the Certificate of Compliance provided by Ardseal Ltd… The Plaintiff's claim, if any, appears more properly to be directed towards persons other than TAL."*

74. At para. 9, Mr. McCarney avers that the Plaintiff's delay is both inordinate and inexcusable and that TAL would be prejudiced in defending the proceedings regarding a development constructed in 2004. Among other things, it is averred that: "*Some 16 years after the construction of the development TAL remains unaware as to the actual claim being advanced against it. The passage of time is such that memories of witnesses available to TAL have naturally deteriorated. The primary point of contact for TAL on this project was Mr. Michael Horan. He ceased to employed by TAL in 2006. Owing to the passage of time TAL no longer holds all documents that it once did relating to this development. In an addition, given that TAL was not charged with the task of inspecting the property TAL would not have known in any event the status and condition of the issues now raised in Mr. Bradley's report which the Plaintiff disclosed to TAL for the first time in the context of this application. There is also the issue that a lack of maintenance over a passage of time can cause, or exacerbate, issues concerning buildings. In addition, in the period in which the Plaintiff has delayed in the issuing and prosecution of its claim, the third defendant, Cordil Construction Ltd, has gone into receivership and the second defendant, Hugh Griffin, has, I believe, retired from practice. It would appear that the Plaintiff is now trying to attach its claim against others on to TAL given that it remains in operation..."*

Applicable legal principles

75. The foregoing comprises the entirety of the evidence before the court and it is now appropriate to turn to the relevant legal principles which must be applied in an application of the present kind. The Court of Appeal issued a decision, on 15th January 2021, in *Murphy v. HSE* [2021] IECA 3 in which Haughton J. conducted a thorough analysis as to the proper interpretation of Ord. 8 and the single test with which this Court is concerned on an Ord. 8, r. 4 application, namely, this Court must be "*satisfied that there are special circumstances which justify an extension*". Given the clarity of the guidance provided so recently by the Court of Appeal, it is appropriate to set out, *verbatim*, a number of paragraphs the Court of Appeal's judgment in *Murphy v. HSE*, as follows:

> ***"Interpretation of amended Order 8***
>
> *52. How then is the amended O. 8 to be interpreted? The proper approach to interpretation of the statutory instrument is that recently summarised in the judgment of Finlay Geoghegan J. in O'Sullivan v. Ireland and others and the Bons Secour [2019] IESC 33, at paragraph 19:*
>
> > *"19. The proper approach to the interpretation of statues of the Oireachtas is now well established. I only need refer briefly to those principles relevant to the interpretation of the 1991 Act, as amended. The starting point is the ordinary and natural meaning of the words used by the Oireachtas: Howard v Commissioners of Public Works [1994] 1 I.R 101. In aid of construction or interpretation of the particular words used by the Oireachtas, the courts may look to the scheme and purpose of the provisions in issue as disclosed by the statue or a relevant part: McCann Limited v O Culacháin (Inspector of Taxes) [1986] 1 I.R 196 per McCarthy J. at p.201. The purpose and policy of the Act may be informed,* inter alia*, by the pre-Act law, but reliance upon same is limited by the words used by the Oireachtas in the provision under consideration: B v Governor of the Training Unit Glengarriff Parade Dublin [2002] IESC 16 and A.B. v Minister for Justice Equality and Law Reform and Ors [2002] 1 I.R 296. Finally, it is to be presumed that words are not used in a statue without a meaning and, accordingly, effect must be given, if possible, to all the words used: Goulding Chemicals Limited v Bolger [1977] I.R 211 per O'Higgins C.J at p. 226"*
>
> *53. Adopting this approach, and with the greatest to those judges in the High Court who found otherwise, the wording in O. 8 does not in my view justify a two-tier approach.*
>
> *54. Sub-rules (1) and (2) now segregate off and govern the application to renew that is made to the Master within the original 12 month period that the summons is in force. The application is for "leave to renew". The Master must be satisfied that "reasonable efforts have been made to serve such*

defendant, or for other good reason" may order renewal – now for the shorter period of 3 months. The test before the Master is the same as it was under the original O. 8, and it is safe to say that the same jurisprudence applies.

55. *It is clear from the ensuing sub-rules, which require application to the court after the 12 month period, that there can be only one such application to the Master, and only one renewal order can be made by the Master. The Master is not required to state the reason for renewal in the order.*

56. *Sub-rules (3) and (4) now govern the process that applies if renewal is sought more than 12 months after the issuance of the summons. As under the old O. 8, the application must be made to the court, but there the comparison ends.*

    Sub-rule (3) states that –

    "(3) After the expiration of 12 months, and notwithstanding that an order may have been made under sub-rule (2), application to extend time for leave to renew the summons shall be made to the Court."

57. *The first point to make concerns is the phrase "and notwithstanding that an order may have been made under sub-rule (2)". Sub-rule (3) clearly contemplates an application being made to the court notwithstanding that the Master has already made an order within the 12 month period renewing the summons for a three month period. Subrule (3) must therefore mean that the court has jurisdiction to grant leave for a further three month renewal. If the legislature intended that there could be no further application for renewal then these words would not have been inserted. Effect must be given, if possible to these words. As they can be ascribed a meaning they cannot be treated as surplusage…*

59. *The second point is that sub-rule (3) refers to an "application to extend time for leave to renew the summons". It does not refer to an application seeking an extension of time to bring an application for leave to renew, or seeking leave to bring an application for leave to renew. To read these words into sub-rule (3) is to introduce words that simply are not there. Had the legislature intended to impose a two-tiered test for renewing the summons – special circumstances in respect of the extension of time for the application and 'good reason' for renewal of the summons – it would have done so explicitly. Nowhere in either sub-rule (3) or (4) is there mention of a twofold test, and nowhere is the term "good reason" used in connection with the court application.*

60. *Nor can the wider phrase "application to extend time for leave to renew" cast doubt on this. The term "leave to renew" is also used in sub-rule (1) in respect of the application to the Master, and refers to the permission of the*

Master or the court, as the case may be, that leads to renewal of the summons in the Central Office by stamping in accordance with sub-rule (5).

61. *Accordingly sub-rule (3) entitles a Plaintiff to bring an application for renewal, and does not impose a preliminary hurdle of persuading the court to extend time for making such an application, whether on showing 'special circumstances' or on satisfying any other test.*

62. *This is reinforced by the wording in sub-rule (4) –*

> *"(4) The Court on an application under sub-rule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances with justify an extension, such circumstances to be stated in the order."*

This deals with the substantive application for renewal. The first phrase references "an application under sub-rule (3)" and therefore refers back to the "application to extend time for leave to renew". The legislature has clearly applied a single test to this substantive application – the court must be "satisfied that there are special circumstances which justify an extension". There is no reference to a second test, or any requirement to satisfy the court of "good reason".

63. *Further rationale for this, with which I respectfully agree, is suggested by Hyland J. in Brereton –*

> *"9. …Moreover, there is the obligation to identify the special circumstances in the order, a most unusual requirement in the architecture of the RSC. It seems improbable that the drafters of the amended Rule would require only the special circumstances mandating the extension of time to be identified in the order, but not the good reason for the renewal of the summons to be similarly identified."*

64. *This interpretation is also supported by the consequential amendment in S.I. 482 of 2018, quoted earlier in this judgment, which substitutes for the old rule 7 of O.122, which empowers the court to enlarge or abridge time for the doing of any act an identical provision but with a rider, which is now O.122 r.7(2), that provides –*

> *"(2) Sub-rule (1) does not apply to any application to which Order 8 applies."*

This indicates that O. 8 is a stand-alone provision dealing with the circumstances in which the Master or the court, as the case may be, can grant leave to renew a summons. It would lead to contradiction if, independently of O. 122 and absent any explicit wording in the revised O. 8,

it was a preliminary requirement of the O. 8 r. (3)/(4) that the court be satisfied of "special circumstance" to extend time for a renewal application…

68. *… I would make two observations. Firstly, it can be argued – as counsel did before Meenan J. - that the amended O. 8 r. 1(3) and (4) does not contain any clear or express provision limiting the number of renewals, and that this would have been set out explicitly if it was indeed the intention of the rule makers. Secondly, it is conceivable that if a summons was renewed on the basis of special circumstances such special circumstances might persist beyond the 3 month period of renewal, or further special circumstance might arise. To give a simple example, during the period of renewal the Plaintiff might overcome the special circumstance relied on to obtain the court's renewal order e.g. delay in obtaining medical opinion, but the defendant might, despite the Plaintiff's reasonable efforts to serve, deliberately evade service of the summons.*

I would therefore leave to an appropriate case further consideration of whether there may be more than one renewal by the court under the amended O. 8.

"Special Circumstances"

69. *Order 8 r. 1(4) does not assist in identifying what may amount to "special circumstances which justify an extension". However, some general observations may be made.*

70. *Firstly, whether special circumstances arise must be decided on the facts of a particular case, and it would be unwise to lay down any hard and fast rule.*

71. *Secondly it is generally accepted that it is a higher test than that of "good reason". This would seem to follow from the fact that the application to the Master is made before the summons lapses, and O. 8 does not require the Master to state the "good reason" in the order.*

72. *It also follows from the use of the word "special". While this does not raise the bar to "extraordinary", it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present.*

73. *Hyland J. in Brereton usefully points by way of analogy to the test of "special circumstances" as it applies resisting a claim for security for costs. Although O. 29 RSC, which concerns the provision of security for costs, does not use the phrase "special circumstances", caselaw has long held that once a defendant establishes that there is a prima facie entitlement to security for costs the onus shifts to the Plaintiff to show special circumstances as to why security should not be granted. At para. 21 Hyland J. stated –*

"In West Donegal Land League v Udaras Na Gaeltachta [2006] IESC 29 Denham J., as she then was, noted that in considering the concept of special circumstances it should be remembered that the essence of the order for security for costs is to advance the interests of justice and not hinder them, and that it is for a court on such an application to consider and balance the interests of the Plaintiff company and those of the defendant in a fair and proportionate manner."

74. *I agree with Hyland J. that this applies by analogy to a court deciding whether "special circumstances …justify an extension". The court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a Plaintiff if renewal is refused.*

75. *This reflects the principle enunciated by Finlay Geoghehan J. in in Chambers v Kenefick [2005] IEHC 526, in describing the approach the court should take under the original O. 8 to deciding "other good reason":*

> *"[8] …Firstly, the court should consider is there good reason to renew the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interest of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."*

That decision has been followed on many occasions – see for example Clarke J., as he then was, in Moloney v Lacy Building and Civil Engineering Ltd [2010] 4 I.R. 417.

76. *In my view this is not a second tier or limb to the test. The need for the court to consider under sub-rule (4) the interests of justice, prejudice and the balancing of hardship is in my view encompassed by the phrase "special circumstances [which] justify extension". Thus there may be special circumstances which might normally justify a renewal, but there may be countervailing circumstances, such as material prejudice in defending proceedings, that when weighed in the balance would lead a court to decide not to renew. The High Court should consider and weigh in the balance all such matters in coming to a just decision.*

77. *At the level of principle a question also arises as to whether inadvertence on the part of a Plaintiff or their solicitors can ever amount to or be relied upon*

as a special circumstance. As far as a Plaintiff is concerned this is very fact dependant and it is probably not helpful to speculate in a vacuum. As far as legal advisors are concerned in my view inadvertence or inattention, for example in effecting service of the summons, will rarely constitute "special circumstances". Legal advisors must be taken to be aware of the 12 month time limit for service of the original summons, and the consequences of allowing it to lapse. Peart J., in the context of "good reason", in Moynihan v Dairygold Co-operative Society Limited [2006] IEHC 318, said –

> *"38 …This is an opportunity to give a timely warning to practitioners that proper attention must be given to the question of service of proceedings after issue, especially where there is a likelihood that after expiration of one year from the date of issue, the Statute will have expired."*

If inadvertence of this nature would not reach the threshold of "good reason" it is even more unlikely to amount to "special circumstance".

78. Finally, provided the trial judge is satisfied that "special circumstances" exist, the jurisdiction to grant leave to renew is discretionary. It follows from that that this court, in reviewing a decision to renew a summons, should afford the trial judge a margin of appreciation and should not interfere with the decision unless the trial judge has erred in principle or there is a clear error of fact or breach of the rules of natural justice."

Submissions by the First Defendant/Applicant

76. Counsel for the First Named Defendant and moving party submitted, *inter alia*, that the evidence wholly undermines the existence of the "*special circumstances*" which were referred to in the court's 24th June 2019 order. It was argued that there was no evidence to sustain the proposition that the First Named Defendant was on notice of the issues in the proceedings prior to obtaining the renewal following the Plaintiff's *ex parte* application. It was also submitted that it could never have been properly said by the Plaintiff that there was no expert's report and that the evidence demonstrates that there was, in fact, a report by the Plaintiff's expert engineer which issued in 2016. It was also submitted that, in circumstances where the relevant development was completed in 2004, the passage of time would inevitably have resulted in fading memories and prejudice to the First Named Defendant with further prejudice evidenced by averments made on behalf of the First Named Defendant that certain staff have left and that certain documents are no longer available. It was further submitted that, insofar as para. 5 of Ms. Burke's 10th May 2019 affidavit, which grounded the *ex parte* application, states that "*the Plaintiff has had to undertake remedial works to the apartments*", further prejudice will have been caused to the First Named Defendant in that alleged defects cannot be inspected if remedial works have already taken place.

Submissions on behalf of the Plaintiff/Respondent

77. Among the submissions made by counsel on behalf of the Plaintiff is that it had been attempting to garner information but that the Plaintiff did not yet have a final report by

the time the *ex parte* application was made. It was submitted that there was no bad faith on the part of the Plaintiff when it was averred that there was no report. It was submitted that the Plaintiff was, in effect, "*going after*" all those involved in the development and, although acknowledged on behalf of the Plaintiff that it is undoubtedly the case that a lot of time has passed, it was submitted that, once the case has been detailed in a statement of claim, the First Named Defendant will have the wherewithal to address the Plaintiff's claim. It was also submitted on behalf of the Plaintiff that any assertion on behalf of the First Named Defendant of inordinate or inexcusable delay can and should be dealt with by way of a separate motion. It was submitted, with regard to the affidavits sworn by Ms. Burke, that it probably would have been better to set out more information, but it was emphasised that, at the time of the *ex parte* application to Meenan J., there was not, in fact, any final report in existence. It was suggested that two matters were "*running in tandem*", in that the Plaintiff's engineer had intimated that there were issues but no final report was yet available and that it was in those circumstances that the *ex parte* application was moved. It was stressed, on behalf of the Plaintiff, that the management company was trying to avoid litigation and to keep their options open and it was in that context that the Plaintiff issued the plenary summons. It was acknowledged that there was no originating "letter before action" and that the plenary summons does not set out a full and detailed account of the nature of the claim, but the submission was made that the plenary summons does flag negligence and breach of contract with regard to the relevant development, although acknowledged that the plenary summons was not served on the First Named Defendant until *after* the successful renewal application. It was also submitted that the fact that a final report was being obtained and would be obtained qualified as "*special circumstances*" justifying renewal of the summons. It was also submitted on behalf of the Plaintiff that it may well be the case that there was delay and it may well be the case that there is a statute of limitations issue, but it was submitted that such issues can be dealt with by way of alternative applications. For the Plaintiff, it was also submitted that the First Named Defendant was raising issues in the present application which can be more appropriately dealt with in an alternative application.

Discussion and decision

78. Among the authorities relied on by the First Named Defendant is the High Court's decision in *Moloney v. Lacy Building and Civil Engineering Ltd* [2010] 4 I.R. 417, wherein Clarke J. (as he then was) referred, at para. 10, to the submissions made by the architects in that case who sought to set aside a renewal of the relevant plenary summons, namely:-

"[10] The architects set out the basis for the relief sought as follows:-

(a) the plenary summons was issued some five years and four months before its renewal was sought and obtained;

(b) no good reason has been put forward as to why the summons should be renewed;

(c) the architects are still unaware of the exact allegations made against them;

(d) given the passage of time, the fading of memory is likely to, and may well, prejudice the architects in their defence; and,

(e) the relevant expert's report was available in 2006 but the application to renew was not made until May, 2009, without explanation for this delay."

79. It was submitted on behalf of the First Named Defendant that the foregoing mirrors the situation in the present case and, having regard to the facts which emerge from the analysis of the evidence before this court, I agree with that submission. Counsel for the First Named Defendant also relied on para. 20 from the same decision in which the learned judge stated as follows:-

"[20] …insofar as the absence of an appropriate expert report may be put forward as a good reason for not serving a plenary summons, it seems to me to follow that the expert report concerned must be reasonably necessary in order to justify the decision to responsibly maintain proceedings in the first place, rather than be necessary in order to take further steps in the proceedings (such as the drafting of a statement of claim or bringing the case to trial) and it must also be established that any delay occasioned by the absence of the expert report concerned was reasonable in all the circumstances, such that appropriate expedition was used by the party placing reliance on the absence of the expert report concerned in attempting to procure same."

80. In the present case, even if it can be assumed that the engineer's report was necessary in order to justify the decision to responsibly maintain the proceedings in the first place, it was a report which Mr. Bradley's firm prepared for the Plaintiff in 2016. Thus, it was available to the Plaintiff long *before* the final date by which the plenary summons of 29th April 2016 could have been served without the necessity for any renewal application, namely 28th April 2017. Given the undoubted availability of this report in 2016, no credible explanation has been offered in the present case (other than a decision on the part of the Plaintiff not to incur the cost of proceedings – as per para. 11(a) of Ms. Burke's 25th June 2020 Affidavit) as to why service was not effected within 12 months of the plenary summons being issued. Nor has any credible explanation been given to justify the delay between the availability (in mid-2016) of the engineer's report and the bringing (in mid-2019) of the *ex parte* application to renew, which application was based on the self-same report only having become available in February 2019, when the evidence demonstrates that it was available in 2016.

81. An analysis of the evidence reveals that it was not suggested at the *ex parte* application, nor is it suggested on behalf of the Plaintiff in opposing the present application, that any mistake or inadvertence, be that on the part of the Plaintiff or on the part of any advisor, was to blame for the failure to serve within the relevant 12 months or, for that matter, explains any of the delay between then and the application to renew. Quite apart from the proposition that inadvertence on the part of legal advisors will rarely constitute special circumstances (see Peart J. in *Moynihan v. Dairygold Co-operative Society Limited* [2006] IEHC 318, at 38) it is important to note that no such reason has ever been asserted in

this case, nor does the Court's order renewing the summons state that mistake or inadvertence by any party comprises any part of the special circumstances justifying the renewal. Furthermore, the order renewing the summons does not state that any difficulties which the Plaintiff might encounter vis a vis the statute of limitations constitutes any part of the special circumstances which justified the renewal at the *ex parte* stage and the Order made on 24 June 2019 makes reference to no such issue.

82. Counsel for the First Named Defendant also referred, *inter alia*, to para. 22 of the decision in *Moloney v. Lacy Building and Civil Engineering Ltd*, wherein Clarke J. (as he then was) stated:-

> *"[22] I am, therefore, satisfied that the general 'tightening up' of the approach of the courts to delay which can be identified in the dismissal for want of prosecution jurisprudence applies also to cases involving an application to renew a summons, such that the question of whether a reason put forward may be deemed a "good reason" may be looked at with greater scrutiny, and the factors which can properly be taken into account in assessing the balance of justice may need to be looked at from a perspective that places a greater emphasis on the need to move with expedition."*

83. To my mind, the foregoing fatally undermines the proposition, urged by counsel for the Plaintiff/Respondent, that this Court, for the purposes of an application concerned with the renewal of a summons, should ignore substantial periods of delay which counsel for the Plaintiff very fairly and properly acknowledges as possibly meriting the description of "inordinate" or "inexcusable" delay (the Plaintiff's counsel going on to submit that such delay is exclusively a matter for consideration in a different application). In my view, delay on the part of a Plaintiff, the extent of that delay, whether an explanation is offered for that delay and the credibility of that explanation are all factors which properly form part of this Court's consideration of whether there are special circumstances which justify extension. In other words, delay cannot be ignored or hived off from the court's consideration. To my mind, in order for this Court to properly apply the test in O. 8, r. 4, necessitates a consideration of all issues, and delay and any reason or reasons proffered to explain delay, as well as issues such as prejudice, hardship and the interests of justice and all other relevant issues must form part of this Court's consideration. That is clear from the guidance given in the Court of Appeal's recent decision in *Murphy v. HSE* [2021] IECA 3, the principles outlined therein being the principles which I have applied in reaching the decision detailed in this judgment.

84. Reference was also made during the course of submissions, to paras. 26 and 27 of the decision in *Moloney v. Lacy Building and Civil Engineering Ltd* in which the learned judge stated, *inter alia*, the following:-

> *"[26] …it seems to me that the policy inherent in the statute of limitations requires that proceedings be commenced and, thus, be tried within a reasonable proximity to the events giving rise to the relevant claim. Part of the reason behind that policy is that injustice may be caused if proceedings are not formally commenced in a timely*

manner, thus causing problems for the defendant. However, it seems to me that another aspect of the relevant policy is to assist in ensuring that cases come to trial sufficiently close to the events giving rise to the relevant proceedings so as to minimise the risk of injustice. In that context, and to the extent that such matters are capable of assessment at that stage, it seems to me that, in balancing the interests of justice in a renewal application, the court should have regard to any real risk of prejudice…

[27] …there does not seem to me to be any legitimate basis for a contention that the Plaintiffs were not in possession of a sufficient expert report to warrant the commencement of professional negligence proceedings against the architects as of the date of the issue of the plenary summons in this case. I am not, therefore, satisfied that the absence of expert reports affords, on the facts of this case, a "good reason" for the plenary summons not having been served within the period provided by the rules, and the absence of such expert reports does not, therefore, in my view, amount to a good reason for renewing the summons in this case."

85. It is not in dispute that the relevant apartment development was completed in 2004. It seems to me to be self-evident that a trial which could not conceivably take place before 2022 at the earliest, is likely to involve impairment, to a material extent, of the ability of witnesses to recall events of at least eighteen years earlier. Neither the First Named Defendant nor this Court has any clear understanding of the specific nature and details of the claim or claims against the First Named Defendant, but the passage of so many years, coupled with positive averments made on behalf of the First Named Defendant to the effect that it is prejudiced in defending a claim at this juncture, seem to me to entitle the court to assume that there is at least moderate prejudice insofar as the ability of the first named defendant to defend a claim is concerned, with a possible risk of injustice arising from delay including, it has to be said, wholly unexplained delay between 29th April 2016 (when the plenary summons was issued) and the service of the plenary summons (well over three years later on 17 July 2019). In other words, the evidence before this court allows for a finding that some prejudice arises insofar as the first defendant's ability to defend a claim at this remove. Furthermore, the evidence in this case wholly undermines the Plaintiff's contention that they were not in possession of a sufficient expert report to justify maintaining the proceedings. The Plaintiff had the engineer's report which issued in 2016. There is no evidence that the Plaintiff ever went to another expert, be that engineer, architect or otherwise. There was no absence of an expert's report and, thus, no reason, still less a good reason or special circumstance, explaining either the failure to serve the plenary summons within 12 months of 29th April 2016, or justifying a renewal at this stage.

86. In circumstances where *Moloney v. Lacy Building and Civil Engineering Ltd* concerned proceedings which the Plaintiff sought to bring against a firm of architects, certain passages from para. 33 and 34 of the court's decision (albeit one which was concerned with the "old" O. 8) also seem appropriate to refer to, as follows:-

"[33] I am satisfied that there would be a significant risk of prejudice to the architects should these proceedings now be permitted to continue. While it is true to say that the architects were given early notice, in general terms, of the complaints made by the Plaintiffs and had, again in those general terms, an opportunity to inspect the premises, which opportunity was availed of, it nonetheless needs to be noted that a case such as this is likely either to turn on, or to be significantly influenced by, many points of detail… It is inevitable that the ability to deal with questions of detail which could be highly material to the question of whether any particular item of claim could properly be said to arise from a liability on the part of the contractor on the one hand, or the architect on the other, must have been significantly impaired by the passage of time and in particular the fact that the claim, which it would appear will now be made if these proceedings are permitted to continue, will involve the filing of detailed particulars, at least some of which will undoubtedly come to the attention of the architects for the first time some eight or nine years after their retainer was terminated…

[34] In addition, it seems to me that it is appropriate to take into account the particularly long delay after the issue of the plenary summons and before its renewal which is shown on the facts of this case. In addition, the fact that the application to renew occurred well over a year after the last date on which the statute of limitations could be said to have expired, seems to me to identify the delay in this case as being particularly excessive."

87. It is submitted on behalf of the First Named Defendant that the foregoing is on "all fours" with the situation in the present case and that the reasoning employed in 2010 by the current Chief Justice applies equally to the case before this Court. I agree with this submission. In contrast to the situation in *Moloney*, the First Named Defendant in the present proceedings was not given, even in general terms, early notice of the Plaintiff's complaints. Nor was the First Named Defendant afforded the opportunity, in general terms or otherwise, to inspect the premises and, thus, no such opportunity was availed of. Rather, entirely unknown to the First Named Defendant, it appears that the Plaintiff has undertaken "*remedial works to the apartments*". If so, that would appear to give rise to the potential for further prejudice to the First Named Defendant, inasmuch as the opportunity to inspect what is alleged to be a defect is plainly compromised if the alleged defect has already been remedied *before* any opportunity for the First Named Defendant to inspect the alleged defect or consider issues such as the necessity, scope and cost of proposed remedial works, in advance of the remedial works themselves being undertaken. This fortifies me in the view that at least moderate prejudice to the first named defendant and a possible risk of injustice arises in this case and forms part of the court's consideration.

88. On behalf of the First Named Defendant, Counsel also pointed to the periods of delay involved in the case before this Court, in particular, to the period of two years and two months which expired between the final day when the plenary summons could have been served without the need for any application to renew (28 April 2017) and the date of the

renewal (24 June 2019). Counsel for the First Named Defendant contrasted that lengthy period with the description given by Hyland J. to various periods of delay during the course of her judgment in *Brereton v. national Maternity Hospital* [2020] IEHC 172, the following being an extract from para. 31 of that judgment:-

> *"The application to renew the Summons was made on 28 May 2019, and the period of delay is therefore a relatively short one, being 10 weeks from the date upon which the Summons expired. In the context of the cases opened before the court, given a spectrum of delay ranging from extreme (see for example Moynihan – elapse of 2 years 2 months from the expiry of the 12 month period, or Moloney v. Lacy Building & Civil Engineering Ltd. & Ors. [2010] IEHC 8 – elapse of 5 years 4 months from the expiry of the 12 month period) to moderate (Roche v. Clayton [1998] 1 IR 596 – elapse of 6 months from expiry of the 12 month period or Allergen – elapse of 10 months from expiry of the 12 month period), a period of 2 ½ months is at the lesser end of the spectrum. I am of course conscious that with the change in the legal test to "special circumstances," much shorter periods of delay are likely to be treated as sufficient to justify a refusal to renew a summons. Had the period of delay been longer, even by a month or two, my approach to this case would have been different. However, in the context of a 12 month period within which to issue a summons, in my view a 10 week delay in the context of this case is sufficient to persuade me that the balance of justice favours upholding the decision to renew the Summons."*

89. In the context of the analysis by Hyland J. in *Brereton*, I have no hesitation in describing the delay on the part of the Plaintiff, of two years and two months, from the expiry of the 12 month period, as being at the *extreme* end of delay. It is also, on the evidence before this Court, delay for which no credible excuse whatsoever has been given.

90. It is also appropriate to refer to paras. 70 and 71 of the judgment by Mr. Justice Simons in his 30th October 2020 decision in *Downes v. TLC Nursing Home Ltd* [2020] IEHC 465, as follows:-

> *"70. …it is said that the balance of justice favours allowing the renewed summons to stand in that it would present difficulties for the Plaintiff in terms of the Statute of Limitations were the renewal to be set aside.*
>
> *71. This circumstance is not one which is stated in the order of 1 July 2019. It will be recalled that, under the revised version of Order 8, rule 1, the "special circumstances" must be stated in the* ex parte *order. It must be doubtful, therefore, whether a Plaintiff is entitled to put forward new grounds at an inter partes hearing under Order 8, rule 2."*

91. The foregoing is a view with which I would respectfully agree. To my mind, there is an obvious connection between the requirement in the revised O. 8 that the *special circumstances* be stated in the *ex parte* order, and the obligation on a Plaintiff to be full, and frank, as regards setting out all relevant facts and circumstances in the grounding

affidavit at the *ex parte* stage. The requirement for candour, particularly in the context of an *ex parte* application is important to re-emphasise. To my mind, there can be no "holding back" and, at the *ex parte* stage, the court is entitled to regard what a Plaintiff has said on affidavit as being both accurate and comprehensive insofar as what they maintain constitute the special circumstances justifying a renewal under Ord. 8. Indeed, it is impossible to conceive of a situation where a Plaintiff could deploy, at the *inter partes* hearing, "ammunition" which they decided not to use at the *ex parte* application stage. That approach would involve being *less* than candid at the *ex parte* stage and any lack of candour must be deprecated. It seems to me that, as a matter of first principles, it would only be permissible for a Plaintiff to proffer new grounds at the *inter partes* hearing if those new grounds were said to have arisen *after* the determination of the *ex parte* application. In the case before this Court, there is no evidence of any new grounds having arisen after the *ex parte* application was heard.

92. I also take the view that this court, on an interlocutory application pursuant to Order 8, rule 2, is entitled to take into consideration the extent to which the account given to the Court by a Plaintiff at the *ex parte* stage was less than comprehensive or contained inconsistencies, in particular unexplained inconsistencies, when compared to the account provided by the Plaintiff in opposition to a defendant's application to set aside a renewal. The foregoing seems to me to be required in the context of the Court considering, as it must, the interests of justice as part of the overall analysis required in order to properly apply the single test detailed in Order 8, rule 4.

The Court's decision summarised

93. Two special circumstances were stated in the court's 24th June 2019 order renewing the summons. As to the first, the evidence demonstrates that, contrary to what Meenan J. was given to understand in the *ex parte* application, it is not the case that an expert report was unavailable. On the contrary, a report from the one-and-only expert ever retained by the Plaintiff was issued in 2016 by the Plaintiff's engineer. That very report of 2016 was said (in para. 6 of the affidavit grounding the *ex parte* application) to have been received on or about 26th February 2019. In reality, the Plaintiff's engineer produced this report in 2016 and it was this 2016 report which the Plaintiff relied upon to secure a renewal of the plenary summons 3 years later on 24th June 2019, with no credible excuse proffered to explain either the failure to serve within 12 months of the plenary summons having been issued, or the failure to seek to renew the summons in the months and years which elapsed since then (other than the suggestion that the Plaintiff decided *not* to pursue litigation). The evidence also demonstrates that, despite the fact that the Plaintiff's engineer had prepared a report in mid-2016 and despite the First Named Defendant requesting a copy at that time and being told by the Plaintiff's engineer that it would be furnished, subject to his client giving consent, 3 years elapsed without the engineer's report being furnished to the First Named Defendant, at which point the Plaintiff, relying on the same 2016 report, secured a renewal of the plenary summons (the erroneous impression created in *the ex parte* application being that it was a 2019 report, or a report not available to the Plaintiff until 2019, upon which the Plaintiff relied).

94. Regarding the second of the special circumstances stated in the Order renewing the summons, the evidence demonstrates that the First Named Defendant was not, at all stages, on notice of the issues in these proceedings. Neither the correspondence from 2015 (all addressed to Mr. Carney), nor the plenary summons (naming Taylor Architects Ltd.) which the First Named Defendant only saw for the first time after the successful renewal application, gives clarity as to the specific nature of the Plaintiff's claim. Despite the Plaintiff's Mr. McCarney asking the Plaintiff's solicitor in 2016, what the specific issue was, the Plaintiff's solicitor was unable to tell him (something else which was not brought to the court's attention at the *ex parte* stage). Despite asking for the engineer's report in 2016, this was not furnished to Mr. McCarney of the First Named Defendant in the 3 years which subsequently elapsed. It was not until the present application that the First Named Defendant saw, for the first time, a report from the Plaintiff's engineer. At no stage has the First Named Defendant ever been told, with anything like sufficient clarity, what duty it is alleged to owe to the Plaintiff, the nature of the alleged breach of such duty and what loss the Plaintiff claims to have incurred as a consequence of an alleged legal wrong by the First Named Defendant, nor does the latter know the quantum of such alleged loss.

95. This Court is obliged to decide whether there are *special circumstances* which *justify* a renewal of the plenary summons. Doing so, involves a consideration of the facts in this particular case and a careful consideration of same demonstrates that neither of the two special circumstances which were stated in the Court's 24 June 2019 Order exist. The evidence which I have analysed in this judgment wholly undermines their existence. There is also evidence before the court of prejudice to the First Named Defendant. Taking into account all relevant matters including the interests of justice and issues concerning prejudice or hardship to either party, I am very satisfied that there are *no special circumstances which justify* renewal of the summons. Moreover, given that, on the facts of this particular case, there are no special circumstances, it does not seem to me that this Court has the discretion to grant a renewal, in the absence of such special circumstances regardless of any hardship which might result to the Plaintiff. The existence of special circumstances on the facts of a given case seem to me to be *a sine qua non* for the grant of a renewal and the evidence before this Court wholly undermines the existence of the "*special circumstances*" stated in the court's 24th June 2019 order.

Marked inconsistencies

96. In *Downes v. TLC Nursing Home Ltd* [2020] IEHC 465, Mr. Justice Simons state the following, at paras. 37-39:-

> "*37. The affidavit grounding an* ex parte *application to extend time for the making of an application for leave to renew a summons must set out in full the factual circumstances relied upon as justifying an extension of time. In particular, the affidavit must address the delay between the expiration of the initial 12 month period and the date of the application to court. All relevant correspondence must be exhibited. Given that the application is made* ex parte*, there is a duty on solicitors to make full and frank disclosure of all relevant matters to the court.*

38. The affidavit should set out the facts relied upon as establishing the "good reason" for which it is said that the summons should be renewed.

39. It is a regrettable feature of much of the case law in this area that the affidavits grounding ex parte *applications under Order 8, rule 1(3) have often been found to be deficient. See, in particular, the observations of Kelly P. in Whelan v. Health Service Executive [2017] IEHC 349 where the grounding affidavit in that case had been criticised as containing a number of "material misrepresentations". In the more recent case law, the courts have identified marked inconsistencies between the explanations offered on affidavit, on the one hand, and the actual contents of the inter partes correspondence exhibited, on the other."*

97. In the case before this Court, it has been necessary for me to point out marked inconsistencies between what the court was given to understand at the *ex parte* stage and the true position which emerges from an analysis of the evidence before this Court in the context of the application brought by the First Named Defendant to set aside the renewal. I want to make clear that I direct no criticism whatsoever at any identifiable individual. Given the information which is, and is not, before this Court, doing so would be unfair. I am conscious, too, that the Plaintiff is not a trading company in operation for profit, but a management company on behalf of which affidavits were sworn. It is incontrovertible, however that the Plaintiff permitted an affidavit to be sworn for the purposes of an *ex parte* application to the court which failed to set out in full, and with accuracy, the entire circumstances and facts relied upon as a basis for the extension which was sought. That should not have occurred. I fully acknowledge that mistakes can and do happen and there can often be entirely innocent and very understandable explanations for same. For example, legal representatives can only prepare affidavits which reflect the instructions which they are given and it can happen that memories or records are imperfect, resulting in imperfect accounts being given on affidavit, albeit *bona fide* when given. Equally, someone may fail to appreciate the obligation, when swearing an affidavit, to detail all facts fully without that failure being any conscious attempt to mislead. One could also conceive of a situation where a deponent relies in good faith on information which they believed at the time to be correct and complete but which on further investigation turns out to be otherwise, particularly if a deponent relies on others with respect to the information. In a management company, as opposed to a trading company scenario, the potential for the foregoing may well be greater. Whether due to simple inadvertence or a failure to appreciate the nature of the task or a reliance by the deponent on incorrect and incomplete information supplied by others, or whether due to any other reason, the reality in the present case is that, whilst it would be entirely unfair for this court to decide there was a conscious decision or effort on the part of any individual to be less than candid with the court at the *ex parte* stage, this was undoubtedly the result.

98. The Court hearing the *ex parte* application was not given the full facts and circumstances and there are material inconsistencies which have come to light since. This should not have happened. It must also be pointed out that there was an opportunity for the Plaintiff

to explain, when responding to the First Named Defendant's application, how it was that the Court at the *ex parte* stage was not given a full and accurate picture. The Plaintiff did not take that opportunity and in my view can also be fairly be criticised for this.

99. I want to emphasise, once more, that I direct no criticism whatsoever at any individual, still less at counsel who, with skill and professionalism, mounted as much of an opposition to the present motion as could reasonably have been made, having regard to the facts. I do however, criticise the Plaintiff. It was the Plaintiff's case and it seems to me that there must have been, in terms of the collective knowledge which was available to the Plaintiff at all material times, sufficient information and documentation to ensure that the Court was given at the *ex parte* stage, a full, frank and accurate account of all facts. It was for the Plaintiff to ensure that this was done, but the Plaintiff did not do so. It is the Plaintiff who can fairly be criticised in this regard.

100. I say this because it seems to me that, had the Plaintiff made proper enquiries *prior* to making the *ex parte* application - in other words, such enquiries as could have reasonably been expected of the Plaintiff - more would inevitably have become known and material information would have emerged. This material information could, and most certainly should, have been made know to Mr. Justice Meenan. Very unfortunately, and due to the Plaintiff's failure, it was not. In the circumstances, it is difficult to avoid the conclusion that, had the Plaintiff made proper enquiries and put all material information before the court at the *ex parte* stage, the present hearing, which self-evidently made considerable demands on what are scarce court resources and which involved a significant commitment of time and legal costs for all concerned, could have been avoided.

101. In the manner explained and for the reasons detailed in this judgment, I am entirely satisfied that no special circumstances exist which justify renewal and that it is not in the interests of justice to renew the summons in question. This is a decision which flows from the evidence before this Court which I have examined in this judgment and is a decision this Court was bound to make in light of the facts, regardless of the undoubted failure on the part of the Plaintiff to ensure that all relevant information was put before the court, accurately and comprehensively, at the *ex parte* stage.

102. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: "*The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate*." Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. In default of

agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days.