THE HIGH COURT

[2011 5235 P]

BETWEEN

FRANCIS DOOLEY

PLAINTIFF

AND

CLANCY PROJECT MANAGEMENT LIMITED, T/A CLANCY CONSTRUCTION

AND

BY ORDER OF THE COURT

MULCAHY MCDONAGH & PARTNERS LIMITED

RESPONDENTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the 21st day of June 2022

Introduction

1. On 10 June 2011, Mr. Dooley issued a plenary summons against the First Defendant making a claim for "*damages for loss, damage, business disruption, inconvenience and distress occasioned to the Plaintiff by reason of the negligence and/or nuisance and/or breach of contract and/or breach of duty and/or trespass…*". The Second Defendant was joined by order made on 29 October 2013.

2. The background concerns a development initiated in 2006 at Courtown Harbour, Co. Wexford and the proceedings concern the Plaintiff's claim in respect of damage to "Skipper's Pub", owned by the Plaintiff, arising from works to an adjacent property in the context of the said project.

3. I will presently look at the claim as pleaded as well as at the manner in which it has been progressed. The Second Defendant has pleaded *inter alia* that it never carried out project management work for the Plaintiff and has denied that it ever owed the Plaintiff a duty of care in relation to any project management services. The Second Defendant's position is that it should never have been joined into the proceedings; that it did not carry out project management services as alleged by the Plaintiff; and that a separate project management company, namely MMP Project Management Limited ("MMP PM"), which is part of the same corporate group as the Second Defendant, was engaged to provide limited, post-tender project management services in relation to the relevant project in or around 23 May 2006.

4. On 22 June 2021, the Second Defendant's solicitors issued a motion which was initially returnable for 13 October 2011 seeking the following relief:

> *(i) An order pursuant to the inherent jurisdiction of this Court striking out the Plaintiff's claim against the Second Defendant as being frivolous and vexatious and/or as disclosing no reasonable cause of action and/or as having no reasonable or arguable prospect of success and/or as clearly unsustainable and/or as bound to fail by reason of the Second Defendant having no involvement in the matters giving rise to these proceedings;*
>
> *(ii) Further and/or in the alternative, an order pursuant to the inherent jurisdiction of this Court dismissing the Plaintiff's claim against the Second Defendant on the grounds of inexcusable and/or inordinate delay;*
>
> *(iii) An order releasing the Second Defendant from its implied obligations of confidentiality in relation to the documents listed in the affidavit of the Plaintiff sworn on 13 April 2021 and any further documents discovered by the Plaintiff to the Second Defendant in these proceedings for the purposes of enabling copies of the said documents and the affidavit of discovery of the Plaintiff to be provided to the solicitors on record for the Second Defendant as sued by the Plaintiff and/or Ocean Point Development Company in related proceedings entitled The High Court record nos. 2011/6564 P and 2014/7827 P for the purposes of deployment in aid of the defences of the Second Defendant in those proceedings.*

5. The reference to proceedings under record no. 2011/6564 P is a reference to separate legal proceedings initiated by Mr. Dooley, in 2011, against 5 defendants (including both of the defendants in the present proceedings) arising from the relevant Wexford development. The title to same is as follows: *Francis Dooley v Patterson Bannon Architects Limited (in Liquidation), P.H. McCarthy Consulting Engineers Limited, Mulcahy McDonagh & Partners Limited, CMPTNR Consultancy Limited t/a Callan Maguire Partnership, Clancy Project Management Limited t/a Clancy Construction* (hereinafter "the Dooley proceedings"). Record No. 2014/7827 P concerns separate proceedings, issued in 2014, against the same 5 defendants by Ocean Point Development Company Limited (hereinafter "the Ocean Point proceedings") in relation to the same development. In December 2021, I gave judgment in respect of motions seeking to dismiss the Dooley and Ocean point proceedings on delay grounds. Messrs. Ronan Daly Jermyn solicitors represent Mulcahy McDonagh & Partners Limited in both the Dooley proceedings and in the Ocean Point proceedings. There are separate insurers and solicitors acting for Mulcahy McDonagh & Partners Limited in the present proceedings, in which Messrs DWF solicitors represent the Second Defendant. I now turn to look at the claim made in the present proceedings and the progress of same since they were commenced in 2011. For ease of reference, I will look at matters in chronological order.

2011

6. The Plaintiff issued a plenary summons on 10 June 2011 which named only the First Defendant and made a claim for damages for loss, damage, business disruption, inconvenience and distress by reason of negligence, nuisance, breach of contract, breach of duty and/or trespass. Plainly, this was not a step taken to progress a claim against the Second Defendant who was not named in the proceedings as originally issued.

7. On 04 July 2011, an Appearance was entered by Messrs. McCann FitzGerald, solicitors on behalf of the First Defendant. Other than the foregoing, the Plaintiff took no step to progress the proceedings in 2011.

2012

8. The Plaintiff took no steps to progress the proceedings throughout 2012. On 15 November 2012, a Notice of Change of Solicitors was filed in the High Court Central Office confirming that Manus Bray & Co solicitors had been appointed for the Plaintiff.

2013

9. The Plaintiff took no step to progress the proceedings in 2013 until his solicitors issued a Notice of Intention to Proceed, which was filed in the High Court Central Office on 23 May 2013. The aforesaid gave notice to the First Defendant that the Plaintiff intended to proceed with his action after the expiration of one month from the date of the notice, namely, as of 23 June 2013. It is appropriate to note that this was two years after the plenary summons had been issued against the First Defendant.

10. On 29 October 2013, the Second Defendant was joined in the within proceedings. Thus, a period of 2 years and 4 months expired between the issuing by the Plaintiff of the plenary summons herein and the joinder of the Second Defendant.

2014

11. The plenary summons was amended on 23 January 2014 and the effect of same was to make precisely the same claim against the Second Defendant as had been made against the First Defendant. This is clear from the contents of the general indorsement of claim, wherein the claim against the First Defendant is repeated, *verbatim*, as against the Second Defendant.

12. On 06 March 2014, the Plaintiff delivered a Statement of Claim. Before proceeding further with the examination of the relevant 'timeline', it is appropriate to look at certain of the pleas made in the Statement of Claim as follows.

The 6 March 2014 Statement of Claim

13. It is fair to say that the Statement of Claim alleges breach of duty and/or negligence on the part of the First Defendant, as building contractor, of the adjacent development site (also owned by the Plaintiff) as well as breach of contract, negligence, and breach of duty on the part of the Second Defendant, as project manager, of the adjacent development. To get a clear understanding of the nature of the Plaintiff's claim and the relevant timeframe, it is useful to quote, *verbatim*, paras. 4 to 15, inclusive, from the Statement of Claim, as follows: -

> *"4. The Plaintiff is the owner of lands in Courtown, Co. Wexford known as the Courtown Entertainment Complex which he purchased in 2003. These lands included the licensed premises*

known as Skipper's premises, hereinafter referred to, and the adjoining lands thereto which then included a fast food outlet and other ancillary areas.

5. In or around December 2004, the Plaintiff secured planning permission from Wexford County Council for a development on the aforementioned lands adjoining Skipper's for a development comprising 34 apartments and 9 retail units hereinafter referred to as the Development.

6. In or around early 2006 the Plaintiff met with the Second Defendant with regard to their provision of full project management and associated services for the development. It was represented to the Plaintiff that those project management services would include inter alia the co–ordination and management of the development from commencement to completion which would include inter alia cost control, quality control and delivery of the completed project.

7. In or around June 2006 agreement was reached between the Plaintiff and Second Defendant for the provision of those project management services for a fee in the region of €120,000. The appropriate due amounts were paid on an ongoing basis.

8. The Second Defendant's duties included to act as project manager and to supervise and monitor the development with regard to Design, Health and Safety, ongoing project costs and monitor and supervise all the parties to the Development and their works therein to include inter alia the: -

(i) Building contractor/sub – contractors

(ii) Architect and planning consultants

(iii) Engineers

(iv) Quantity surveyors

9. The Plaintiff at all times relied on the Second Defendant with regard to the performance of the aforementioned duties and the satisfactory completion of the development.

10. In or around 20th August, 2006 the Plaintiff formed a company, Ocean Point Development Company Limited, to complete the development for and on behalf of the Plaintiff.

11. After a tender process commencing in or around September 2006, the First Defendant was recommended by the Second Defendant as the contractor for the development. The Plaintiff accepted the Second Defendant's recommendation.

12. A contract was signed based on the RIAI Contract where quantities form part of the contract between Ocean Point Development Company Limited and the First Defendant commenced the development on the 2nd March, 2007 with a scheduled contract period of 56 weeks i.e. completion in or around March 28th 2008.

13. The construction works were commenced by the First Defendant on or about 2nd March 2007 with the Second Defendant as Project Manager thereof and the duties aforementioned.

14. In the completion of the aforementioned works involving excavation, foundation and superstructure works, damage was caused to the Plaintiff's Skipper's premises and as a result of which the Plaintiff has suffered loss, damage, inconvenience and expense with the Skipper's premises rendered unfit for purpose.

15. At all material times it was an implied and/or an express term of each of the contracts and/or agreements with the defendants that in the course of the construction works all the adjoining properties, to include the Skipper's premises, would not be damaged or rendered unfit for purpose during the completion of the development".

14. With regard to the foregoing pleas, it is appropriate to make the following comments. The relevant events are said to go back to "*early 2006*". This is when the Plaintiff pleads that he met with the Second Defendant and when, according to the Plaintiff, representations were made as to the project management services which would be provided. It is also expressly pleaded that "*in or around June 2006 agreement was reached between the Plaintiff and Second Defendant for the provision of those project management*

services…". Furthermore, it is pleaded that, after a tender process commencing "*in or around September 2006*", the Second Defendant "*recommended*" the First Defendant as contractor and the Plaintiff "*accepted*" the Second Defendant's recommendation, following which a contract was entered into and the First Defendant commenced the development "*on the 2nd March, 2007*".

15. In light of the foregoing, what occurred in "*early 2006*" and in "*June 2006*" are important elements of the Plaintiff's case. In the manner which will be explained later in this judgment, the Second Defendant denies that any agreement between it and the Plaintiff was ever reached at any stage as regards project management services. As will also be seen, the Plaintiff pleads that the agreement reached with the Second Defendant in 2006 was an *oral* agreement. Thus, disputed events going back to early 2006 are a feature of the Plaintiff's claim in these proceedings.

16. It can also be said that well over 7 years elapsed between early 2006/June 2006 and the joinder of the Second Defendant into the proceedings, by order made on 29 October 2013.

17. The significance of oral evidence being necessary to resolve disputes is also clear from the fact that, in the statement of claim, the Plaintiff pleads reliance on both express and implied terms in relation to the alleged agreement between the Plaintiff and Second Defendant.

18. The statement of claim also contains pleas indicating when the alleged breaches arose. The Plaintiff makes clear that it was by March/April 2008 that he suffered loss. It is appropriate, at this juncture, to quote, *verbatim*, the particulars of loss and damage and special damages as pleaded by the Plaintiff: -

> "***PARTICULARS OF LOSS AND DAMAGE***
>
> *The Skipper's premises contained a two–storey licensed premises.*
>
> *The general damages to the premises included inter alia damage to the floors, statute doors, walls, roofs, ceilings and the fixtures and fittings therein. This damage included inter alia, cracking, ground heave.*
>
> *Further damage and losses were to the electrical and heating installation, together with all decoration throughout.*
>
> *This damage and losses extends to and includes the necessary works to comply with all and any requirements of the current building regulations and the appropriate professional fees thereto.*
>
> *Furthermore, the Plaintiff was due to commence trading on the scheduled completion of the contract on the 28th March 2008 with the 4-week extension thereof, i.e. to the 25th April 2008, and due to the damaged condition of the premises was unable to do so.*
>
> *These losses include inter alia (a) loss of trading profit and/or (b) loss of rental income.*
>
> *The above losses as applicable apply from the 25th April 2008 and are continuing and ongoing.*
>
> *(Please note, the Plaintiff has been and continues to be denied access to the premises and reserves the right to amend the particulars of damage up to the date of the trial of the action).*
>
> ***PARTICULARS OF SPECIAL DAMAGES***
>
> *(i) Building works to include repairs, reinstatements as necessary to building and to include electrical and mechanical services therein: total including VAT, provisional sums c. €589,746.00.*
>
> *(ii) Project management, specification and supervision therein, including VAT c. €95,866.20.*
>
> *(iii) Licensed premises, fixtures and fitting and items thereto c. €200,000.*
>
> *(iv) Loss of trading income from 25th April 2008 (contract extension) ongoing at c. €20,000.00 per week to present €5,000,000.00*

(v) Loss of profit income at €4,000 per week from 25th April 2008 ongoing €232,000.000.

(Please note, the Plaintiff reserves the right to amend the particulars of special damages up to and including date of trial)."

19. It is plain from the Statement of Claim that the relevant period begins in "*early 2006*" and runs to "*25th April 2008".* It is uncontroversial to say that just over 5 years and 6 months expired between 25 April 2008 (when, according to the Plaintiff, he was due to commence trading, but, due to the damaged condition of the premises, was unable to do so) and 29 October 2013 (when the Second Defendant was joined into the proceedings). Having looked at the Statement of Claim, I now return to the chronology of relevant events to look at what happened after the Statement of Claim was delivered in March 2014.

What occurred from April 2014 onwards

20. Having been served with the 06 March 2014 Statement of Claim, the Second Defendant caused an Appearance to be entered, dated 08 April 2014. On 19 May 2014, the First Defendant raised a Notice for Particulars. On 16 September 2014 a Notice of Change of Solicitors was filed, confirming that John P. O'Donohoe Solicitors had been appointed to act for the Plaintiff. On 10 October 2014 the Plaintiff furnished Replies to the First Defendant's Notice for Particulars.

2015

21. On 26 January 2015, the solicitors for the First Defendant served a Notice Seeking Further and Better Particulars. On the same date, a Defence was delivered on behalf of the First Defendant.

27 February 2015 – Second Defendant's Notice for Particulars

22. On 27 February 2015, the solicitors for the Second Defendant served a Notice for Particulars. This ran to 35 paragraphs and sought particulars arising from matters referred to in the Statement of Claim.

23. On 06 March 2015, the Second Defendant served a Notice of Indemnity and Contribution against the First Defendant.

24 April 2015 – Defence of the Second Defendant

24. On 24 April 2015, a Defence was delivered on behalf of the Second Defendant and it is appropriate to look at its contents. It is fair to say that, in addition to pleading that the Plaintiff's claim is 'statute barred', the Second Defendant's position is that the Plaintiff has sued the wrong defendant.

25. The Defence denies that the Second Defendant entered into any contract with the Plaintiff and goes further by identifying the entity which it maintains was requested by the Plaintiff to provide certain project management services concerning the relevant development. That entity is identified as "MMP Project Management Ltd" (i.e. MMP PM) and the Defence specifies, with some particularity, what the Second Defendant maintains was the limited service to be provided by MMP PM. It is appropriate to quote *verbatim* extracts from the Second Defendant's Defence as follows: -

"*1. The Plaintiff is statute barred from taking this case against the Second Defendant by virtue of the provisions of the Statute of Limitations 1957 and in particular by virtue of s. 11 thereof.*

Without prejudice to the foregoing

2. It is denied that the Second Defendant entered into a contract with the Plaintiff as alleged in the statement of claim. For the avoidance of doubt, it is denied that the Second Defendant ever carried out any project management work for the Plaintiff or anyone else and it is denied that the Second Defendant ever owed to the Plaintiff a duty of care in relation to any project management services. It is denied that the Plaintiff is entitled to damages for breach of contract and/or negligence and/or breach of duty and/or interference with Plaintiff's property rights and/or wrongful interference with his property against the Second Defendant as alleged in the statement of claim or at all. Each and every plea contained in the statement of claim relating to the Second Defendant is denied as if set forth individually hereunder and traversed seriatim.

Further without prejudice to the foregoing

3. The Second Defendant is a stranger to the matters pleaded at paras. 1 and 2 of the statement of claim and requires full proof of all such matters.

4. The matters pleaded at para. 3 of the statement of claim are denied. The Second Defendant is a limited liability company with registered offices at 46–48 Pembroke Road, Dublin 4 and provides chartered quantity surveying and building cost consultancy services.

5. The Second Defendant is a stranger to the matters pleaded at paras. 4 and 5 of the statement of claim and requires full proof of all such matters.

6. The matters pleaded at paras. 6, 7 and 8 of the statement of claim are denied. Without prejudice to the generality of the foregoing, it is denied that the Second Defendant provided project management and associated services and/or entered into an agreement with the Plaintiff whether as alleged at para. 7 of the statement of claim or at all. At the time planning was already in place, the full design team appointed and a tenderer already identified. For the avoidance of all doubt, it is specifically pleaded that the Second Defendant never had a contractual relationship with the Plaintiff for project management services as alleged.

7. Without prejudice to the foregoing, in or about May 2006, the Plaintiff purporting to be Ocean Point Development Limited (with Philip McDonald) requested MMP Project Management Ltd. to provide a limited post – tender project management service in relation to the development. MMP Project Management Limited agreed to provide construction stage project management services for a fee of €120,000 plus VAT. The service to be provided by MMP Project Management Ltd. was limited to the construction stage of the development and included: -

(a) Establish lines of responsibility and communication with and between consultants and contractor organisations.

(b) Establish a framework for monitoring progress and financial control.

(c) Arrange and chair meetings as necessary.

(d) Arrange for minutes of meetings to be circulated to all concerned.

(e) Report regularly to client.

(f) Construction Stage: Commissioning and handover.

(g) Arrange procedure for handover of projects.

(h) Coordinate inspections, hand–over and commissioning.

(i) Monitor preparation and hand–over of maintenance manuals, as - completed drawings, test certificates, final reports, statements, warranties, safety statements and other similar documents.

8. Further, without prejudice to the foregoing, it is specifically pleaded that the Plaintiff project managed the development process to a point where on – site work was due to begin. The Plaintiff made the appointments of the Design Team including architects, engineers and quantity surveyors. Neither the Second Defendant nor MMP Project Management Ltd. were involved in the pre or post contract cost control or valuation/certification process at all. The client appointed architect and/or the engineer, certified the works and the payments and managed the quality control . . ."

26. The Defence goes on to plead that the Second Defendant and MMP PM are strangers to matters pleaded in the Statement of Claim. The Defence pleads *inter alia* that if the Plaintiff suffered loss (which is denied), same was not due to any wrong on the part of the Second Defendant and/or MMP PM but was due to the negligence and/or contributing negligence of the Plaintiff.

27. Pleas of contributory negligence include that; the Plaintiff adopted the role of project manager when he did not have the skill, qualifications or experience to do so; that he failed to appoint a project manager; that he failed to agree a clear specification of works with the contractor; that he failed to inform the Second Defendant or MMP PM of any issue in relation to damage at the Skipper's premises; that he failed to exercise reasonable care for the protection of that premises; and that he failed to instruct competent architects and competent engineers regarding the development.

28. Each and every particular of special damage is denied, and it is pleaded that the Plaintiff is not entitled to the reliefs sought in the Statement of Claim or any relief, as against the Second Defendant and/or MMP PM, in the manner alleged or at all.

16 October 2015 - Plaintiff's replies to the Second Defendant's Notice for Particulars

29. On 16 October 2015 the Plaintiff furnished Replies to the Second Defendant's Notice for Particulars of the 14 August 2015.

17 June 2016 - Second Defendant's Notice for Further and Better Particulars

30. On 17 June 2016, the Second Defendant raised a Notice Seeking Further and Better Particulars. This sought further particulars in light of the replies which had been delivered by the Plaintiff on 16 October 2015.

20 June 2016 – Second Defendant's Notice to Produce Documents

31. On 20 June 2016, the Second Defendant delivered a Notice to Produce Documents pursuant to O. 31, r. 15 of the Rules of the Superior Courts ("RSC") requiring the Plaintiff to produce for inspection (i) the planning permission referred to at para. 5 of the statement of claim and (ii) the contract based on the RIAI contract between Ocean Point Development Co. Ltd and the First Defendant referred to at paras. 12 and/or 16 of the Statement of Claim.

27 September 2016 – Plaintiff's Replies to Second Defendant's Notice for Further and Better Particulars

32. On 27 September 2016, the Plaintiff furnished Replies to the Second Defendant's Notice for Further and Better Particulars of the 17 June 2016.

29 June 2017 – Plaintiff's Notice of Intention to Proceed

33. On 29 June 2017, the Plaintiff's solicitors issued a Notice of Intention to Proceed which was filed in the High Court Central Office on 30 June 2017.

34. It is plain that, following the delivery by the Plaintiff, on 27 September 2016, of Replies to the Second Defendant's Notice for Further and Better Particulars, the Plaintiff took no step to progress the claim against the Second Defendant during the following 9 months, at which point the Notice of Intention to Proceed, dated 29 June 2017, was issued.

13 November 2018 – Plaintiff's Further Particulars of Loss, Damage and Expense

35. On 13 November 2018, the Plaintiff's solicitors served Further Particulars of Loss, Damage and Expense. This document ran to 4 pages and detailed the damage alleged to have been caused to the Plaintiff's premises.

36. Reference was made *inter alia* to a May 2018 'Defects Report' prepared by OLM Consultancy, a copy of which was said to have been furnished to both defendants under cover of letters dated 28 September 2018. Reference was also made to a Valuation Report dated 1 November 2017 from John P. Younge FRICS, which report was said to have valued the pub premises as of December 2004, in the sum of €1.7 million. It was also stated that the then recent opinion of Mr. Younge was that the current market valuation for the licenced premises was €130,000. Reference was made to the property having suffered a diminution in value in the sum of €1,570,000. It was stated that the OLM Consultancy report identified the cost of remedial works as being €723,500.00, excluding fees and VAT. It was also stated that, but for the actions and/or omissions of the defendants, the Plaintiff would have leased the pub premises from April 2008 and it was stated that the Plaintiff had been leasing the premises for a yearly rent of €231,429 or €19,285 per month, in 2004. It was stated that the Plaintiff claimed damages as against the defendants, and each of them, in the sum of €19,285 for each month commencing 1 June 2008.

37. It is clear that just over 1 year and 4 months elapsed between the date of the Plaintiff's Notice of Intention to Proceed (29 June 2017) and the date of the Plaintiff's Further Particulars of Loss, Damage and Expense (13 November 2018), the latter of which referred to the reports of 1 November 2017 (John P. Younge) and May 2018 (OLM Consultancy). Similarly, a period of over 2 years and 1 months elapsed between the delivery by the Plaintiff (on 27 September 2016) of Replies to the Second Defendant's Notice for Further and Better Particulars and the delivery by the Plaintiff (on 13 November 2018) of Further Particulars of Loss, Damage and Expense.

21 November 2018 – The First Defendant's Notice for Further and Better Particulars

38. On 21 November 2018, the First Defendant raised a Notice for Further and Better Particulars.

2019

39. On 08 January 2019 the Plaintiff replied to the First Defendant's Notice for Further and Better Particulars of 21 November 2018.

12 November 2019 – Plaintiff's Particulars of Negligence and Breach of Duty of the Second Defendant

40. On 12 November 2019, the Plaintiff served Particulars of Negligence and Breach of Duty of the Second Defendant. This identified 15 alleged failures, (a) to (o), on the part of the Second Defendant.

41. It is fair to say that a full year elapsed between the delivery by the Plaintiff of Further Particulars of Loss, Damage and Expense (13 November 2018) and the Plaintiff's delivery of Particulars of Negligence and Breach of Duty on the part of the Second Defendant (12 November 2019).

42. On 12 November 2019, the Plaintiff also delivered Further Particulars of Negligence, Nuisance, Breach of Duty, to include Breach of Statutory Duty, as against the First Defendant.

31 January 2020 – Reply by Plaintiff

43. On 31 January 2020, the Plaintiff delivered a formal Reply in respect of the Defence of the defendants. Paras. B (i) to (viii) related to the Defence of the Second Defendant. At para (ii) it was denied that the Plaintiff's claim against the Second Defendant was statute barred and among the other pleas made in reply to the Defence of the Second Defendant were the following: -

- *"For the avoidance of doubt, the Plaintiff claims that he engaged the Second Defendant, in early 2006, to provide project management services"* (iv);

- *"…the Plaintiff denies that he ever requested MMP Project Management Ltd. to provide 'a limited post – tender project management service in relation to the Development', as alleged by this defendant, or at all. The Plaintiff denies each and every factual assertion made by the Second Defendant in this paragraph and puts this defendant on strict proof thereof"* (v);

- *". . . it is denied that 'the Second Defendant and MMP Project Management Limited had no involvement in the tender process'."* (vii)

15 May 2020 – Second Defendant's Notice Requiring Further and Better Particulars

44. On 15 May 2020, the Second Defendant's solicitors served a Notice Requiring Further and Better Particulars of certain matters referred to in: (i) the Plaintiff's Further Particulars of Loss, Damage and Expense, dated 13 November 2018; (ii) the Plaintiff's Further Particulars of Negligence and Breach of Duty as against the Second Defendant, dated 12 November 2019; and (iii) the Plaintiff's Reply to Defence, dated 31 January 2020.

09 June 2020 – Plaintiff's Replies to the Second Defendant's Notice Requiring Further and Better Particulars

45. On 09 June 2020, the Plaintiff's solicitors replied to the Second Defendant's 15 May 2020 Notice Requiring Further and Better Particulars. Among other things, the Plaintiff stated *inter alia* the following in response to the particulars raised by the Second Defendant concerning the Plaintiff's Reply to Defence: -

> *"…the Second Defendant was engaged by the Plaintiff as Project Managers in or about the months of June 2006. Their appointment as Project Managers was to ensure that the development works (and particularly the construction contract) were executed in a timely, professional and on–budget manner. In broad terms, their responsibilities included: -*
>
> *(a) Activity and resource planning.*
>
> *(b) Single point of responsibility.*
>
> *(c) Supervision of construction contract.*
>
> *(d) Motivating and managing design team.*
>
> *(e) Controlling time management, including monitoring master schedule.*

(f) Regular reporting to client.

(g) Cost estimating and developing the budget.

(h) Ensuring completion of construction works on time.

(i) Monitoring progress.

(j) Analysing and managing project risk.

(k) Ensuring customer satisfaction.

(l) Ensuring quality.

(m) Monitoring construction company's compliance with construction contract.

In furtherance of these responsibilities, the Second Defendant's servants or agents chaired fortnightly site meetings attended by all professional team members, reporting on, inter alia, the use of resources, time line targets, budget, and progress in general.

. . .

The Second Defendants, its servants or agents, specifically intervened in the tender process by requesting that the First Defendant be added to the tender list of contractors bidding for the construction contract, in or about the months of December 2006 / January 2007"

24 July 2020 – Plaintiff's Notice of Intention to Proceed

46. On 24 June 2020, the Plaintiff's solicitors issued a Notice of Intention to Proceed which was filed in the High Court Central Office on 30 June 2020. This was issued just over two weeks after the delivery by the Plaintiff of Replies (dated 9 June 2020) to the Second Defendant's Notice Requiring Further and Better Particulars (dated 15 May 2020) which had sought particulars in relation to 3 documents served by the Plaintiff (namely, those Notices dated 13 November 2018; 12 November 2019; and 31 January 2020 respectively).

21 July 2020 – Notice of Trial issued by Plaintiff

47. On 21 July 2020, the Plaintiff's solicitors issued a Notice of Trial.

21 July 2020 – Voluntary Discovery Request by Second Defendant

48. By letter dated 21 July 2020, Messrs DWF, solicitors for the Second Defendant, served a request for voluntary discovery on the Plaintiff's solicitors pursuant to O. 31, r. 12 of the RSC. It is fair to say that this letter, which ran to in excess of 6 pages, was clear and detailed as to the 6 categories of documentation which the Second Defendant required. These categories can be summarised as follows:

- Category 1 – all documents in the Plaintiff's possession relating to the retainer by the Plaintiff or Ocean Point or Philip McDonald, of the Second Defendant or MMP PM concerning the development;

- Category 2 – all documents in the Plaintiff's possession relating to the role of the Plaintiff or Ocean Point in the development, including all documents relating to the retainer by the Plaintiff or Ocean Point or Philip McDonald of any design team members;

- Category 3 – all documents in the Plaintiff's possession relating to any tender process concerning the development in question;

- Category 4 – all documents in the Plaintiff's possession relating to the Second Defendant's role in relation to the development;

- Category 5 – all documents in the Plaintiff's possession relating to any damage caused to the Skipper's premises and/or any loss, damage, inconvenience and/or expense allegedly suffered by the Plaintiff, including any documentation evidencing the Plaintiff's interest in the Skipper's premises;

- Category 6 – all documents in the Plaintiff's possession relating to the contract allegedly entered into between the Plaintiff and the First Defendant in relation to the development.

49. Thus, the Second Defendant's request for discovery included, but certainly was not limited to, a request for documents relating to the retainer of the Second Defendant and/or MMP PM in respect of the development, the subject matter of the underlying proceedings. In other words, although the foregoing was plainly an important issue in the context of the discovery sought, it is fair to say that a range of other issues were felt by the Second Defendant to be of sufficient relevance as to merit a request for discovery in the context of preparing for a trial of the underlying proceedings. The fact that this is so is clear from the *reasons* given by the Second Defendant's solicitors as a basis for each category sought.

Reasons for Seeking Discovery

50. As regards Category 1, the reason given to justify the request for discovery made reference to relevant paragraphs in the Statement of Claim and Defence and concluded in the following terms: -

> *"The identity of parties to the contract entered into between entities associated with the Plaintiff on the one hand and entities associated with the defendant on the other hand is an issue on the face of the pleadings.*
>
> *Discovery of these documents is relevant and necessary to assist the parties in establishing who were the parties to the contract entered into between the Plaintiff and/or Ocean Point Development Ltd. and/or Philip McDonald and/or another party or parties, on the one hand and the defendant and/or MMP Project Management Ltd. and/or another party on the other hand. This is an issue on the face of the pleadings.*
>
> *Furthermore, the terms of any such agreement are at issue on the face of the pleadings. Discovery of this category of documentation will enable the parties to establish the terms of any such contract and the extent of the contractual duties of each of the parties and in particular the Defendant and/or MMP Project Management Ltd. The existence of any such contractual relationship, and the terms of any such contractual relationship are issues between the parties in these proceedings.* ***Discovery of these documents will save the parties time and money at the hearing of this action***". (emphasis added)

51. The final sentence comprising the reason for the voluntary discovery request in respect of Category 1 is repeated as part of the reasons to justify the request for Category 2; Category 3; Category 4; Category 5; and Category 6, i.e. "*discovery of these documents will save the parties time and money at the hearing of this action*".

21 September 2020 – Plaintiff's Reply to Request Seeking Voluntary Discovery

52. On 21 September 2020, the Plaintiff's solicitors responded to the Second Defendant's request for voluntary discovery dated 21 July 2020 by indicating what the Plaintiff was prepared to agree in respect of each of the 6 categories sought. The Plaintiff's 21 September 2020 letter ended by stating the following: -

> "*Please confirm if the above can be agreed and our client will endeavour to furnish an Affidavit of Discovery within eight weeks thereof. Finally, we also note that you have sought discovery from the First Defendant and you might kindly provide an update as to same. We look forward to hearing from you".*

06 October 2020 - Second Defendant's Response to Plaintiff's Discovery Proposals

53. By letter dated 06 October 2020, the solicitors for the Second Defendant responded to the proposals which had been made by the Plaintiff with regard to voluntary discovery indicating that the Plaintiff's proposals in respect of Categories 1, 2 and 3 were not acceptable, whereas the Plaintiff's proposals concerning Categories 4, 5 and 6 were acceptable.

54. It will be recalled that Category 1 related to documents concerning the retainer of the Second Defendant and/or MMP PM and the Second Defendant's voluntary discovery request was plainly directed towards *inter alia* its assertion that the Plaintiff had not sued the correct defendant. It is clear from the contents of the 06 October 2020 letter sent by the Second Defendant's solicitors that one of the reasons underpinning the request for Category 1 was the possibility that a formal contract or, failing that, other documents relating to the terms of the retainer existed and should be disclosed. The following is a *verbatim* extract from the 06 October 2020 letter in that regard: -

"Category 1

We find your offer limited to documents evidencing the agreement between the Plaintiff and/or Ocean Point Development Company with the insured inadequate. The insured contends that MMP Project Management Limited was the correct defendant and there should be documents relating to the retainer of that entity, if not a formal contract then other documents relating to the terms of the retainer should be disclosed. These documents are essential to demonstrate the duty of care owed by MMP Project Management Limited. The discovery offered excludes any documents relating to MMP Project Management Limited and is therefore unacceptable. We reiterate our request for all documents in the power, possession or procurement of the Plaintiff relating to the retainer by the Plaintiff and/or Ocean Point Development Limited and/or Philip McDonald on the one hand, of the Second Defendant and/or MMP Project Management Limited."

03 November 2020 – Plaintiff's Further Proposals Regarding Voluntary Discovery

55. In a letter dated 03 November 2020, the Plaintiff's solicitors made further proposals in respect of the voluntary discovery which the Plaintiff was prepared to make concerning Categories 1, 2 and 3.

07 December 2020 – Second Defendant's Reply to Plaintiff's Further Proposals

56. By letter dated 07 December 2020, the solicitors for the Second Defendant confirmed agreement in respect of the then latest proposals made on behalf of the Plaintiff concerning discovery of Categories 1 and 3. The Second Defendant's requirements in respect of Category 2 were also outlined in the letter.

11 December 2020 – Confirmation that Voluntary Discovery is Agreed

57. In a letter dated 11 December 2020, the Plaintiff's solicitors stated *inter alia* that: -

> *"…we have now agreed the categories of discovery to be provided to your client within a period of 8 weeks, i.e. on or before 4th February 2021, and our client has already commenced collating said documentation. As you will be further aware, we are not pursuing our recent discovery request* ***in order to progress this matter to an early trial***." (emphasis added).

58. The letter went on to ask; whether the Second Defendant intended to seek discovery from the First Defendant; it suggested that any motion be issued in advance of 11 February 2021; a request was made as to what expert witnesses the Second Defendant intended to call; and reference was made to correspondence dated 04 February 2020 in respect of a certificate of readiness. The letter also referred to the certificate of readiness as filed on 12 August 2020.

13 April 2021 – Affidavit of Discovery Sworn by Plaintiff

59. On 13 April 2021, the Plaintiff swore an Affidavit of Discovery in respect of the 6 Categories which were the subject of correspondence exchanged between the solicitors for the Second Defendant and Plaintiff, respectively dated; 21 July 2020; 21 September 2020; 06 October 2020; 03 November 2020; 07 December 2020; and 11 December 2020. The first schedule, first part of the Plaintiff's Affidavit of Discovery lists items 1-79; 1-115; 1-91; 1-5; and a copy of an RIAI contract of 02 March 2007 between Ocean Point and the First Defendant, as well as a tender document of 23 January 2007.

60. It is uncontroversial to say that the making of discovery in these proceedings involved considerable time, effort and cost and that same was expended on foot of explicit requests that discovery be made in the context of preparation for a trial.

21 June 2021 – Plaintiff's Request for Voluntary Discovery by Second Defendant

61. On 21 June 2021, the Plaintiff's solicitors made a formal request, pursuant to O.31, r.12 of the RSC, that the Second Defendant make voluntary discovery. Two categories were sought which can be summarised as follows: -

1. Category A – all documentation relating to the contract or retainer between the Plaintiff or Ocean Point, on the one hand, and the Second Defendant or MMP PM, on the other, in relation to the development site the subject of the proceedings; and

2. Category B – all documentation relating to the role of the Second Defendant or MMP PM in relation to the development.

22 June 2021 - Second Defendant's Motion Seeking to Strike Out the Plaintiff's Claim

62. On 22 June 2021, the solicitors for the Second Defendant issued the present motion which was initially returnable for 13 October 2021, which, as I indicated at the outset of this judgment, seeks (i) an order pursuant to the inherent jurisdiction of this Court striking out the Plaintiff's claim as bound to fail by reason of the Second Defendant having no involvement in the matters giving rise to the proceedings; (ii) an order dismissing the Plaintiff's claim against the Second Defendant on delay grounds; and (iii) an order permitting the discovery made by the Second Defendant in the present proceedings to be provided to the solicitors on record for Mulcahy McDonagh & Partners Limited in what I have called "the Dooley proceedings" (Record No. 2011/6564P) and the Ocean Point proceedings (Record No. 2014/7827P). The third element of the relief set out in the Motion was not pursued at the hearing of the application.

63. It is uncontroversial to say that the present motion was issued 1 year and 1 month after the Second Defendant served on the Plaintiff, a formal request for voluntary discovery of 6 separate categories, the discovery of which were said by the Second Defendant to be necessary in the context of saving the parties time and money at the "*hearing of the action"*. It is also true to say that the present motion was issued a year to the day after the Plaintiff issued a Notice of Trial (dated 21 July 2020) and 2 months after the Plaintiff had made discovery in the manner sought by and agreed with the Second Defendant. Furthermore, prior to the initial return date for the present motion, the Second Defendant also made discovery.

13 July 2021 - Second Defendant's Response to Plaintiff's Voluntary Discovery Request

64. By letter dated 13 July 2021, the solicitors for the Second Defendant suggested modifications in respect of Categories A and B in terms of the voluntary discovery which had been sought by the Plaintiff. The letter indicated that, if the proposed amendments were acceptable, the Second Defendant agreed that it would make discovery within twelve weeks *i.e.* by 4 October 2021.

16 July 2021 – Plaintiff Agrees to the Modified Categories Suggested by Second Defendant

65. By letter dated 16 July 2021, the solicitors for the Plaintiff confirmed agreement in relation to the amendments proposed on behalf of the Second Defendant concerning the categories of discovery which the Plaintiff was seeking. The Plaintiff also proposed that the Second Defendant make discovery within ten weeks *i.e.* by Friday 08 October 2021.

17 September 2021 – Affidavit of Discovery by Second Defendant

66. On 17 September 2021, Mr. Kevin Porter, a director of the Second Defendant, swore an affidavit of discovery on its behalf in respect of Categories A and B as per the correspondence exchanged between the solicitors for the Plaintiff and Second Defendant, respectively on 21 June and 13 July 2021. It comprises a lengthy affidavit running to 176 pages.

Submissions

67. I am very grateful to Mr. O'Donnell S.C. (for the Second Defendant and moving party) and to Mr. Hayden S.C. (for the Plaintiff) who provided the Court with detailed written submissions. These were supplemented by oral submissions made with clarity and skill at the hearing of the application and were of great assistance to the Court.

Submissions on behalf of the Second Defendant

68. Counsel for the Second Defendant accepts that, for the purposes of the first of the reliefs sought, the Plaintiff's claim must be taken "at its high-water mark", but he goes on to submit that the Plaintiff's claim must nevertheless be dismissed. It is emphasised that the primary line of defence to the claim is that Mr. Walsh (who is referred to at para. 9 of the Plaintiff's 16 October 2015 Replies to Particulars) did not contract on behalf of the Second Defendant when he met with the Plaintiff and, thus, that the Plaintiff has sued the wrong defendant. It is submitted that, in circumstances where the alleged contract was an oral one, the Court should look at documentation including a handwritten note of the relevant meeting and correspondence between a range of parties during the following months and years which, according to the Second Defendant, demonstrates that what the Plaintiff asserts is not credible.

69. Among the submissions made on behalf of the Second Defendant was to point to a "*record*" in the form of Mr. Walsh's handwritten note, dated 22 May 2006, of the meeting in 'Ashtons' and, according to counsel for the Second Defendant, "*the Plaintiff can't get around that"*. It was also submitted that, in the Dooley proceedings, the Plaintiff pleads that he met Mr. Walsh on or about 23 May 2006. The submission was made on behalf of the Second Defendant that the Plaintiff "*cannot credibly say that Mr. Walsh made all this up or invented it".* The submission was made that it would not be appropriate to send this case to a trial having regard to what was described as "*the absence of credible evidence concerning the Plaintiff's assertions".*

70. It is also submitted that this is not a situation where there was any "*concealment of the identity of the correct party*" with whom the Plaintiff contracted, namely, MMP PM. Counsel described as "*a mystery*" why the correct defendant was not joined in the proceedings, given that the correct defendant had been pointed out to the Plaintiff. Why the Plaintiff's solicitors did not write "O'Byrne letters" prior to instituting proceedings was also described as "*a mystery*". It was pointed out that the Second Defendant was not even incorporated when the alleged contract was entered into.

71. With regard to the key question as to who the Plaintiff contracted with as a matter of law, it was submitted that "*all the evidence points one way*". On behalf of the Second Defendant, emphasis was laid on the discovery as made by both sides, all of which documentation was said to "*point one way*" and to entirely undermine the proposition that the Plaintiff had entered into a contract with the Second Defendant (as opposed to MMP PM). It was accepted that this is <u>not</u> a case where the Court is being invited to construe a document, such as a contract, in order to determine the meaning of terms therein. Notwithstanding this, it was submitted on behalf of the Second Defendant that the documentation available to the Court throws a "*bright light*" on what the parties actually believed as regards the agreement entered into and it was submitted that the Plaintiff has not even laid the ground to suggest that there could be a dispute which needed to be resolved as to who the Plaintiff contracted with.

72. The submission was made that there was simply no dispute. Among other things, it was submitted on behalf of the Second Defendant that the discovery, including the documents exhibited in the present motion, contains no representation that Mr. Walsh acted for the Second Defendant. It was submitted that there is no correspondence from the Plaintiff suggesting that Mr. Walsh acted for the Second Defendant or that the Plaintiff had entered into a contract with the Second Defendant or regarded the Second Defendant as the responsible party in respect of his concerns. It was submitted, with reference to the Supreme Court decision in *Kett v. Shannon & Anor.* [1986] IESC 2, that Mr. Walsh had neither actual, nor ostensible authority to enter into a contract binding the Second Defendant. It was submitted that Mr. Dooley gave instructions to third parties consistent with having entered into a contract with MMP PM, rather than the Second Defendant.

73. Counsel for the Second Defendant made clear that, although his client puts 'in issue' all allegations of liability, the key issue arising in respect of the primary relief sought in the present motion concerns the identity of the party who entered into the contract. This issue was described as one which could "*easily*" be decided by the Court having regard to the documentation before it and reliance was placed by the Second Defendant on the decision in *Highfield Distribution Ltd v. Pat The Baker Unlimited Company* [2020] IEHC 137. It was submitted that there was no need to seek to cross-examine any party in circumstances where "*the documents speak for themselves*". The present case was described as one which is "*relatively easy to decide on the documents*" and it was submitted that the relief should be granted.

74. It was emphasised that the primary relief sought by the Second Defendant is that detailed at para. (1) of the 22 June 2021 Motion seeking to strike out the proceedings. It was pointed out, however, that the Second Defendant had "*by no means abandoned"* the relief sought at para. (2) and contended that the Plaintiff was guilty of inordinate delay which was inexcusable and that, in the present circumstances, the balance of justice lay in favour of dismissing the Plaintiff's proceedings, with reliance placed on the principles set out in the well-known judgment of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459. Counsel for the Second Defendant submitted that the Plaintiff did "*absolutely nothing*" to progress his case for 5 years, from 2015 to 2020. He further submitted that the Second Defendant was entitled to seek discovery and to wait until discovery was made before bringing the present application. The submission was made that there is no authority cited by the Plaintiff to the effect that the Second Defendant could not bring the present application after discovery had been made.

<u>Submissions on behalf of the Plaintiff</u>

75. For the Plaintiff, Counsel submitted that the present application was "*purely opportunistic*" as well as "*groundless*", having regard to the relevant jurisprudence. It was submitted that the Second Defendant was, in effect, impermissibly looking for summary disposal of a claim in a manner which the authorities make clear is inappropriate. Emphasis was laid on the fact that the onus of proof rests on the Second Defendant and the relevant threshold is a very high one. It was submitted that where affidavits disclose conflicts as to fact, this Court cannot adjudicate on these and must take the Plaintiff's case "*at its height".* It was also emphasised that the Second Defendant chose not to serve a notice to cross-examine the Plaintiff. Thus, it was submitted, this Court cannot resolve whether the relevant meeting took place in May or in June of 2006 and cannot resolve any disputes as to fact concerning what occurred at the meeting. It was also submitted that it is *not* the case that the documentation points "*all one way*". Specific references to the Second Defendant in various documents, as well as the cheque sent by the Plaintiff to the Second Defendant, were referred to in that regard. With respect to Mr. Walsh's handwritten note of his meeting with the Plaintiff, the

submission was made that this Court does not know when or where that note was created. Counsel was very clear to emphasise that no aspersions were being cast on Mr. Walsh, but the probative value of the note was submitted to be a matter for the trial judge who would have the benefit of the sworn evidence of Mr. Walsh and Mr. Dooley concerning the meeting itself.

76. It was submitted on behalf of the Plaintiff that Mr. Dooley's position is that he entered into a contract, not with a subsidiary, but with a business which has been in operation since 1951. In that regard, reference was made to the averment by Mr. Porter at para. 3 of his grounding affidavit wherein he averred "…*that the business operated by the Second Defendant has been in operation since 1951, and that the business operates as part of a corporate group (hereinafter 'the MMP Group') providing various services including quantity surveying, project management, project monitoring, cost management and dispute resolution."* It was submitted that the present proceedings are part and parcel of a "*debacle*" presided over by the First and Second Defendants. The submission was made that, at a future trial, "*somebody will be believed*" in relation to their evidence concerning the meeting which is at the heart of the dispute, but that central issue cannot be determined by the Court in the present Motion.

77. It was also submitted on behalf of the Plaintiff that it was only after it was pointed out that Mr. Porter was not at the crucial meeting, that Mr. Walsh swore an affidavit. It was submitted that there are no averments made by Mr. Walsh that he has any difficulties in terms of remembering the meeting. The fact that Mr. Walsh appeared and swore an affidavit was described by the Plaintiff's counsel as "*extraordinary*", having regard to the averments made by Mr. Porter at para. 24 of his grounding affidavit, sworn 21 June 2021, to the effect that Mr. Walsh was "*…no longer available as a witness*". Particular reference was laid on the principles detailed by the Court of Appeal in *Trafalgar Developments Limited & Ors. v. Dmitry Mazepin & Ors.* [2019] IECA 218 which set out the proper approach by a court to an application of the present type. It was stressed on behalf of the Plaintiff that, insofar as the present motion is concerned, the Plaintiff does not even have to demonstrate that he has a *prima facie* case.

78. Regarding the second element of the relief sought, it was submitted on behalf of the Plaintiff that, if there was delay, it did not reach the threshold of inordinate delay. It was also submitted that any such delay was excusable and that the balance of justice decidedly favoured the case proceeding to trial. Reference was made to the steps taken by the Plaintiff to progress the matter to trial, including the making of discovery by both sides. Reference was also made to the effect that the Second Defendant had acquiesced. The thrust of the submissions on behalf of the Plaintiff was to say that the application to strike out the present proceedings on delay grounds was very much an "*after-thought*" without merit.

Discussion and Decision in Relation to the Primary Relief Sought

79. The primary relief which is sought by the Second Defendant in the present motion is an order dismissing the Plaintiff's claim against it as being frivolous and vexatious and/or as disclosing no reasonable cause of action and/or having no reasonable or arguable prospect of success and/or as clearly unsustainable and/or as bound to fail. The basis for this relief is that the Second Defendant asserts that it had no involvement in the matters giving rise to the proceedings. Counsel for the Second Defendant made it clear, however, that the relief at para. 2 of the present motion was still being pursued, namely, an order dismissing the proceedings on grounds of delay.

80. In light of the foregoing, I propose to deal first with the Second Defendant's application for the primary relief and then turn to the application to strike out the proceedings on delay grounds.

The Dispute as Pleaded

81. Earlier in this judgment I looked at the pleadings and it is clear that the Plaintiff makes the case that the Second Defendant was appointed as project manager in respect of the relevant development pursuant to an agreement entered into in or around June 2006 with a Mr. Patrick Walsh, on behalf of the Second Defendant. The foregoing is clear from para. 6 of the Plaintiff's Statement of Claim dated 6 March 2014 and para. 9 of the Plaintiff's 16 October 2015 Replies to Particulars. At para. 9(a) thereof, the Plaintiff pleads that the agreement was "*an oral agreement*" and at para. 9(b)(i), the Plaintiff pleads that "*the agreement was made between the Plaintiff and Patrick Walsh, who was acting by and/or on behalf of the Second Defendant*". Earlier in this judgment I referred to further pleas of relevance, including those in paras. B(iv) of the Plaintiff's Reply dated 31 January 2020 wherein it is pleaded that: -

> "*the Plaintiff claims that he engaged the Second Defendant, in early 2006, to provide project management services. Para B (v) of the said Reply contains a plea whereby the Plaintiff denies that he ever requested MMP Project Management Ltd. to provide a limited post–tender project management service in relation to the development. Furthermore, in the Plaintiff's 09 June 2020 replies to the Notice*

for Particulars raised by the Second Defendant on 15 May 2020, the Plaintiff again pleads that the Second Defendant was engaged by the Plaintiff as project managers in or about June 2006 and he details what, in broad terms, are said to have been the Second Defendant's responsibilities (see para. C 1 (a) to (m). The Plaintiff also pleads at para. 3 of the 9 June 2020 particulars that the Second Defendant specifically intervened in the tender process by requesting the First Defendant to be added to the tender list of contractors bidding for the construction contract in or about the months of December 2006 / January 2007. As is clear from the Defence delivered by the Second Defendant, it pleads that it never carried out project management work for the Plaintiff and denies that it ever owed a duty to the Plaintiff in relation to project management services. Fundamentally, the Second Defendant pleads that the Plaintiff has pursued the wrong defendant. It has also gone further by identifying what it says is the correct defendant, namely MMP Project Management Ltd. which the Second Defendant says was the party retained by the Plaintiff in May 2006".

Cause of Action

82. The foregoing is the dispute as made out in the pleaded case. It has not been submitted on behalf of the Second Defendant that the pleadings do not disclose a cause of action. Before turning to the various affidavits sworn in the context of the present motion, it is important to refer to certain legal principles of relevance.

Legal Principles

83. Both parties to this motion agree that the relatively recent decision by the Court of Appeal in *Trafalgar Developments Ltd* sets out the principles applicable to a motion to strike out proceedings pursuant to the inherent jurisdiction of the Court. Given how fundamentally relevant these principles are and how comprehensively they were set out in that decision, it is appropriate to quote it at some length from that decision, as follows: -

> "**The Legal Principles Applicable to Applications to Strike Out Proceedings Pursuant to the Inherent Jurisdiction of the Court**
>
> 50. Since *Barry v. Buckley* [1981] IR 306, it has been recognised that the court has an inherent jurisdiction to strike out, or stay proceedings, if they are frivolous or vexatious or are bound to fail. The jurisdiction exists to ensure that an abuse of the process of the courts does not take place. All the authorities emphasise that it is an exceptional jurisdiction to be exercised sparingly and only adopted when it is clear that the proceedings are bound to fail and not where the Plaintiff's case is very weak (*Keohane v. Hynes* [2014] IESC 66 and *Sun Fat Chan v. Osseous Ltd.* [1992] 1 IR 425). *In Jodifern Ltd. v. Fitzgerald* [2000] 3 IR 321, Barron J. said at p. 333: -
>
> > '*In my view, a defendant cannot succeed in an application to strike out proceedings upon the basis that they disclose no reasonable cause of action or are an abuse of the process if the Court, on the hearing of such application, has to determine an issue for the purpose of deciding whether the Plaintiff will succeed in the action. It is not the function of the court to determine whether the Plaintiff will succeed in the action.*
> >
> > *The function of the Court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such* ***incontrovertible evidence*** *as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out.* ***There is no room for considering what evidence should be accepted or how it should be interpreted.*** *To do the latter is to enter on to some sort of hearing of the claim itself*.' (emphasis added)
>
> 51. As Murray J. pointed out in *Jodifern*, there is no such thing as a summary trial in our rules of procedure (save as provided for in the Rules of the Superior Courts which do not apply in this case). In *Moylist Construction Ltd. v. Doheny* [2016] IESC 9, Clarke J. stated: -
>
> > '*Depriving the parties of a full trial in whatever form is appropriate to the proceedings concerned is a departure from the norm, and one which should only be engaged in when it is clear that there is no real risk of injustice in adopting that course of action*.'
>
> At para. 5.9, he cautioned that the court must avoid slipping into the error of giving the defendant '*the type of summary disposal which our procedural law does not provide for and which Murray J. cautioned against in Jodifern. Such issues, by analogy with McGrath, cannot safely be dealt with in the confines of a motion on affidavit*.'

52. In *Lopes v. Minster for Justice, Equality & Law Reform* [2014] IESC 21, Clarke J. stated: -

> '*2.5 It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail… all that a Plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in Sun Fat Chan (at p. 428), that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance*.'

53. In *Keohane v. Hynes* [2014] IESC 66, Clarke J. stated: -

> '*6.9 …it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the Plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred*.'

54. The question for the Court on an application to strike out proceedings in reliance on the court's inherent jurisdiction was described by Clarke J. in *Lopes* as: -

> '*…can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits…*'"

Disputed Oral Evidence of Fact Cannot be Relied Upon

84. Reference was made in *Trafalgar Developments* to para. 6.9 from the Supreme Court's decision by Clarke J. (as he then was) in *Keohane v. Hynes* [2014] IESC 66. It is also useful to quote certain passages, from para. 6.2 in *Keohane v. Hynes*, as follows: -

> "6.2 However, it is important to emphasise that the extent to which it is appropriate for the Court to assess the evidence and the facts on a motion to dismiss as being bound to fail is extremely limited. In that context, it is, perhaps, appropriate to go back to one of the earlier important cases on this topic being *Jodifern v. Fitzgerald* [2000] 3 I.R. 321. There, Barron J. observed at p. 332: -
>
> > *'One thing is clear, disputed oral evidence of fact cannot be relied upon by a defendant to succeed in such an application. Again, while documentary evidence may well be sufficient for a defendant's purpose, it may well not be if the proper construction of the documentary evidence is disputed. If the Plaintiff's claim is based upon allegations of fact which will have to be established at an oral hearing, it is hard to see how such a claim can be treated as being an abuse of the process of the court. It can only be contested by oral evidence to show that the facts cannot possibly be true. This however would involve trial of that particular factual issue*.'

Caution

85. Continuing on, Clarke J. said at: -

> "In [*Jodifern*], Murray J., in explaining the need for caution in such an application, stated at p. 334: -

'The reason for such caution is self-evident. The making of an order staying or dismissing the proceedings on the basis of such inherent jurisdiction deprives the Plaintiff of access to the courts for a trial of his or her action.

The object of such an order is not to protect a defendant from hardship in proceedings to which he or she may have a good defence but to prevent the injustice to a defendant which would result from an abuse of the process of the court by a plaintiff. Clearly, therefore, the hearing of an application by a defendant to the High Court to exercise its inherent jurisdiction to stay or dismiss an action cannot be of a form of summary disposal of the case either on issues of fact or substantial questions of law in substitute for the normal plenary proceedings'.

6.3 In like vein, Birmingham J., in *Burke & Anor v. Anglo Irish Bank Corporation PLC & Anor* [2011] IEHC 478, emphasised that a court cannot seek to resolve conflicts of fact in an application to dismiss as being bound to fail, but rather is required to accept the facts as deposed to on behalf of the plaintiff.

6.4 More recently still, in *Lopes*, I said the following at para. 2.6 of my judgment:

'At the same time, it is clear that certain types of cases are more amenable to an assessment of the facts at an early stage than others. Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss. In that context, it is important to keep in mind the distinction, which I sought to analyse in Salthill Properties, between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well.'

The passage referred to above from *Salthill Properties* as to the various types of documents cases begins at para. 3.9 of the High Court judgment and is as follows: -

'It has often been noted that an application to dismiss as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established. Likewise, a defendant in a specific performance action may be able to persuade the court that the only document put forward as being a note or memorandum to satisfy the Statute of Frauds, could not possibly meet the established criteria for such a document. More difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence. At this end of the spectrum, it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. In between are a range of cases which may be supported to a greater or lesser extent by documentation.

3.10 However, it is important to emphasise the different role which documents may play in proceedings. In cases, such as the examples which I have given earlier, involving contracts and the like, the document itself may govern the legal relations between the parties so that the court can consider the terms of the document on its face and may be able to come to a clear view as to the legal consequences flowing from the parties having governed their relations by the document concerned.

3.11 However, there are other cases where documents are not vital in themselves save that they may cast light on the underlying facts which may be at the heart of the proceedings concerned. Correspondence, minutes of meetings, memoranda and the like, do not, of themselves, create legal relations between the parties. Rather they purport to reflect facts such as what was said at meetings, what was communicated from one party to another or the like. Parties may explain or seek to clarify what might otherwise appear to be the natural meaning of such documents. At the end of the day, it will be what view the court takes as to what actually happened that will determine the facts on the basis of which the court will come to its judgment. Contemporary documentation is often a very valuable guide to such facts, but such documentation is not necessarily determinative. It is important, in that context, not to confuse cases which are dependent on documents themselves with cases where documents may be a

guide, albeit often a most important guide, to the underlying facts which need to be determined in order to resolve the issues between the parties.'

6.5 It is important, for the avoidance of any doubt, that the overall principle be clearly stated. As pointed out in many of the authorities, not least in the judgment of Murray J. in *Jodifern*, the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process. Bringing a case which is bound to fail is an abuse of process. If it is clear to a court that a case is bound to fail, then the court has jurisdiction to prevent that abuse of process by dismissing the proceedings. However, as again noted by Murray J. in *Jodifern*, whatever might or might not be the merits of some form of summary disposal procedure, an application to dismiss as being bound to fail is not a means for inviting the court to resolve issues on a summary basis.

6.6 It is for that reason that all of the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the Plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law. It is against that background that the extent of the court's entitlement to look at the facts needs to be judged.

6.7 I am in full agreement with the views expressed by Birmingham J. in *Burke*. Where there is evidence placed before the court on affidavit on behalf of a plaintiff which, if accepted at trial, might arguably lead to the plaintiff succeeding, then that is an end of the matter. But it does not necessarily follow that a plaintiff even has to put evidence of that type before the court. . ."

No Written Contract

86. Before proceeding further, it is appropriate to make clear that this is not a case involving the existence or construction of a written contract. No contract exists. Rather, the Plaintiff pleads that an oral agreement was entered into with the Second Defendant, something the Second Defendant disputes, pleading that the Plaintiff retained a different entity, albeit within the same corporate group. In other words, this is not a case where there is a document which governs the legal relations between the parties. Thus, there is no question, on the present application, of the court having before it a contract entered into by both parties, in respect of which document the court might be in a position to determine the legal consequences of same as a matter of construction. In the manner I will come to presently, averments made by both parties disclose conflicts of fact, most especially as to what did or did not occur at a meeting in 2006, which meeting did not produce a formal written contract detailing the parties to and terms of same but is said to have produced an oral agreement with express as well as implied terms.

87. As to documents, a very large volume - including handwritten notes, typed minutes and correspondence between the parties to the present dispute and others - has been put before the court. The Plaintiff asserts that the contents of these documents fall far short of the evidence required to demonstrate that the Second Defendant provided project management services in the manner pleaded in the Defence and the Plaintiff also contends that its position is supported by the majority of the available documents.

Averments and Documents

88. I propose to look first at certain averments made in the various affidavits which were put before the Court. Doing so, in my view, reveals that there are significant conflicts of fact. I will then turn to a selection of the very many documents exhibited in support of, as well as in opposition to, the relief claimed.

89. It needs to be stressed that, insofar as I will proceed to look in some detail at a range of documents and what, it is submitted, they evidence, my doing so is not to be taken as an acknowledgement by this Court that the correct approach to the present application is some form of 'summary hearing' of matters in dispute. It is not. To look at the documents is simply to engage with the evidence which is before this Court, and to which counsel drew the Court's attention, sufficient to apply the principles which emerge from the relevant legal authorities, in particular, *Trafalgar Developments.*

Affidavits

90. I have carefully considered the contents of all affidavits filed in support of, and in opposition to, the Second Defendant's motion as well as all exhibits thereto. These comprise the following:

- Grounding affidavit sworn by Mr. Kevin Porter on 21 June, 2021, with exhibits KP1-KP6 thereto;
- Replying affidavit of the Plaintiff sworn 23 August, 2021, with exhibits FD1-FD10 thereto;

- Supplemental affidavit of Mr. Porter sworn 17 September, 2021, with exhibits KP1- KP10 thereto;
- Supplemental affidavit of Kevin Porter sworn 11 October, 2021, with exhibits KP1-KP7 thereto;
- Supplemental affidavit of the Plaintiff sworn 02 November, 2021, with exhibits FD1-FD12 thereto;
- Supplemental affidavit of Kevin Porter sworn 11 November, 2021, with exhibits KP1-KP2 thereto;
- Affidavit of Mr. Pat Walsh sworn 11 November, 2021 with exhibits PW1-PW3 thereto.

91. Mr. Porter has been a director of the Second Defendant since 2007 and has been its managing director since 2016. He is also a director of Mulcahy McDonagh and Partners Ltd ("MMP") which, he avers, is a dedicated project management company within the MMP group. Exhibit KP3 to Mr. Porter's 2 June 2021 affidavit comprises an Annual Return in respect of MMP PM. It refers *inter alia* to the following companies which would appear to be within the MMP group:

- MMP Project Management Ltd (company no. 305367);
- Mulcahy McDonagh & Partners Ltd (company no. 44451);
- Mulcahy McDonagh & Partners (Sligo) Ltd (company no. 351700);
- MMP Health and Safety Ltd (company no. 262858);
- Mulcahy McDonagh Consultancy Services Unlimited Company (company no. 450011).

92. There follows a selection of averments made on behalf of the Second Defendant and by the Plaintiff, respectively, which demonstrates that there are significant and unresolved conflicts of fact as between the parties.

Averments in Mr. Porter's 21 June 2021 Affidavit

93. In his affidavits, Mr. Porter, on behalf of the Second Defendant, refers to "MMP Project Management Limited" as "MMP-PM" and averments made by him include *inter alia* the following:

- *"I say that MMP-PM was engaged to provide limited, post-tender project management services in relation to the project in or around 23 May 2006."* (21 June 2021 affidavit, para. 5);
- *"I … am advised that the only, and correct, defendant to have been joined in this matter (notwithstanding that I understand that MMP-PM would deny any liability to the Plaintiff) was MMP-PM, that there was no basis whatsoever for joining the Second Defendant to these proceedings, and, further, that the facts in this regard were well known to the Plaintiff at all material times prior to his application … on 29 October 2013 to join the Second Defendant as a party to these proceedings, as is apparent from correspondence between MMP-PM and the Plaintiff from 2009 onwards."* (21 June 2021 affidavit, para. 8);
- *"… [T]he Plaintiff … has delivered an affidavit of discovery sworn on 13 April 2021 and has discovered certain documents that now unambiguously confirm and make clear that MMP-PM, and not the Second Defendant, was the party retained by the Plaintiff to provide project management services in relation to the Project."* (21 June 2021 affidavit, para. 10);
- *"I say that the Second Defendant had no involvement in the provision of services to the Project and has been incorrectly joined to these proceedings."* (21 June 2021 affidavit, para. 11);
- *"I confirm again that the Second Defendant had no involvement in the matters alleged by the Plaintiff in these proceedings. Its joinder to these proceedings is an error. The Plaintiff had no grounds to join the Second Defendant and his claims against the Second Defendant are accordingly bound to fail."* (21 June 2021 affidavit, para. 17).

Averments made by the Plaintiff in his 23 August 2021 Affidavit

94. The Plaintiff swore a replying affidavit on 23 August 2021 disputing Mr Porter's account and among the averments made by Mr. Dooley were the following:

- "*I say that the Second Defendant was appointed as project manager to the Development Site pursuant to an oral Agreement entered into in or around June 2006 with Mr. Patrick Walsh, on behalf of the Second Defendant."* (para. 5);

- "*… [I]n or around August 2006, it was decided by this deponent that the Development would be executed through a special purpose vehicle, principally for tax reasons, and named Ocean Point Development Company Ltd ("Ocean Point"). I say that the Second Defendant were fully aware of the motives behind said incorporation, and were aware that the development was taking place on lands owned by this deponent and adjacent to other lands owned by this deponent, including and involving the skipper's public premises."* (para. 6);

- *"… [S]ubsequent to the incorporation of Ocean Point, I say that there was no novation of the contract between this deponent and the Second Defendant, and moreover they continued to owe me a duty of care…"* (para. 8);

- *"… I say that an oral Agreement was entered into in June 2006 with the Second Defendant, as set out at para. 7 of the statement of claim. I say that this is evidenced inter alia by the first cheque that was paid to the Second Defendant in or around 11 December, 2006 for the sum of €21,780.00. I beg to refer to a true copy of said cheque …"* (paras. 12-13);

- *"I say that this cheque did not come back unreturned, and this sum was cashed from this deponent's bank account"* (para. 14);

- *"… [T]he Agreement was between this deponent and the Second Defendant and at no point did I ever accept or agree that MMP Project Management Ltd, or indeed any other party, would, or could, step into the shoes of the Second Defendant"* (para. 15);

- *"… [A]t no point did I agree to a novation of the contractual relationship with the Second Defendant to any party, including MMP Project Management Ltd or MMP-PM. I say and am advised that the fact that certain (later) documentation referred to such a party does not, and cannot, legally alter the parties to a contractual relationship …"* (para. 28);

- *"… [T]his is a fundamental factual issue which is a matter for trial, including oral evidence from this deponent and, in particular, Mr. Patrick Walsh, who entered into the Agreement on behalf of the Second Defendant."*

Averments by Mr. Porter in his 17 September 2021 Affidavit

95. Mr. Porter, in his 17 September 2021, disputes Mr. Dooley's claim that a contract was entered into with the Second Defendant and, among the averments made by Mr. Porter are the following:

- *"I say that the Second Defendant played a limited role in the Project, consisting of the provision of quantity surveying services primarily prior to the appointment of the First Defendant as the contractor. I say that the Second Defendant's role included an assessment of the tender from Cleary & Doyle, the building contractor originally engaged to carry out the construction work on the project, a draft costs summary, and assisting in negotiating a potential contract sum with Cleary Doyle. I say that the role played by the Second Defendant is clear from minutes of a meeting dated 9 November, 2006, signed by Eoin Wilcox of the Second Defendant at which Eoin Wilcox met with the Plaintiff, Mr. Philip McDonald, and Mr. Patrick Walsh MMP-PM in order to discuss the draft costs summary prepared by the Second Defendant together with a letter of Cleary & Doyle."* (para. 5);

- *"I have prepared and sworn an affidavit of discovery dated 17 September, 2021 … I say that in the course of undertaking searches in preparation for the affidavit of discovery, an extensive range of documents that provide further support to the averments in my affidavit of 21 June, 2021 have been identified and assembled…"* (paras. 6 – 7);

- *"I say that the discovered documents make clear that the Plaintiff was not in a contractual or other relationship with the Second Defendant in relation to the provision of project management services on the project and should not have been joined in these proceedings."* (para. 10);

- *"I say that throughout the discovered documents there are consistent references to MMP-PM and its employees Mr. Patrick Walsh and Mr. Michael Ferry. Further the documents issued by MMP-PM in the course of providing the project management services in connection with the project referred*

to MMP-PM specifically. I say that there are no discovered documents that provide any basis for the joining of the Second Defendant to the within proceedings."

Averment by Mr Porter in his 11 October 2021

96. Further averments made by Mr. Porter in his 11 October 2021 affidavit included *inter alia* the following:

- "*Mr. Dooley avers at para. 5 of his affidavit that the Second Defendant was appointed project manager to the development site at Courtown Co. Wexford pursuant to an oral agreement entered into in or around June 2006 with Mr. Patrick Walsh, on behalf of the Second Defendant. I say that this is not correct. I say that it is clear from the memorandum of the meeting at which the appointment for project management services was agreed with MMP Project Management Ltd, and that the contract was negotiated and concluded by Mr. Patrick Walsh who was in attendance at that meeting. I say that Mr. Walsh was managing director of MMP Project Management Ltd and was not a director of the Second Defendant Mulcahy McDonagh & Partners Ltd. I say that Mr. Walsh had no legal authority to enter – and could not therefore, have entered – into a contract with the Plaintiff on behalf of Mulcahy McDonagh & Partners Ltd."* (para. 6);

- *"…[T]here was no novation of the 'contract' alleged to exist between Mr. Dooley and MMP Project Management Ltd, because no such contract existed."* (para. 8);

- "*I refer to the note of meeting which took place on 17 October, 2006 between the Second Defendant and Cleary & Doyle Contractors … I say that the note issued by Eoin Wilcox, who was employed by the Second Defendant, makes clear that the Second Defendant was retained for cost advice services … and not for project management services."* (para. 9);

- "*Mr. Dooley refers to the minutes of Site Meeting No. 1 from Cleary & Doyle, the initial building contractor on the development. With regard to the use of the initials 'MMP' by Cleary & Doyle Building Contractors to refer to both Patrick Walsh (of MMP Project Management Ltd) and Eoin Wilcox (of the second named defendant), I say that it is possible that Cleary & Doyle may have inadvertently used the initials MMP to refer to both individuals as they were accustomed to dealing with the second named defendant in relation to the cost advice services carried out by the second named defendant in relation to the contract sum."* (para. 10);

- "*[W]ith regard to the reference to the reference to the development on the website of Mulcahy McDonagh & Partners Ltd exhibited to Mr. Dooley's affidavit as 'FD8', I say that Mulcahy McDonagh & Partners Ltd were engaged to provide limited cost advice services to the development, and as such it is entirely consistent with Mulcahy McDonagh & Partners Ltd.'s role on the development that it would make reference to those services on its website."* (para. 11);

- *"With regard to the report of Watts referred to at paras. 23-25 of Mr. Dooley's affidavit, I say that Watts were under the mistaken understanding that Mulcahy McDonagh & Partners Ltd had a role as project managers in relation to the project."* (para. 12);

- *"… [T]he mistakes of any third party as to the role of the Second Defendant in the development have no bearing on the actual legal position which is that the Second Defendant was not engaged to provide project management services."* (para. 13);

- *"… Mr. Dooley contends … that the cheque paid in or around 11 December, 2006 for the sum of €21,780 supports his contention that the correct contract counterparty for the performance of project management services to the Project was the Second Defendant Mulcahy McDonagh & Partners Ltd, as the cheque was made out to Mulcahy McDonagh & Partners Ltd. I say that Mr. Dooley made out that cheque to the wrong party. The cheque was clearly paid in discharge of an invoice issued on 28 November, 2006 by MMP Project Management Ltd to Ocean Point Development Company Ltd."* (para. 15);

- *"I say that it appears that the cheque may have been initially lodged to the bank account of Mulcahy McDonagh & Partners Ltd on the basis that the accounts department of Mulcahy McDonagh & Partners Ltd would have been aware that Mulcahy McDonagh & Partners Ltd had been engaged to carry out limited cost advice services for Ocean Point, but that the error was discovered, following which the amount paid was then transferred by Mulcahy McDonagh & Partners Ltd to MMP Project*

Management Ltd as an inter-company transfer, as is clear from the statement of account issued by MMP Project Management Ltd." (para. 19);

- *"… [A] spreadsheet was prepared for MMP Project Management bank lodgements for financial years April 2007 to March 2008 and April 2008 to March 2009 which clearly identifies five payments made by Ocean Point Development Company Ltd to MMP Project Management Ltd … I say that this indicates that all cheques issued by Ocean Point for project management services subsequent to the first cheque for €21,780 were correctly addressed to MMP-PM and lodged to MMP-PM bank account."* (para. 20);

Averments by the Plaintiff in his 2 November 2021 Affidavit

97. Among the averments made by the Plaintiff in his 2 November 2021 affidavit, in which he disputes what Mr. Porter has averred, are the following:

- *"… Mr. Porter is not in a position to proffer admissible evidence to this court regarding the within proceedings, and, in particular, regarding the core issue of who, or which party, it was agreed was to be Project Manager for the development site, which agreement was made in June 2006 between the Plaintiff and Mr. Pat Walsh for and on behalf of the Second Defendant."* (para. 4);

- *"… Mr. Porter only became a director of MMP Project Management Ltd on 1 December, 2014. I beg to refer to a copy of a print-out of the history of directors for MMP Project Management Ltd…"* (para. 5);

- *"… [I]t is not disputed by Mr. Porter that he was not present at the meeting with this deponent in June 2006 at which the Agreement was entered into between this deponent and Mr. Pat Walsh for the Second Defendant".* (para. 13);

- "*I refer to para. 5 of the supplemental affidavit, which is worth setting out in full:*

  *'I say that the Second Defendant played a **limited role** in the Project consisting of the provision of quantity surveying services primarily prior to the appointment of the First Defendant as the contractor …'*

  *I say and believe that this is some turnaround from the Second Defendant. By contrast, I say that at para. 11 of the grounding affidavit sworn by Mr. Porter on 21 June, 2021 – just circa three months previously – he had previously averred: 'I say that the Second Defendant had **no** involvement in the provision of services to the Project and has been incorrectly joined to these proceedings'.*

  In reality, I say and believe that this incredible U-turn only appears to have come about as this deponent first exhibited a note of the meeting involving Eoin Wilcox and Pat Walsh from 2006 in my replying affidavit sworn on 23 August, 2021." (paras. 15-17);

- *"… I say that, whilst the documentation provided by the Second Defendant does contain certain references to MMP Project Management Ltd in places, it is also equally clear that it also refers to the Second Defendant and to MMP and MMP Project Management simpliciter in many other places…"* (para. 19);

- *"... I dispute that the discovered documentation in any way demonstrates that MMP Project Management Ltd were this deponent's contractual counterparty."* (para. 20);

- *"… [I]nsofar as the Second Defendant refers to a handwritten memo from Mr. Pat Walsh as evidencing that the agreement was with MMP Project Management Ltd, and not the Second Defendant, I dispute that this was the case. In particular, I say that the purported handwritten memo is on headed paper of 'MMP Project Management Ltd' in any event, and that there is no reference to any separate limited liability company therein, simply MMP Project Management simpliciter."* (para. 21);

- *"… I also wish to say that the meeting with Mr. Walsh took place in June 2006, not on 22 May, 2006 as this alleged memo suggests."* (para. 23);

- *"… I do not believe that Mr. Donal McMenamin (now deceased) attended the meeting with Mr. Walsh at which point the Agreement was made, nor was Mr. Ciaran Linnane present. I now understand Mr. Linnane to be Mr. Walsh's brother-in-law and that they often met in Ashton's after their respective work-days, but I do not believe that he was there when the Agreement was made, as I would not even know who he was at the time, and there would be no reason or necessity for his presence."* (para. 24);

- *"… []I]nsofar as Mr. Porter refers to letters written by Ocean Point or various other parties to MMP Project Management Ltd, I say that there are various other letters and documents which simply (sic) to 'MMP'."* (para. 26);

- *"… I say that I was introduced to the Second Defendant by Mr. Philip McDonald, who arranged to set up a meeting between this deponent and the Second Defendant at Ashtons in Clonskeagh in June 2006. I say that present at this meeting were Mr. Walsh, myself and Philip McDonald. As set out, I do not believe that Donal McMenamin (now deceased) or Ciaran Linnane were present when the agreement was reached."* (para. 29);

- "*… [A]t this meeting, Mr. Pat Walsh represented that he had 'vast' experience working with the Second Defendant as a Project Manager and that the Second Defendant was also well known to members of Wexford County Council, as well as currently working on a civic development in Gorey, Co. Wexford, not miles away from the development site in Courtown. Thus, Mr. Walsh was of the view that this deponent's project would 'fit nicely' with this ongoing development."* (para. 30);

- "*… [T]o be clear, at no point did Mr. Walsh indicate or represent that he was operating from a different company other than the Second Defendant, whether MMP Project Management Ltd or otherwise. I say that Mr. Walsh simply held himself out as a competent Project Manager within the Second Defendant."* (para. 31);

- "*Therefore, it was on that basis, it was agreed that the Second Defendant would operate as Project Manager for the development at the sum of €120,000.00 plus VAT."* (para. 32);

- *"… [T]he MMP corporate group all operate under the same roof at Pembroke Road, Dublin 4 … Whilst waiting in reception, the phone was always answered as 'MMP' short for Mulcahy McDonagh & Partners – and there was never any delineation or distinction between MMP and MMP Project Management Ltd."* (para. 33);

- *"In particular, Mr. Walsh also referred to 'his' company as 'MMP', never MMP Project Management Ltd or MMP-PM."* (para. 34);

- *"Further, in the dealings that this deponent had with Mr. Cornelius O'Sullivan, who was the managing director of the Second Defendant at the time, there was never any mention or reference or representation that this deponent was not contracting with the Second Defendant."* (para. 35);

- *"Insofar as Mr. Porter refers to Project Minutes, I say that it is clear that some of these just referred to 'MMP Project Management' at times and that in various other places and times, it is simply 'MMP' or 'Mulcahy McDonagh & Partners'."* (para. 36);

- *".. I … dispute that the … cheque was paid to the wrong party. The cheque was paid in accordance with the terms of the Agreement between the parties"* (para. 43);

- *"… I do not agree that the cheque was paid directly in discharge of an invoice dated 28 November, 2006. I say that my recollection of events was that Mr. Walsh specifically requested payment of this sum following the breakdown with Cleary & Doyle, and I duly paid this, which payment was made directly from this deponent's own personal account at that time. I say that this request was made verbally by Mr. Walsh."* (para. 44).

- *"… Whilst Mr. Porter refers to the fact that 'MMP Project Management Ltd' is referred to on … invoices, I say and believe that the key point for me was that the invoices had the emblem 'MMP' on and that was it. It is also further clear that one of the invoices (5 December, 2006) also specifically referred to 'Mulcahy McDonagh & Partners Ltd', the Second Defendant herein." (*para. 50*);*

- *"… [I]t is abundantly clear that the cheque was lodged and cashed by the Second Defendant. Indeed, I wish to be absolutely clear, lest there be any confusion, at no point did this cheque come back unreturned or not cashed."* (para. 57);

- *"Furthermore, at no point was this deponent ever advised, represented or otherwise informed that I had paid the wrong party."* (para. 58)*;*

- *"… [A]t no point during the Project did the Second Defendant or MMP Project Management Ltd or Mr. Pat Walsh or Mr. Corry O'Sullivan indicate or represent to me that the contract was with another company other than the Second Defendant. In circumstances where this deponent personally paid the first cheque to the Second Defendant, as outlined above, the aforementioned parties would be well aware, or on notice, that the Agreement was with the Second Defendant, no other, and at no point did they seek to indicate otherwise."* (para. 63).

Averments by Mr. Porter in his 11 November 2021 affidavit

98. Mr. Porter made *inter alia* the following averments in his affidavit sworn on 11 November, 2021.

- *"… I was not personally in attendance at the meeting at which the agreement between Mr. Dooley and the Second Defendant was reached. Mr. Dooley states that Mr. Patrick Walsh was in attendance at that meeting, however, and I beg to refer to the affidavit of Mr. Patrick Walsh sworn in support of the Second Defendant's application…"* (para. 4);

- *"… I say that there is no 'about turn' – as characterised by Mr. Dooley – on the part of the Second Defendant arising from my averments. I say that the Second Defendant did not provide project management services in relation to the project. The Second Defendant performed a limit prior to the commencement of the works in providing quantity surveying and tender assessment services to the Plaintiff/Ocean Point Development Company Ltd ('Ocean Point'). I say that the 'services' referred to in para. 11 of my affidavit of 21 June, 2021 are the project management services which are the subject matter of these proceedings."* (para. 5);

- *"… I say that the manner in which Cleary & Doyle may have referred to the Second Defendant may simply indicate that they were in error in writing to the Second Defendant rather than to MMP Project Management Ltd. In subsequent letters from Cleary & Doyle they address letters to Mr. Pat Walsh of MMP Project Management."* (para. 6.a.);

- *"… I say that in order to prevent unnecessary paper waste, it was the practice at the time in Second Defendant to use damaged or obsolete 'headed' notepaper to print or photocopy documents for internal filing. I say that if MMP Project Management Ltd did likewise, this could account for examples of documents such as those exhibited at 'FD5' to Mr. Dooley's affidavit."* (para. 6.c.);

- *"… [T]he manner in which third parties referred to the Second Defendant and/MMP Project Management Ltd is not a matter within the control of the Second Defendant. I say that there is no such entity as 'MMP'."* (para. 6.e.);

- *"… I say that an invoice was issued by the Second Defendant dated 5 December, 2006 which sets out the hours worked by the Second Defendant in respect of quantity surveying services, in the amount of €8,104 plus VAT. I say that to the best of my knowledge this is the only invoice issued by the Second Defendant in respect of those services."* (para. 8);

- *"I say that it is notable that Mr. Dooley has produced a copy of the cheque made payable to the Second Defendant but has not produced copies of the cheques made payable to MMP Project Management Ltd on foot of invoices issued by that company."* (para. 9);

- *"… I say that there was no need to clarify, indicate or represent to the Plaintiff that the contract for project management services had been entered into with MMP Project Management Ltd, as it never became an issue until Mr. Dooley sued the Second Defendant in error."* (para. 12).

Affidavit of Patrick Walsh sworn 11 November, 2021

99. It is common case that Mr. Porter was not present at the relevant meeting between the Plaintiff and Mr. Patrick Walsh in 2006. The present application is not an interlocutory one, but a final application. Order 40, r.8 of the Rules of the Superior Courts provides that:

"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions."

100. Against the foregoing backdrop, Mr. Patrick Walsh swore an affidavit on 11 November 2021 in support of the relief sought, in which he made averments which directly conflict with those made by Mr. Dooley, in particular, as regards their meeting in 2006. His averments include the following:

- *"I say that in addition to being a director of MMP Project Management Ltd, I was also a shareholder in MMP Project Management Ltd and held 25% of the issued share capital in the company from October 2002 until June 2012. I say that amongst my roles as director of MMP Project Management Ltd was that of business development. I say that in light of my shareholding in MMP Project Management Ltd, I had a commercial interest in securing project management work for MMP."* (paras. 4-5);

- *"… [I]n early 2006 I was notified by Mr. Ciaran Linnane of a potential business opportunity for MMP Project Management Ltd to provide project management services in respect of a project in Courtown, Co. Wexford that was being developed by Mr. Dooley. I say that Mr. Linnane facilitated an introduction to Mr. Dooley at a meeting in Ashton's pub in Clonskeagh, Dublin 14 on 22 May, 2006 and my recollection is that it was on that date that I met Mr. Dooley for the first time."* (para. 6);

- *"… I was not a director of the Second Defendant Mulcahy McDonagh & Partners Ltd. I say that I could not, therefore, have entered into a contract with the Plaintiff on behalf of Mulcahy McDonagh & Partners Ltd."* (para. 7);

- *"I say that I negotiated an agreement with Mr. Dooley for MMP Project Management Ltd to provide project management services to the Project at the meeting at Ashton's pub in Clonskeagh, Dublin 14, on 22 May, 2006. I say that my practice at the time was to carry business cards when meeting clients for the first time and that if I did so on that occasion, the business card would clearly have referred to MMP Project Management Ltd. I say that agreement was reached for the provision of project management services by MMP Project Management Ltd for the Project at a fee of €120,000 plus VAT. I say that I wrote down the key terms agreed with Mr. Dooley in a handwritten memorandum. I beg to refer to a copy of the said memorandum…"* (para. 8);

- *"I recorded the memorandum of the meeting … by hand on a notepad bearing the branding 'MMP Project Management Ltd'. I say that it is not correct to state that the meeting took place in June 2006"* (para. 9);

- *"… I negotiated the agreement for MMP Project Management Ltd <u>only</u> to carry out the project management services to the Project. I say that I had no authority to act on behalf of the Second Defendant, nor did I represent myself as having any such authority."* (para. 10);

- *"I say that the reason that the Second Defendant was subsequently retained in order to provide tender assessment services to the Plaintiff is because I advised the Plaintiff, shortly after the project management services commenced, that the Second Defendant's advice be sought in relation to the assessment of the tender received from Cleary & Doyle contractors on foot of the Plaintiff's initial tender exercise for the carrying out of the Project."* (para. 11);

- *"… [A]t no stage did I represent to Mr. Dooley that the Second Defendant would carry out the project management services for the project. I say that in all of my discussions with Mr. Dooley I never suggested that the contract for the project management services would be performed by the Second Defendant rather than by MMP Project Management Ltd, the company of which I was a director. Nor did Mr. Dooley ever ask why the correspondence that I sent in the course of providing the services referred to MMP Project Management Ltd. I say that it is incorrect and untrue to state that this deponent 'held himself out as a competent project manager within the Second Defendant' in the manner alleged by Mr. Dooley at para. 31 of his supplemental affidavit. I say that I never told Mr. Dooley that I was acting on behalf of the Second Defendant or employed by them."* (para. 12);

- *"I say that, accordingly, it was not agreed that the Second Defendant would operate as project manager to the project in the manner alleged by Mr. Dooley … rather, it was agreed at a meeting*

of 22 May, 2006 that project management services would be carried out by MMP Project Management Ltd." (para. 13);

- *"I say that this position is consistently maintained throughout all of the correspondence issued by the Plaintiff and Ocean Point in relation to the Project…"* (para. 14);

- *"… I generally signed such correspondence with the full company name of MMP Project Management Ltd beneath my printed name under my signature. I say that I do not recall Mr. Dooley ever asking me why the correspondence, documents, invoices and minutes of meetings created throughout the performance of the project management services by MMP Project Management Ltd referred to that company and not to the Second Defendant."* (para. 16);

- *"… I do not recall any formal variation being entered into of the contract for the project management services being varied to provide for a fee of €138,000 rather than €120,000… I say that that I believe what occurred is that the project management services rendered in relation to the initial contractor who had tendered for the construction work on the Project (Cleary & Doyle) proved abortive, as that contractor was not retained to complete the works. I say that the balance of €120,000 would have been the sum agreed for the project management services to be provided in respect of the balance of the Project in relation to the various works to be carried out by the First Defendant herein."* (para. 18);

Referring to a spreadsheet exhibited by Mr. Porter concerning three payments made in May, July and December 2007, Mr. Walsh made the following averment:

- *"I say that this indicates that all cheques issued by Ocean Point for project management services subsequent to the first cheque for €21,780 were correctly addressed to MMP Project Management Ltd and lodged to MMP Project Management Ltd bank account."* (para. 20);

- *"… [T]o the best of my knowledge, at no time did Mr. Dooley indicate that MMP Project Management Ltd was not, in his view, the consultant retained for the project management services, despite the fact that all such invoices and statements of account referred to MMP Project Management Ltd and not to the Second Defendant."* (para. 22);

- *"I say that MMP Project Management Ltd and the Second Defendant had different telephone lines and numbers, and that receptionists were trained to answer each line with the appropriate company name. I say that I have no recollection of a receptionist ever answering the telephone line of either of the companies as 'MMP'."* (para. 23);

- *"[T]he significant volume of documents exhibited to previous affidavits delivered in connection with this application include numerous letters from this deponent to Mr. Dooley and his management team for the Project, which are generally signed with the full name of MMP Project Management Ltd beneath the name of this deponent."* (para. 24);

- *"… [I]t is categorically untrue and incorrect to claim that I 'never' referred to MMP Project Management Ltd by its proper name."* (para. 24);

- *"I say that Mr. Dooley claims that the amount of €21,780, a cheque for which he addressed in error to the Second Defendant, was paid on the basis of a verbal request from this deponent, and not on the basis of an invoice from MMP Project Management Ltd for the same amount. I say that this is incorrect and untrue."* (para. 25);

- *"I say that I authorised the issue of the invoice in the amount of €21,780 and that it related to project management services. I say that Mr. Dooley made his payment on foot of that invoice out to the wrong company, and that the payment was ultimately credited to the account of MMP Project Management Ltd in the manner set out in the supplemental affidavit of Kevin Porter…"* (para. 26);

- *"… Mr. Dooley refers to the first cheque issued in error to the Second Defendant but not to all the subsequent invoices issued by MMP Project Management Ltd, which were paid to MMP Project Management Ltd by the Plaintiff and/or by Ocean Point and VAT receipts issued by MMP Project Management Ltd to the Plaintiff and/or Ocean Point."* (para. 28);

- *"… I say that filing procedures at MMP Project Management Ltd were such that documents created were printed on headed notepaper with logos, and issued on behalf of MMP Project Management Ltd, and a paper copy retained in paper files, which was printed on plain paper, or occasionally on obsolete or unusable headed paper. I say that this is why Mr. Dooley possesses a copy of an invoice on headed paper while MMP Project Management Ltd.'s copy is on plain paper."* (para. 29);

Significant and Unresolved Conflicts of Fact

101. Earlier in this judgment I referred to relevant legal principles and it is those which must guide this Court. I have gone to some lengths to quote extracts from the various affidavits which are before the Court because a reading of same demonstrates that there are significant conflicts of fact. These remain unresolved. Perhaps the starkest example, but one which goes to the heart of the dispute between the parties, is the following.

102. At para. 30 of his 2 November 2021 affidavit, the Plaintiff avers *inter alia* that "*Mr. Pat Walsh represented that he had 'vast' experience working with the Second Defendant as a project manager and that the Second Defendant was also well known to members of Wexford County Council…".* At para. 31 of the same affidavit, the Plaintiff avers *inter alia* that *"… at no point did Mr. Walsh indicate or represent that he was operating from a different company other than the Second Defendant … I say that Mr. Walsh simply held himself out as a competent project manager within the Second Defendant."*

103. By contrast, in his affidavit sworn on 11 November 2021, Mr. Walsh makes *inter alia* the following averment: *"I say that it is incorrect and untrue to state that this deponent 'held himself out as a competent project manager within the Second Defendant' in the manner alleged by Mr. Dooley at para. 31 of his supplemental affidavit. I say that I never told Mr. Dooley that I was acting on behalf of the Second Defendant or employed by them."*

104. The foregoing is a dispute which this Court, on the present application, simply cannot resolve. It is plainly a fundamental factual dispute going to the heart of the claim by the Plaintiff that he contracted with the Second Defendant. Of crucial significance to the Defence of the Second Defendant is to say that the agreement was not with it, but with MMP PM. As I observed earlier, this is not a case where there was any possibility of the outcome being determined as result of, for example, the interpretation of a formal written contract entered into by the relevant parties. The opposite is the case, in that the competing averments illustrate that there is a fundamental dispute as to what was, or was not, said and what parties are, or are not, bound by an alleged oral agreement.

105. It seems to me that it would be utterly inappropriate for this Court to ignore this conflict of fact. Equally, it would be wholly inappropriate for this Court to try and resolve it. This is for the simple reason that doing so would involve preferring one version of events over another. This is something the Court cannot do in the present application. As Mr. Justice Barron made clear in the *Jodifern* decision (at p. 332): -

> "*One thing is clear, disputed oral evidence of fact cannot be relied upon by a defendant to succeed in such an application. … If the plaintiff's claim is based upon allegations of fact which will have to be established at an oral hearing, it is hard to see how such a claim can be treated as being an abuse of the of the process of the Court. It can only be contested by oral evidence to show that the facts cannot possibly be true. This however would involve trial of that particular factual issue."*

Incorrect and Untrue

106. As is clear from the respective averments made, the Plaintiff has put forward an account of the relevant meeting which Mr. Walsh says is *"incorrect and untrue".* It seems to me that, underpinning the Second Defendant's application for the primary relief sought is the proposition that this Court can and should agree with Mr. Walsh. Doing so, it seems to me, would be inappropriate and impermissible having regard to the relevant legal principles.

Cheque

107. The foregoing is not by any means the only conflict of fact disclosed by the various averments. Another example relates to the cheque for €21,780 and the circumstances surrounding the payment made by the Plaintiff to the Second Defendant. It is not in dispute that a cheque for this amount, dated 11 December 2006, was made out by the Plaintiff to the Second Defendant. The circumstances in which it was encashed, rather than having been returned to the Plaintiff, are dealt with in the various averments made and which I have quoted earlier in this judgment. What the Plaintiff took this to mean is also averred to. Without for a moment purporting to make any findings as regards those averments, a stark conflict of fact concerning this payment is as follows.

Specific Request Made Verbally

108. At para. 44 of his 2 November, 2021 affidavit the Plaintiff avers *inter alia* that:

> *"I do not agree that the cheque was paid directly in discharge of an invoice dated 28 November, 2006. I say that my recollection of events was that Mr. Walsh specifically requested payment of this sum following the breakdown with Cleary & Doyle, and I duly paid this, which payment was made directly from this deponent's own personal account at that time. I say that this request was made verbally by Mr. Walsh."*

Incorrect and Untrue

109. An utterly different version of events is sworn to by Mr. Walsh who, at para. 25 of his 11 November 2021 affidavit, avers that the foregoing is *"incorrect and untrue".* To my mind, only a trial judge can resolve such a factual dispute which, on any analysis, is of relevance to a determination of the underlying claim as made, and as defended, in the pleadings.

110. The authorities make very clear that this Court's jurisdiction on a motion of this type should be exercised 'sparingly' and only in circumstances where it is clear that the proceedings are bound to fail, rather than where a Plaintiff's case appears to be weak. The jurisdiction cannot provide a form of summary disposal of a case. The authorities also indicate that, when considering a motion of this type, to dismiss proceedings pursuant to the inherent jurisdiction of the Court, the proper approach is to accept that the averments made by a Plaintiff can be proved at the trial.

111. On this issue it is appropriate to quote as follows from the decision of Mr. Justice O'Donovan in *Moran v. Oakley Park Developments Ltd* [2000] IEHC 39. Referring to Mr. Justice McCracken's decision in *Jodifern* (Unreported, , O'Donovan J. stated as follows (at pg. 3-4):

> *"… McCracken J. referred to an unreported judgment delivered on the 15th day of March, 1999 by Macken J. in the case of Supermacs (Ireland) & Anor v. Katesan (Naas) Ltd & Anor in which, when considering this inherent jurisdiction of the Court, the learned judge said:*
>
> > *'Turning now to the question as to whether or not the defendants are entitled to have their relief relying on the inherent jurisdiction of the Court, when one is considering a claim of this nature based on the inherent jurisdiction of the Court, it is permissible for Affidavit evidence to be filed. A number of Affidavits have been filed and, although there are several conflicting elements in the Affidavits there are certain principles which Mr. Buttenshaw has correctly acknowledged and conceded, including the fact that I must assume;*
> >
> > > *(a) that every fact pleaded by the plaintiffs in their Statement of Claim is correct and can be proved at trial, and*
> > >
> > > *(b) that every fact asserted by the plaintiffs in their Affidavits is likewise correct and can be proved at the trial.*
> >
> > *This particular approach which is adopted as being the correct approach in all of the cases in which Affidavit evidence has been adduced does mean that, insofar as there may be conflict between matters averred by the Plaintiffs and the defendants in their respective Affidavits, such conflicts must be, at least for the purpose of this application, resolved in favour of the plaintiff.'*
>
> *McCracken J. expressed his entire agreement with that statement of the law and, for the purpose of the Judgment which he was delivering, he adopted it. Likewise, for the purpose of this case, so do I."*

112. It seems to me that the proper approach is for this Court to assume that the facts asserted by the Plaintiff on affidavit are correct and can be proved at the trial of the action. As I have already made clear, this Court cannot reach a finding that what the Plaintiff avers to be true is untrue in the manner Mr. Walsh avers. Even from a 'first-principles' analysis, doing so would be fundamentally unfair as the evidence of neither the Plaintiff nor Mr Walsh has been tested by means of examination and cross-examination, including with reference to such documentation as either side contends to be relevant such as correspondence which relevant witnesses authored or received. Moreover, to do what the Second Defendant asks would be to act contrary to the principles in the relevant authorities including *Jodifern*. A trial is needed to resolve what are stark factual disputes in the present case.

Authority to Enter a Contract

113. The various averments which I have quoted above also reveal *inter alia* a dispute as to whether Mr. Walsh had the necessary authority to enter into an agreement binding on the Second Defendant. Mr. Porter and Mr. Walsh make averments to the effect that, not being a director of the Second Defendant, Mr. Walsh *"…could not, therefore, have entered into a contract with the Plaintiff on behalf of Mulcahy McDonagh & Partners Limited."* (see para. 7 of Mr. Walsh's 11 November, 2021 affidavit)

114. The question of ostensible authority, as opposed to actual authority is a complex one. In submissions made on behalf of the Second Defendant, counsel referred to the Supreme Court's decision in *Kett v. Shannon & Anor* [1986] IESC 2. The facts concerned a purchaser of a second-hand car from a garage. The car in question was not ready when the purchaser called and a mechanic allowed the purchaser to borrow a 'Mini' motorcar. Soon afterwards, while driving the Mini, the purchaser negligently collided with the Plaintiff while she was walking on the public road. The net question was whether the mechanic was acting as an agent for the garage owner/vendor when he allowed the purchaser to take the Mini.

115. Counsel for the Second Defendant in the present proceedings opened *inter alia* the following passage from the decision in *Kett*:

> *"In the law of agency a distinction is drawn between actual (or real) authority and ostensible (or apparent) authority. Actual authority exists when it is based on an actual agreement between the principal and the agent. In this case the uncontradicted evidence of both the vendor and the mechanic was that the vendor had never authorised the mechanic to lend a car to a customer. So it is clear that the mechanic was without actual authority to lend the Mini to the purchaser.*
>
> *Ostensible authority, on the other hand, derives not from any consensual arrangement between the principal and the agent, but is founded on a representation made by the principal to the third party which is intended to convey, and does convey, to the third party that the arrangement entered into under the apparent authority of the agent will be binding on the principal. It is agency of this kind that is contended for by the plaintiff and the purchaser.*
>
> *It is a contention which I fear cannot be sustained in the particular circumstances of this case. The essence of ostensible authority is that it is based on a representation by the principal (the vendor) to a third party (the purchaser) that the alleged agent (the mechanic) had authority to bind the principal by the transaction he entered into. Such a representation, however, was absent in this case.*
>
> *The law on ostensible or apparent authority is fully and illuminatingly dealt with by Diplock L.J. in Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480. Having referred to that judgment, Robert Goff L.J. in Armagas Ltd v Mundogas SA [1985] 3 All ER 795 says (at p. 804):*
>
> > *'It appears, from that judgment, that ostensible authority is created by a representation by the principal to the third party that the agent has the relevant authority, and that the representation, when acted on by the third party, operates as an estoppel, precluding the principal from asserting that he is not bound. The representation which creates ostensible authority may take a variety of forms, but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has.'*
>
> *I have no doubt that in the eyes of the purchaser the mechanic had ostensible authority to lend him the Mini. But that is not enough to create ostensible authority in the law of agency. There should have been a representation of some kind by the vendor to the purchaser that the mechanic had authority to lend the Mini. On that aspect of the case the facts are clear and unequivocal. There was no representation of any kind by the vendor to the purchaser in regard to the mechanic. The mechanic was one of four or five mechanics who worked in the garage. When the purchaser called to return the Renault, this mechanic happened to be the only member of the staff on the premises. He took it on himself to lend the purchaser the mini. He had no authority from the vendor to do so. And there is not the slightest suggestion in the evidence that the vendor had by word or deed represented to the purchaser that the mechanic was authorised to lend the Mini. I must therefore hold that in lending the Mini to the purchaser the mechanic was not the vendor's agent."*

116. Counsel for the Second Defendant submits that there was no representation by the Second Defendant, as principal, to the effect that Mr. Walsh had authority to bind it and he submits that Mr. Walsh had neither actual, nor ostensible authority. However, as counsel for the Plaintiff points out, the decision in *Kett* was made in the wake of a trial before a jury where evidence had been given, wholly unlike the present position where the Court is invited to determine a complex legal issue without evidence having been given and tested. The foregoing seems to me to be a submission with great force. I take the view that whether or not Mr. Walsh had ostensible authority is not an issue which this Court could properly or fairly determine on the basis of the affidavit evidence before it, which contains fundamentally different versions of what is alleged to have been said, including what Mr. Dooley asserts that Mr. Walsh said to him as regards the latter's involvement with and experience in the Second Defendant.

117. It seems to me that, in the present case, there is a mixed question of fact and law as to whether Mr. Walsh had ostensible authority which question is required to be resolved, but which simply cannot be resolved in an application of this type.

118. It seems to me that if the Plaintiff can 'stand up' his claims that Mr. Walsh *"represented that he had 'vast' experience working with the Second Defendant as a project manager"* and *"…held himself out as a competent project manager within the Second Defendant"* and that *"Mr. Walsh also referred to 'his' company as 'MMP', never MMP Project Management Limited or MMP PM",* the foregoing could well have a bearing on how a trial judge determines the question of ostensible authority. For the reasons detailed in this judgment, I take the view that this question cannot be determined by this Court in the present application.

119. As the learned judge made clear in the *Kett* decision, the most common representation which creates ostensible authority is one by conduct. In order to establish facts concerning conduct, it seems to me that a trial is required. Furthermore, no issue was taken by the Second Defendant with the principle which emerges from *Allied Pharmaceutical Distributions Limited v. Walsh* [1991] 2 IR 8 (at p. 17) where Mr. Justice Barron stated that the *"absence of any comment from the defendant firm was a sufficient representation by conduct"* in the context of that case.

120. The foregoing underlines that it would be improper for this Court, on the present application, to decide complex questions of law, the determination of which will necessarily hinge on facts which must be established at a trial, given the conflicts of fact which emerge from an analysis of the various different averments before the Court.

Notice to Cross-Examine

121. It is useful at this juncture to quote as follows from the Supreme Court's decision in *Boliden Tara Mines Limited v. Cosgrove & Ors.* [2010] IESC 62, wherein Mr. Justice Hardiman stated (at pg. 17-18): -

> *"It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a Notice of Intention to Cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of fact which may have been disposed to. In a case where there is no contradictory evidence an attack on the evidence which is before the Court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height."*

122. No Notice to Cross-examine the Plaintiff was served by the Second Defendant. That is not a criticism, but it is a fact which underlines that I am required, for the purposes of the present application, to take 'at its height' what the Plaintiff says on affidavit. Doing so requires me to refuse the primary relief sought by the Second Defendant.

123. In the present application, the onus lies on the Second Defendant to establish that the Plaintiff's claim is bound to fail (see Clarke J. (as he then was) in *Salthill Properties Ltd. & Anor. v. Royal Bank of Scotland Plc & Ors.* [2009] IEHC 207). In light of the conflicting averments as to fundamentally important matters of fact, I am satisfied that the Second Defendant has not discharged the relevant onus.

124. It seems to me that this Court cannot fairly take the view that the Plaintiff's claim is bound to fail. This Court cannot safely hold that it was improper to institute the present proceedings. In my view, given the conflict of fact which is at the core of the dispute, there would be a real risk of injustice in granting the primary relief sought by the Second Defendant. That is not for a moment to suggest that the Plaintiff's claim will succeed at trial. It is merely to say that, given the fundamental conflict of fact, oral evidence is required and the giving, and testing, of such evidence is likely to have a bearing on the issues of central relevance to

the dispute, such as (i) what agreement, if any, came into being as a result of the meeting between the Plaintiff and Mr. Walsh; (ii) who were the parties to that agreement; and (iii) what were the express terms thereof; and (iv) what were the implied terms thereof.

125. In short, the Plaintiff's claim is based on allegations of fact, keenly disputed, which will have to be established by means of an oral hearing at a future trial. Thus, I cannot consider the Plaintiff's claim to be an abuse of process and a trial is required.

Documents

126. Before proceeding to look at certain documents it is important that it be re-stated that there are different roles which documents may play. As Clarke J (as he then was) made clear at para. 3.11 of his decision in *Salthill Properties*:

> *"Correspondence, meetings of minutes, memoranda and the like, do not, of themselves, create legal relations between parties. Rather they purport to reflect facts such as what was said at meetings, what was communicated from one party to another or the like. Parties may explain or seek to clarify what might otherwise appear to be the natural meaning of such documents. At the end of the day, it will be what view the court takes as to what actually happened that will determine the facts on the basis of which the court will come to its judgment".*

127. Where the document itself (such as a written contract) governs the legal relations between the relevant parties, a court can consider same and may be able to come to a clear view as to the legal consequences flowing from it. This is not such a case. Nothing in the voluminous documentation is said to comprise a binding written contract between identified parties entered into on a specific date and clearly setting out, within its 'four walls', the terms of same. Regardless of the range of submissions made with such sophistication and skill by counsel for the Second Defendant, all of the documentation can fairly be said to comprise documents which may cast light on underlying facts at issue in the proceedings but, of themselves, do not create legal relations. Nor do the documents, individually or collectively, resolve the disputes as to fact disclosed by the competing averments which I have referred to earlier in this judgment. Thus, the proper role for the large volume of documentation which has been put before the Court in the present application seems to me for same to be available to a trial judge and for examination and cross-examination of witnesses to be conducted with reference to so much of that documentation as the parties regard as appropriate, subject, of course, to normal rules of admissibility etc.

128. The documents put before the Court in the present application comprised correspondence, minutes of meetings and memoranda etc. To the extent that either party may seek to explain or clarify what might otherwise appear to be the natural meaning of such documents, the forum for same is a trial court. A definitive view as to what actually happened at the meeting in mid-2006 is an exercise for the trial court and this view will determine the facts forming the basis of a court's judgment on the underlying claim. It would be wholly impermissible for this Court, in the present application, to come to a view on disputed facts based on a reading of minutes, correspondence and memoranda. It might be tempting, and it might be easy, to decide which side of the dispute appeared more likely to succeed, but it would be entirely wrong to decide the application for the primary relief in the Motion on such a basis.

129. Given the emphasis which was placed on that documentation during the course of the hearing, I now turn to certain specific documents.

Handwritten Memorandum '22-05-06 MMP Project Management'

130. At para. 9 of Mr. Walsh's 11 November 2021 affidavit, it is averred that, *"I attended that meeting myself on 22 May 2006. I recorded the memorandum of the meeting exhibited at 'PW1' by hand on a notepad bearing the branding 'MMP Project Management'. I say that it is not correct to state that the meeting took place in June 2006."*

131. Mr. Walsh has exhibited a two-page handwritten memorandum. In the top right-hand corner of each page is a 'logo' with the words "*MMP Project Management"*. The date at the top of the handwritten note is "22-05-06". The text of the document reads as follows: -

> *"Meeting in Ashtons.*
>
> *Ciaran Linnane, Francis Dooley, Philip McDonald,*
>
> *Donal McMenamin, P.W.*

Agreed fee €120,000.

P.W. to meet C&D, Randel McGowan (Q.S.).

David Cleary

Chris

_____

Tanya Van Dyke – Planner

Mark Bannon – PBP Ltd. Arch.

Randel McGowan

437B Howth Road,

_____

Premier = Michael Comerford

_____

Programme 14 months?"

132. The foregoing is the entire of what the document contains. The first observation to make is that neither the branding, nor the text contain any reference to "MMP Project Management Limited" (emphasis added). Nowhere in the text is it stated what entity will carry out project management services. The handwritten note does not bear the signature of the Plaintiff nor is it asserted that a copy of this note was furnished to the Plaintiff at the time.

133. To make the foregoing observations is not for a moment to purport to decide questions which are properly for the trial court. It is merely to point out that this is plainly not a contract which governs the legal relations between the parties and it is not a document upon which this Court could determine the legal consequences, if any, flowing from it. Nor does this document resolve the stark differences between the parties as to the facts of what occurred at the meeting to which it refers. This document, and many others which were put before the Court in the present Motion, may well form the basis of cross-examination of witnesses, in particular, the Plaintiff. It does not, however, provide a basis for the primary relief sought by the Second Defendant.

134. It is also appropriate to note that, as is clear from the various averments which I set out earlier in this judgment, the Plaintiff disputes that the meeting took place on 22 May 2006 and avers that it took place in June. This is another conflict of fact which will be for the trial judge to resolve. As to the date of the meeting, counsel for the Second Defendant submitted that in the Dooley proceedings the Plaintiff has pleaded that he met Mr. Walsh in May 2006. It seems to me that the existence of such a plea in separate proceedings may well form the basis for cross-examination of the Plaintiff at a trial of the present matter and may well speak to the issue of the credibility of his testimony. It is not, however, a dispute of fact which this Court can resolve on the present application. Nor does this document, or any other, definitively resolve the disputes of fact disclosed by a reading of the conflicting averments to which I have earlier referred.

Handwritten Minutes '9/11/06'

135. At para. 5 of Mr. Porter's supplemental affidavit sworn 17 September, 2021, he avers that the Second Defendant played a limited role in the project and says that the role played by the Second Defendant is clear from minutes of a meeting dated 9 November 2006 signed by Eoghan Wilcox of the Second Defendant at which Mr. Wilcox met with the Plaintiff, Mr. Philip McDonald and Mr. Patrick Walsh of MMP PM in order to discuss the draft costs summary prepared by the Second Defendant, together with a letter of Cleary & Doyle. Those minutes comprise a handwritten note bearing the date "9/11/06". The bottom of the second page bears the initials "EW".

136. The first observation to make is that there is a 'logo' in the top-right hand corner of each page and within the logo are the initials "MMP". Immediately under the logo is the name "Mulcahy McDonagh & Partners

Ltd" being the Second Defendant. From the Second Defendant's perspective, the foregoing is consistent with its limited role in the project and with a different entity, i.e. MMP PM, having been engaged by the Plaintiff in respect of project management services. It is not, however, determinative of the disputed issues of fact between the parties which are apparent from the mutually incompatible averments made in the affidavits before this Court.

Minutes of Meetings dated 25 July, 2006/9 August, 2006/6 December, 2007

137. Exhibit "KP7" to Mr. Porter's 17 September, 2021 affidavit comprises minutes of meetings dated 25 July, 2006; 9 August, 2006 and 6 December, 2007. The list of those present on each set of minutes includes the Plaintiff and Mr. Philip McDonald whose names appear opposite "Ocean Point Development Ltd." The names of Mr. Patrick Walsh and Mr. Michael Ferry are noted opposite the words "MMP Project Management". This is the case on all three sets of minutes. Counsel for the Second Defendant points out that "Ltd" appeared after the words "Ocean Point Development" but did not appear after the words "MMP Project Management" insofar as recording those who were present at each meeting. He also points out that the 'logo' in the top right-hand corner of each page states "MMP Project Management" with no reference to "Ltd".

138. On behalf of the Plaintiff, it is submitted that the foregoing is a distinction without a difference and the Plaintiff's counsel also points out that, at the end of the minutes appears "Michael Ferry MMP Project Management Limited". The foregoing is certainly true in respect of the minutes dated 6 December 2007 and there are numerous other examples of "MMP Project Management Limited" being stated. However, it is also true to say that the minutes dated 25 July 2006 do not refer to "Ltd" in the 'logo', or in the note of who was present, or in the body of the text, or at the very end of the document where the following appears: "Michael Ferry MMP Project Management".

139. The foregoing seems to me to illustrate what this Court cannot and should not be asked to engage in with a view to determining the application for the primary relief. In other words, there are numerous documents put before this Court and it is possible to examine them in granular detail and to suggest, having regard to that analysis, that it favours one version of events or another. That is not, however, the proper role of this Court on the present application. It may well be the case that documentation of this type might form the basis of cross-examination of a witness at a future trial, but this Court simply cannot reach findings of fact in respect of areas of fundamental dispute, based on a consideration of the documents, regardless of how careful that consideration might be or how tempting it might be to draw inferences. In short, whilst a given document may favour the version of events contended for by one or other party, a trial is required in order for facts, which are disputed, to be determined. This simply cannot be done as a 'paper exercise' because such an exercise would, in truth, amount to a summary hearing.

140. The foregoing comments apply to <u>all</u> the documentation which has been put before this Court including the documents to which I will presently refer. Even though it seems fair to say that the great preponderance of documents refers to "MMP Project Management Limited", the crucial point which cannot be lost sight of, is that this documentation does not prove what happened, in particular, at the meeting between the Plaintiff and Mr. Walsh which is at the heart of the present dispute, in respect of which meeting mutually incompatible averments have been made and stark factual disputes exist. Nor does any documentation resolve, for example, the mixed question of fact and law concerning authority, be that actual or ostensible.

141. In short, there are several issues where the facts are disputed and in order to grant the primary relief which is sought in this application, this Court would have to agree with Mr. Walsh when he avers that what the Plaintiff has said is "incorrect and untrue". This is not something the Court can or should do, regardless of what any letter, minute or memorandum might, on its face, appear to say. Moreover, this is not a case where the entirety of the documentation consistently points in only one direction as the foregoing comments concerning the 25 July 2006 minutes illustrates.

Letter and Invoice – 28 November, 2006

142. Exhibit 'KP8' to Mr. Porter's 17 September 2021 affidavit comprises a copy of a letter sent by "*Patrick Walsh MMP Project Management Ltd*" addressed to "*Ocean Point Development Company Ltd*" marked for the attention of the Plaintiff. The body of the letter states as follows: -

> "*Re <u>OCEAN POINT DEVELOPMENT, COURTOWN, CO. WEXFORD</u>*
>
> *Dear Sir,*

As per our agreement of 22 May, 2006, full fee for project management services is €120,000.00 + VAT.

We enclose herewith our invoice amounting to €21,780.00 for professional services rendered in connection with the above. A remittance at your earliest convenience would be appreciated.

Yours faithfully,

Patrick Walsh

MMP Project Management Ltd".

143. Behind it is a copy of an invoice dated November 28, 2006, the top of which states: "*Ocean Point Development Ltd – in account with – MMP Project Management Ltd".* The wording in the invoice includes: *"To amount of account for fees for professional services rendered. Agreed fee as per agreement of 22 May, 2006 €120,000.00 + VAT".*

144. The letter and invoice are put before the Court in support of the proposition that the Plaintiff's case should be struck out as an abuse of process. Again, it is uncontroversial to say that this letter and invoice may well, at a future trial, be found to have reflected what was agreed at a meeting on 22 May 2006 to which the letter and invoice refer. It is conceivable, however, that they may not. In oral testimony, it is conceivable that an explanation will be given which differs from what would appear to be the inference to be drawn from this documentation. I cannot lose sight, however, of the fact that this documentation neither creates nor proves what legal relations were previously entered into. Indeed, the manner of the payment of this invoice has given rise to significant disputes of fact which remains unresolved. In that regard I refer to the competing averments which I have set out earlier in this judgment. That dispute of fact is not resolved by the aforesaid letter and/or invoice.

145. It is a fact that payment was made by means of a cheque written by the Plaintiff in favour of the Second Defendant, not in favour of "MMP Project Management Limited". On behalf of the Second Defendant, it has been explained that an inter-company transfer was made, such that value was received by the entity entitled to the payment. The Plaintiff disputes that he made payment to the 'wrong' company and asserts that he made the payment at Mr. Walsh's specific request, something Mr. Walsh says is *incorrect* and *untrue*. What is or is not correct or true can only be determined at a trial having regard to the disputes of fact. In short, neither the letter and invoice nor any other documentation resolves the factual dispute as regards what was or was not said by the Plaintiff and Mr. Walsh, respectively, concerning the Plaintiff's cheque for €21,780 which was, in fact, made out to the Second Defendant, dated 11 December 2006.

Email sent to the Plaintiff by Mr. Walsh on 26 May 2008

146. Among the documents exhibited by Mr. Dooley in opposition to the motion was an email sent to the Plaintiff by Mr. Walsh on 26 May 2008. This describes Mr. Walsh as managing director "MMP Project Management". There is no reference in the email to "Limited". In addition, Mr. Walsh's email is stated to be "*P.walsh@mmp.ie*" and the 'footer' under the text of the email includes the following statement: "*Any views expressed in this message are those of the individual sender, except where the sender specifies and with authority, states them to be the views of Mulcahy McDonagh & Partners*".

147. Whilst stressing, once more, that it is no function of the Court in the present application to conduct a summary hearing, it is fair to say that not all of the documentation points 'one way', as illustrated by the foregoing.

23 August 2006 Minutes of Site Meeting

148. Mr. Dooley also exhibited *inter alia* minutes of a site meeting, dated 23 August 2006 prepared by Cleary Doyle which *inter alia* record the attendance of the following:

"Francis Dooley	*Ocean Point Developments*
Philip McDonald	*Ocean Point Developments*
Catriona Graham	*Ocean Point Developments*
Pat Walsh	*MMP"*

149. The Plaintiff places considerable emphasis on the foregoing. It is unnecessary to repeat here the comments I have made previously, save to say that a trial is required to determine the disputes of fact. These disputes simply cannot be determined by this Court making value judgments or merits based judgment based on a reading of documents and the drawing of inferences as to what they do or do not mean. The stark reality is that the parties have made mutually incompatible averments in respect of crucial facts which no amount of reading documents can resolve. Thus, the primary relief is not available to the Second Defendant in the present case.

2009 Report by Watts Consultancy Ltd

150. The Plaintiff also exhibits a report dated 21 August 2009 prepared by Watts Consultancy Limited entitled "*Project implementation plan for Ferris and Associates relating to: Ocean Point Development, Ballintray, Courtown, Co. Wexford*". In that report, reference is made to "MMP" whom the authors confirm that they met "*…on one occasion at the onset of our review. It was clear from our meeting that MMP did not feel that they had any specific responsibilities throughout this project and it is unclear to us exactly what role MMP were performing during the construction phase.*"

The Plaintiff's 29 November 2006 letter

151. Among the documents exhibited by Mr. Porter and relied on for the primary relief sought in the present motion is a letter dated 29 November 2006 which was sent by Mr. Francis Dooley in his capacity as "*Managing Director, Ocean Point Development Company Limited",* which letter was addressed to "*Mr. Pat Walsh, MMP Project Management Limited".* The letter concerned the "*Ocean Point development – Courtown, Co. Wexford*" and stated *inter alia* that the author was currently reviewing Cleary Doyle's offer. The letter concluded with the following statement: "*In the meantime can you please process the valuation as a final account. Once again, can you instruct Cleary Doyle to vacate site without further delay.*"

152. Counsel for the Second Defendant submitted that this was a letter authored by the Plaintiff and sent to the person which the Plaintiff believed he should be writing to, namely MMP PM (as opposed to the Second Defendant). A similar submission was made by counsel for the Second Defendant with regard to a letter dated 31 January 2008 sent by the Plaintiff as "*Director, Ocean Point Development Company Limited*" addressed to "*Mr. Patrick Walsh, Managing Director, MMP Project Management Limited*". This letter concerns the "*Ocean Point Development, Courtown, Co. Wexford*" and the text of the letter begins as follows:

> "*Dear Pat,*
>
> *We are writing to ask you, as Project Manager, to address the matter of quality of workmanship on this project with, the Design Team specifically the design team leaders Patterson Bannon & Associates and your colleagues. During a recent visit a number of quality deficiencies were noted, which included, but not limited to, the defects listed herein …*"

153. Counsel for the Second Defendant submits that there was no question of this letter being sent to the addressee other than in their capacity as Project Managers. It is plain that this Court is being asked to take it from the contents of the aforesaid letter (and from a large volume of other correspondence and documentation which post-dates the alleged agreement at the heart of the dispute) that the agreement was not, in fact, made with the Second Defendant.

154. It seems necessary to repeat at this juncture that, although it is fair to say that a very significant amount of documentation, taken at its face, appears to be consistent with the Second Defendant's contention that it did not enter a contract to provide project management services, there is simply no formal contract which is said to comprise the agreement which was, in fact, reached. All of the documentation relied on by the Second Defendant in the present application post-dates the alleged agreement and the one and only handwritten note which is said to relate to the meeting itself (being Mr. Walsh's manuscript note bearing the date 22 May 2006): (i) does not actually contain the name of the party which the Second Defendant contends was engaged (*i.e.* "MMP Project Management Limited"); (ii) does not purport to be a contract; (iii) does not set out the terms of an agreement; and (iv) there is not even agreement as to the date of the meeting it refers to. More significantly, Mr. Walsh has averred that what the Plaintiff says took place at the meeting is "incorrect and untrue".

155. Even if this Court was to assume that the handwritten note represented a contemporaneous note of the meeting, it is plainly not a comprehensive note of everything discussed, nor was it furnished to the Plaintiff or signed by him at any stage. Thus, regardless of the contents of the documentation (be they the various exhibits in support of the primary relief sought in the present Motion, or the contents of what appears to be an extensive discovery exercise on the part of the Second Defendant) this Court is still left with mutually

incompatible sworn averments on affidavit. Again, it seems necessary to emphasise that this Court simply cannot resolve disputes of fact by preferring one version of events over another with reference to documentation, all of which (with the possible exception of the handwritten note although the date it was produced is unknown) post-dates the alleged agreement. Moreover, although it is fair to say that the majority of the documents point in a particular direction, that is not entirely so, as there certainly are some documents, albeit a much smaller number, which make reference to the Second Defendant.

16 December 2008 letter sent by Mason Hayes & Curran

156. By way of example, one of the letters exhibited is dated 16 December 2008 and was sent by Mason Hayes & Curran Solicitors, acting for Ocean Point Development Limited, by fax and post to the Second Defendant, for the attention of Mr. Walsh. It is clear from the contents of that letter that the Second Defendant was accused of having failed to project manage the relevant development properly.

7 January 2009 letter sent by Mason Hayes & Curran

157. A further letter, sent by Mason Hayes & Curran Solicitors, dated 07 January 2009, is also exhibited. That letter was addressed by fax and post to both the Second Defendant and to MMP Project Management Limited. It refers to a response from the Second Defendant, dated 18 December 2008 (a copy of which response was not exhibited) and the final paragraph of that 7 January 2009 letter states as follows:

> "*The Mulcahy McDonagh & Partners Limited website (www.mmp.ie) represents that it acted as project manager for our client's development in Courtown, County Wexford and includes our client as a reference. We attach a printout from the website for ease of reference. Our client holds Mulcahy McDonagh & Partners Limited and MMP Project Management Limited responsible for failures in the project management of the development.*"

158. The enclosure to that letter is a copy extract, dated 16 December 2008, from the website of the Second Defendant. Under the heading "*Projects & Experience: Construction Project Management",* the final entry is as follows:

> *"Ocean Point Developments*
>
> *Year: 2006 – 2007*
>
> *Reference: Mr. Francis Dooley*
>
> *Description: Mixed Use, Courtown, Co. Wexford (8,500 sq. metres)*
>
> *© 2008 Mulcahy McDonagh & Partners Limited. All rights reserved*."

23 January 2009 response to Mason Hayes & Curran

159. The response dated 23 January 2009 sent by the Second Defendant to Mason Hayes and Curran is also exhibited. That letter states *inter alia* that:

- *Mulcahy McDonagh & Partners Ltd is a quantity surveying practice and does not itself carry out project management services, all of which services are handled through a separate project management company – MMP Project Management Limited;*

- *Mulcahy McDonagh & Partners Ltd did carry out Q.S. work, estimates/cost plans et cetera in respect of the Ocean Point development which were clearly billed on Mulcahy McDonagh & Partners Ltd company notepaper and paid by the developer to the account of Mulcahy McDonagh & Partners Ltd;*

- *MMP Project Management provided some limited project management services in connection with the above and all invoices etc. were presented on MMP Project Management Ltd. notepaper and paid to the account of that company;*

- *The website to which you refer was not in existence at the time of the appointment and indeed its installation post-dates the contract completion date of the Courtown development;*

- *In conclusion we would state that a review of our files and correspondence on this project, that there is no foundation whatsoever for the contention that Mulcahy McDonagh & Partners Ltd, Quantity Surveyors, had any input whatsoever in the project management of this project or any other project since the foundation of the company.*"

160. That it was necessary for the foregoing explanation to be given illustrates the conflict of fact between the parties, which conflict of fact persists and cannot be resolved in the present application.

5 October 2006 Schedule Break Down

161. Among the documentation exhibited by the Plaintiff is a "*Schedule Break Down*" in respect of the Ocean Point development. The top right-hand corner of the first page contains a logo with the words "*MMP Project Management".* The first page identifies the "project team" and in the bottom right-hand corner appears the date "05.10.2006". The first two parties listed as the project team are as follows:

"*EMPLOYER* *Ocean Point Development Co. Ltd*

Unit 2,

Jamestown Ind. Centre

Inchicore

Dublin 8

PROJECT MANAGERS *Mulcahy McDonagh and Partners*

Project Management

46/48 Pembroke Road

Ballsbridge

Dublin 4 … "

The second page of that document contains *inter alia* the following entry:

"*Project Managers* *MMP Project Management Pwash@mmp.ie…"*

30 May 2006 letter sent by Cleary & Doyle Contracting Ltd

162. The Plaintiff also exhibits a letter dated 30 May 2006 sent by Cleary & Doyle Contracting Limited "*Re: Courtown"* which was addressed for the attention of Mr. Pat Walsh and sent to "*Mulcahy McDonagh & Partners*" which letter stated:

"*Dear Pat,*

Further to our meeting of 29th May, we enclose the following documents for your attention:

- *Copy of priced bill*
- *Copy of minutes of meeting between Joe McNabb & Randall Mocwogen*
- *Copy of prelims*
- *Organisational chart.*

Chris Shepherd will forward Minutes of the meeting under separate cover…"

163. In addition to the many documents which comprised exhibits to various affidavits, counsel for the Second Defendant drew the Court's attention, during his submissions, to two letters contained amongst the many documents comprising three folders of what were described as "core discovery documents". Both letters date from March 2009 and I propose to look briefly at them as follows: -

19 March 2009 letter from Ferris & Associates to the Plaintiff

164. Counsel for the Second Defendant opened a letter from Mr. Martin Ferris, an insolvency practitioner, which was sent in his capacity as receiver of Ocean Point, to *"Mr. Pat Walsh, MMP Project Management Limited*". That letter, dated 19th March, 2009 began as follows: -

> *"Dear Mr. Walsh,*
>
> *I wish to advise you that by deed of appointment dated 5th March, 2009 I was appointed Receiver and Manager over the assets and undertaking of the above-named company. I understand that your firm was engaged by Ocean Point Development Company Limited in connection with a development at Ballintray Lower, Courtown, Co. Wexford.*

Inferences

165. Counsel for the Second Defendant rhetorically asked, *"Where could the receiver's understanding have come from, if not from Mr. Dooley?"* It seems to me that the foregoing may well be a submission with very considerable force at a trial and a line of questioning with reference to this letter may well be one the Second Defendant might wish to pursue. In the context of the present Motion, however, the submission made on behalf of the Second Defendant appears to me to be an invitation to draw an inference and to base, on that inference drawn, a view that what the Plaintiff has sworn to be correct is not so. That seems to me to be entirely impermissible as a means of determining the application for the primary relief in the present Motion.

166. I now turn to the second of the letters which was contained in the "core discovery" folders.

23 March 2009 letter from Watts Consultancy Limited

167. Counsel for the Second Defendant also drew the Court's attention to a letter from a Mr. Allan Murphy of Watts Consultancy Limited, dated 23rd March, 2009, sent to "*Mr. Pat Walsh, MMP Project Management Limited*". The letter, which concerned the Ocean Point development, began as follows: -

> *"I write further to your recent telephone conversation with my colleague Stephen Scott. We understand that you were appointed by Ocean Point Development Co Ltd (OPDCL) as the Project Manager for the above development. As you are aware, the company has been put into receivership. The receivers, Ferris & Associates have appointed Watts Consultancy Limited, to undertake a review of the project, you should have received formal notification of this from the receiver. The purpose of this review is to identify any outstanding issues relating to design, construction and statutory compliance, which need to be regularised to complete the development."*

168. The submission made by the Second Defendant is that Mr. Murphy's understanding "*could only have come from the instructions received from Mr. Dooley*". It seems uncontroversial to say that such a proposition may well feature in the cross-examination of Mr. Dooley at a trial, but I am satisfied that that is the proper place for the submission made with reference to this document. Put simply, this Court cannot draw inferences from this or any other document in order to reach findings of fact in respect of matters which are disputed between the parties, the resolution of which require the testing of evidence at a trial.

169. It is fair to say that it is possible to look at numerous documents which have been put before the Court in the present application and to argue that their contents support the case made by the Second Defendant. None, however, are determinative of the case pleaded by the Plaintiff and none resolve the conflicts of fact which emerge from a comparison of the various averments made on both sides. As I have also observed, it is not the case that all the documentation points 'one way' and there are a number of documents which have been referred to by the Plaintiff who argues that their contents support the case he makes. The documentation also reveals that, in light of the contents of certain documents which, on their fact, might seem supportive of the Plaintiff's assertions, the Second Defendant felt it necessary to proffer an explanation (see the 23 January 2009 letter sent to Mason Hayes & Curran to explain why the Second Defendant's website named the Plaintiff and the relevant development under the heading of "*Projects & Experience: Construction Project Management"*). Despite the large volume of documentation available, this is not a 'documents case' in circumstances where the outcome cannot be determined by, for example, the interpretation of a clause in a written contract. In truth, an analysis of the documents simply highlights that there are conflicts of fact which the documents cannot determine.

170. Insofar as the Second Defendant relies on this Court's decision (Meenan J.) in *Highfield Distribution Limited v. Pat the Baker Unlimited Company* [2020] IEHC 137, the factual background against which that case was determined is wholly unlike the situation in the present case. Furthermore, it is clear from para. 10 of Mr. Justice Meenan's decision that the court regarded the principles applicable as being those in *Trafalgar Developments*, which I quoted earlier in this judgment. It is also clear that a highly relevant feature of the

Court's decision in *Highfield Distribution* was the existence of a written contract (referred to in paras. 7-8). The relevant contract was one which neither named the defendant, nor referred to it. It was in that particular context that the Court observed that no evidence had been produced to support the contention that the defendant had entered into a contract with the Plaintiff.

The Primary Relief – this Court's Decision summarised

171. With regard to the primary relief sought by the Second Defendant, the Court of Appeal made the following clear at para. 50 of the *Trafalgar Developments* decision:

> "*All the authorities emphasise that it is an exceptional jurisdiction to be exercised sparingly and only adopted when it is clear that the proceedings are bound to fail and not where the Plaintiff's case is very weak"*.

172. Applying the principles outlined in *Trafalgar Developments* to the facts in this case, I am satisfied that it is not appropriate to dismiss the present proceedings. The Second Defendant contends that the Plaintiff's claim discloses no reasonable cause of action and/or constitutes an abuse of the process, yet, to grant the primary relief sought, this Court would, in reality, need to make a merits-based decision that the Plaintiff will not succeed in the action. That is not the proper function of this Court in an application of this type. This Court cannot answer in the negative the question "was it proper to institute the proceedings?" This Court cannot say that the Plaintiff's claim could *never* have succeeded. This Court may well have significant doubts as to the likely prospects of the claim's success in light of the evidence before the Court in the present application. But the critical point is that the proper function of the Court in determining the motion is that it should *not* analyse the evidence with a view to making judgments as to how it should be interpreted, particularly in the context of (i) competing and incompatible averments as to the facts and (ii) different factual and legal positions being contended for with reliance on a range of documents from which the Court is asked to draw inferences.

173. The present application is not a summary hearing of the underlying claim and it would be improper for the Court to treat the Motion as such. To grant the primary relief would, in reality, involve an impermissible summary hearing with a risk of injustice, as it would deprive the Court, at a future trial, of the opportunity to have evidence tested so that the disputes as to fact might be resolved and findings made, upon which a sound basis for the ultimate decision could be reached. This is not a case where the legal rights and obligations of the parties are governed by, say, a written contract. On the contrary, much will turn on the oral testimony of witnesses, in particular as to what was, or was not, said or agreed at a meeting in mid-2006, the details of which meeting are keenly disputed by the two persons who attended it. Other issues where stark disputes of fact exist concern the question of ostensible authority as well as what was or was not said in relation to a cheque made out by the Plaintiff to the Second Defendant. Both sides assert that various documents assist the cases they make but it is not for this Court to draw inferences from documents, still less where the meaning or significance of same is contended.

174. The factual disputes go beyond mere assertion. This Court cannot say at this juncture that it is not possible that a trial judge would believe the Plaintiff's account, as opposed to Mr. Walsh's, insofar as the crucial meeting is concerned or with regard to the circumstances in which the cheque was tendered by the Plaintiff to the Second Defendant. In the present application, this Court is required to take what the Plaintiff has averred at its height and at face value. Regardless of how weak the Plaintiff's case might appear to be in light of certain material exhibited, this Court simply cannot say that the Plaintiff has put forward no credible basis for suggesting that evidence might be available at trial to substantiate the claim he makes, in circumstances where a trial court has yet to hear the disputed oral evidence and has yet to reach findings including as to the credibility of the accounts given by the respective witnesses.

175. Put succinctly, in seeking the primary relief, the Second Defendant is (i) relying on *disputed* oral evidence and (ii) the documentary evidence *post-dating* the alleged agreement. Regardless of how much the documentation might tend to support what the Second Defendant asserts, it does not conclusively address the fundamental factual disputes and is not determinative of the claim. The underlying claim is one based upon allegations of fact and, given that there is a fundamental dispute as to the facts, these will have to be established at an oral hearing. Thus, I cannot regard the Plaintiff's claim as an abuse of the process of the Court. It is one which the Second Defendant opposes and that opposition will involve oral evidence, in particular by Mr. Walsh, who asserts that the Plaintiff's account is untrue. To determine the foregoing will require a trial.

176. The foregoing is not to suggest that the Plaintiff appears to have a strong case or anything like it. It also seems uncontroversial to say that the large volume of documentation before the Court in the present application could well give rise to a range of questions which might be put to the Plaintiff at a trial, the

answers to which might speak to the credibility of the version of events he has averred to. It is, however, important to keep in mind what Clarke J (as he then was) stated at para. 3.13 of his decision in *Salthill Properties,* namely that:

> *"[T]he court need not and should not require a Plaintiff to be in a position to show a prima facie case at the stage of an application to dismiss, in order that the application should fail".*

177. Thus, the applicant in the present case faced a very high hurdle which, for the reasons set out in this judgment has not been cleared. That the 'bar' is set high for an applicant in a motion of this type, and why this is so, is equally clear from comments made by the former Chief Justice at para. 3.13 in *Salthill* proceedings where he observed that:

> "*There have been many cases where the crucial evidence which allowed a Plaintiff to succeed only emerged in the course of the proceedings.*"

178. Clarke J. (as he then was) returned to this theme some years later in his decision in *Lopes* wherein, referring to the point made by McCarthy J. in *Sun Fat Chan*, the learned judge commented (at para. 2.5) that *"experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance".*

179. For the reasons set out in this judgment, I take the view that the Second Defendant is not entitled to the primary relief sought in the Motion.

180. In circumstances where the applicant made clear that the relief at para. 3 of the Second Defendant's Motion was not being pursued, I now turn to the secondary relief sought, namely an order dismissing the proceedings on the grounds of inordinate and/or inexcusable delay.

Discussion and Decision in relation to the application to dismiss on delay grounds

181. At the start of this judgment I looked closely at the pleadings in this case and at the sequence of events. It is unnecessary to repeat that analysis here. It is entirely fair to say, however, that there has been both pre-commencement and post-commencement delay on the Plaintiff's part. In light of the analysis I conducted earlier, the following is a useful chronology, bearing in mind that the meeting at which the relevant agreement is alleged by the Plaintiff to have been reached, took place in mid-2006:

DATE	**EVENT**
25 April, 2008	**Premises was due to commence trading.**
10 June, 2011	**Plenary Summons is issued.**
23 May, 2013	Notice of Intention to Proceed.
29 October, 2013	**Order joining Second Defendant.**
6 March, 2014	**Statement of Claim.**
8 April, 2014	**Appearance of Second Defendant.**
19 May, 2014	First Defendant's Notice for Particulars.
1 August, 2014	Plaintiff's Notice of change of solicitor.
10 October, 2014	Plaintiff's replies to First Defendant's Notice for Particulars.
26 January, 2015	First Defendant's Notice for Further and Better Particulars.
26 January, 2015	Defence of First Defendant.

27 February, 2015	**Second Defendant's Notice for Particulars**.
6 March, 2015	**Second Defendant Notice of Indemnity and Contribution against First Defendant.**
24 April, 2015	**Defence of Second Defendant.**
16 October, 2015	**Plaintiff's replies to Second Defendant's Notice for Particulars.**
17 June, 2016	**Second Defendant's Notice for Further and Better Particulars.**
20 June, 2016	**Second Defendant's Notice to Produce Documents.**
27 September, 2016	**Plaintiff's replies to Second Defendant's Notice for Further and Better Particulars.**
29 June, 2017	Plaintiff's Notice of Intention to Proceed.
13 November, 2018	**Plaintiff's Further Particulars of lost damage and expense.**
8 January, 2019	Plaintiff's replies to First Defendant's Notice for Further and Better Particulars.
12 November, 2019	Plaintiff's Further Particulars of negligence, nuisance and breach of duty as against First Defendant.
12 November, 2019	**Plaintiff's Particulars of negligence and breach of duty of the Second Defendant.**
31 January, 2020	**Plaintiff's reply to Defence.**
4 February, 2020	**Plaintiff's letter to First and Second Defendants regarding certificate of readiness.**
14 May, 2020	**Second Defendant's Notice for Particulars (in relation to (i) 13 November, 2018 Further particulars of loss damage and expense; (ii) 12 November, 2019 Further particulars of negligence and breach of duty as against Second Defendant; and (iii) 31 January, 2020 reply to Defence).**
9 June, 2020	**Plaintiff's replies to Second Defendant's Notice for Particulars.**
24 June, 2020	Plaintiff's Notice of Intention to Proceed.
21 July, 2020	**Notice of trial served by Plaintiff.**
21 July, 2020	**Second Defendant requests voluntary discovery of 6 categories giving reasons, including that "*discovery of these documents will save the parties time and money at the hearing of this action".***
21 September, 2020	**Plaintiff proposes amended categories of discovery.**
6 October, 2020	**Second Defendant accepts certain categories and makes further proposals re voluntary discovery.**
3 November, 2020	**Plaintiff makes further proposals re discovery.**

7 December, 2020	**Second Defendant agrees certain revised proposals and requires amendment re Category 2.**
11 December, 2020	**Plaintiff notes agreement regarding voluntary discovery to be provided within 8 weeks and queries whether Plaintiff is seeking discovery from First Defendant; what experts Second Defendant intends to call; and whether Second Defendant agrees that the case will likely take 10 days to hear.**
13 April, 2021	**Plaintiff swears Affidavit of Discovery.**
21 June, 2021	**Plaintiff writes seeking voluntary discovery from Second Defendant.**
22 June, 2021	**Second Defendant issues the present Motion (initially returnable for 13 October, 2021).**
13 July, 2021	**Second Defendant suggests modified categories of voluntary discovery.**
16 July, 2021	**Plaintiff agrees to modified categories of discoveries as proposed by Second Defendant.**
12 August, 2021	**Certificate of Readiness filed by Plaintiff.**
17 September, 2021	**Affidavit of Discovery sworn by Second Defendant.**

182. The authorities make clear that, although the period of delay which this Court should consider in an application of this type is the period commencing when the writ has been issued, those who make a 'late start' to their proceedings are under an added obligation to progress their claim with greater speed. In other words, a late start places a duty on a Plaintiff to proceed with even greater speed than if there had been no pre-commencement delay.

183. In the Court of Appeal's 24 February 2015 decision in *Tanner v. O'Donovan & Ors.* [2015] IECA 24, one of the authorities relied on by the Second Defendant, Hogan J. stated (at para. 26) that, in circumstances where the relevant proceedings had a late start:

> *"This made it all the more incumbent on the Plaintiff to proceed with expedition thereafter. As Lord Diplock observed in Birkett v. James [1978] A.C. 297, 322:*
>
> > *'A late start makes it the more incumbent on the Plaintiff to proceed with all due speed and a pace which have been excusable if the action had started sooner may be inexcusable in the light of the time that has already passed before the writ was issued.'"*

184. In circumstances where, in his Statement of Claim, the Plaintiff pleads losses from 25 April 2008, it is fair to assume that, from the Plaintiff's perspective, his cause of action arose at that stage. Despite this, the plenary summons was not issued until over 3 years later, on 23 June 2011. Furthermore, the Second Defendant was not joined until over 2 years and 4 months after that. I am satisfied that there has, in fact, been pre-commencement delay on the part of the Plaintiff who, without doubt, made a 'late start' to his claim and who did not serve a Statement of Claim, dated 6 March 2014, on the Second Defendant until some 6 years after the "Skipper's" premises was apparently due to open, being some 8 years after the alleged agreement which, according to the Plaintiff, was entered into in mid-2006.

Inordinate delay

185. Even if the Plaintiff had not made a 'late start' and even if the Plaintiff was under no greater obligation to progress his claim with expedition as a result of pre-commencement delay, I am satisfied that there has undoubtedly been post-commencement delay in this case which can fairly be described as *inordinate.* It is inordinate, in the sense that the delay can fairly be considered to be irregular, excessive and outside what could be considered normal limits. This is particular so with regard to the following periods:

- Over **2 years and 4 months** elapsed between the plenary summons being issued on 10 June 2011 and the Second Defendant being joined on 29 October 2013;

- Thereafter, the pace at which the Plaintiff progressed his claim against the Second Defendant could be charitably described as leisurely. It was not until 6 March 2014 that a Statement of Claim was served and, following the entry of an Appearance on behalf of the Second Defendant on 8 April 2014, the Plaintiff does not appear to have pressed the Second Defendant for a Defence and certainly issued no motion in that regard.

- Although the Second Defendant served a Notice for Particulars on 27 February 2015, the Plaintiff did not furnish replies to same until 16 October 2015 some **8 months** later (and 6 months after the Second Defendant's Defence).

- Having furnished those replies in October 2015, it does not appear that the Plaintiff actively tried to progress the claim by, for example, seeking discovery in circumstances where a Defence had been filed. The next significant step in the proceedings seems to have occurred some **8 months** later. This was not a step taken by the Plaintiff. Rather, it involved the service by the Second Defendant of a Notice Seeking Further and Better Particulars on 17 June 2016.

- It is fair to say that the said Notice was replied to relatively quickly on 27 September 2016 but, thereafter, a period of over **2 years and 1 month** elapsed between the service (on 27 September 2016) of the Plaintiff's Replies and the service by the Plaintiff (on 13 November 2018) of Further Particulars of loss damage and expense. Indeed, the only thing which happened between those two dates was the service by the Plaintiff of a Notice of Intention to Proceed dated 29 June 2017. Plainly, serving a Notice of Intention to Proceed does not constitute a 'step' in terms of pleading a case. Rather, it indicates that significant delay has occurred.

- The foregoing was not the end of the delay on the Plaintiff's part insofar as progressing his claim against a Second Defendant is concerned. Having served, on 13 November 2018, Further particulars of loss, damage and expense, a further **year** elapsed before the Plaintiff served Particulars of Negligence and Breach of Duty of the Second Defendant, on 12 November 2019.

186. In my view the foregoing can fairly be called inordinate delay on the Plaintiff's part. In *Tanner v. O'Donovan & Ors.* Mr. Justice Hogan stated the following (at para. 24): -

> *"Relevant period of delay.*
>
> *24. It is necessary, first, to consider the relevant period of delay for the purposes of the Primor test. It is the period since the commencement of the proceedings up to the date of hearing of the motions to dismiss by the High Court Judge which is the period which must be considered for this purpose. For the reasons next set out, however, the period from the date of the accrual of the cause of action to the issue of proceedings is also relevant to the assessment of the question as to whether post issue delay is inordinate or inexcusable."*

187. In the manner analysed, the Plaintiff most certainly did not move with speed from 29 October 2013 onwards (the date the Second Defendant was joined) and further periods of significant delay have characterised the progress of the Plaintiff's claim since that point.

188. For the foregoing reasons I am satisfied that the delay in the present case was, without doubt, inordinate. I now turn to the question of whether it was inexcusable.

Inexcusable delay

189. In opposing the Second Defendant's application to dismiss the within proceedings on grounds of delay, the Plaintiff avers that the issue of delay was not raised previously, despite efforts by the Plaintiff to secure a trial and he refers, in particular, to the contents of a letter dated 4 February 2020 sent by his solicitor to the solicitors for the Second Defendant. He exhibits a copy of this letter ("FD10") to the Plaintiff's 23 August 2021 affidavit, and it is appropriate to quote its terms as follows:

> *"Our client: Francis Dooley*
>
> *Your client: Mulcahy McDonagh & Partners Limited:*

Case ref: Francis Dooley v Clancy Project Management Limited t/a Clancy Construction and Mulcahy McDonagh Partners Limited:

High Court Record No. 2011/5235P

Dear Sirs,

We refer to the pleadings and proceedings already had herein, and in particular:

1. *Our further particulars of loss, damage and expense dated the 13th November 2018.*

2. *Our further particulars of negligence, nuisance and breach of statutory duty to include breach of statutory duty, on the part of the First Defendant, dated the 12th November 2019.*

3. *Our particulars of negligence and breach of duty, as against the Second Defendant, dated the 12th November 2019.*

4. *Our Reply dated the 31st day of January 2020.*

In our opinion, this case is now ready to be Certified as ready, subject of course to Practice Direction HC 75, certificates of readiness in non-jury and chancery actions.

Firstly, we are now ready to share the following expert reports with you, on the basis that you are prepared to share your expert reports (if any) with us:

a. *The Perri report (October 2008).*

b. *The Watts International Report (February – August 2009).*

c. *Report of Michael Lyons Fire Consultant.*

d. *Report of T.J. O'Connor Consulting Structural & Civil Engineers.*

e. *Report of John Younge (October 2017).*

f. *Report of OLM Consultancy (May 2018).*

g. *We also have a copy of the Dilapidations Survey carried out by the First Defendants prior to their construction works.*

Secondly, in order to ensure the efficient use of Court time, we would propose that our respective experts meet, in order to ascertain whether or not:

a. *Certain factual matters can be agreed.*

b. *The parties could agree the issues to be decided by the Court.*

Please indicate whether or not you are prepared to participate in such a meeting(s).

TAKE NOTICE, THAT, IN THE EVENT THAT

a. *you are not appointing experts,*

b. *you are not prepared to participate in a meeting of experts aforesaid,*

c. *then it is our intention to Certify the case as Ready.*

In our opinion, this case will take approximately two weeks hearing time and if you are in disagreement with this estimate, perhaps you would be kind enough to indicate how long you believe the hearing of this case will take.

We await hearing from you in early course. "

190. It seems to me that this letter sent on 4 February 2020 cannot constitute a *reason* for delay which preceded it. Thus, it cannot constitute an *excuse* for what was inordinate delay. Later in this judgment I will return to this letter in a different context.

No delay

191. It is also appropriate to note that the Plaintiff avers that he "*has not been guilty of any general delay*" (see 23 August 2021 affidavit, para. 39). The Plaintiff also makes the following averment; "*I dispute that there has been any delay on the part of this deponent, or that there is any prejudice, or any real prejudice, to the Second Defendant in the proceedings progressing to a full plenary trial*" (23 August 2021 affidavit, para. 45).

No reason or excuse

192. In circumstances where there is no acknowledgment on the part of the Plaintiff that there has been *any* delay, it is perhaps unsurprising that no reasons are proffered on affidavit to explain delay. Rather, the Plaintiff expresses amazement that the issue of delay was being raised at that stage and his position can be summarised by the following averment at para. 36 of his 23 August 2021 affidavit:

> "*… I say that it is highly injurious, improper and unfair for the Second Defendant to seek to raise delay at this stage, and that such an argument, which appears to be used to bolster the primary argument, should not be readily (and respectfully) countenanced by this Honourable Court.*"

The Dooley proceedings and the Ocean Point proceedings

193. I am satisfied that nothing in the affidavit evidence before this Court is proffered as a reason to excuse delay. Counsel for the Plaintiff also made it clear that the Plaintiff did not acknowledge that he had been guilty of any inordinate delay. He went on to submit that, even if there has been inordinate delay, which is denied, any such delay is excusable. Counsel for the Plaintiff referred in oral submissions to the existence of the Dooley Proceedings the Ocean Point proceedings and to an arbitration motion brought by the First Defendant in the Ocean Point proceedings as a result of which that action was stayed as against the First Defendant. Leaving aside that, in his affidavits, the Plaintiff does *not* canvass his involvement in the aforesaid proceedings as reasons to explain or excuse his delay in progressing the present claim against the Second Defendant. It does not seem to me that any such involvement renders the Plaintiff's inordinate delay excusable. I say this for several reasons as follows.

194. There is no evidence whatsoever that, at any stage, the Plaintiff put the Second Defendant on notice of his involvement in separate legal proceedings and explained that such involvement would or could inhibit his ability to progress the present claim against the Second Defendant in any way. The Plaintiff never suggested that he lacked the time or resources to progress, concurrently, the different legal claims in which he was involved. The Plaintiff never sought and never received from the Second Defendant any 'forbearance' due to his involvement in separate legal proceedings. There is simply no evidence of a causal link between the relevant periods of delay in the present proceedings and the Plaintiff's involvement in other legal proceedings.

195. Insofar as the Plaintiff's counsel makes reference to the claim made by Ocean Point, it is plain that those proceedings commenced in 2014. It can be observed that, by that stage, the Plaintiff had delayed over three years before issuing the plenary summons in the present case (in June 2011) and it was almost a further three years until the Plaintiff served a Statement of Claim on the Second Defendant (dated 6 March 2014) having only joined the Second Defendant into proceedings on 29 October 2013. In light of the foregoing, it is impossible to understand how the Plaintiff's involvement in the Ocean Point proceedings, which did not commence until 2014, could explain his delay up until the end of 2013.

196. In short, having carefully considered the evidence as well as the submissions made on behalf of the Plaintiff, I am satisfied that the Plaintiff's inordinate delay in the present case also constitutes inexcusable delay. I now turn to the question of the balance of justice.

Balance of justice

197. The well-known decision by the Supreme Court (Hamilton C.J.) in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 sets out (from p. 475) the relevant principles in an application which seeks to strike out proceedings on delay grounds. These are as follows:

"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

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

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

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

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

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

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and *be other than that merely caused by the delay, including damage to a defendant's reputation and business."*

198. It is uncontroversial to say that the onus lies on a party seeking to have a case dismissed on delay grounds to establish that the delay complained of is both inordinate and inexcusable. The Second Defendant in the present case has discharged that onus. That being so, it is for the Court to ascertain where the balance of justice lies in light of the facts and circumstances of this particular case.

199. Earlier in this judgment I charted the exchange of pleadings and correspondence in chronological order. I also quoted, *verbatim,* the letter from the Plaintiff's solicitors dated 04 February 2020. That letter made clear that the Plaintiff regarded the case as ready to be certified for trial and, making specific reference to High Court Practice Direction HC 75 – Certificate of Readiness in Non-Jury and Chancery Actions. The said letter listed certain "expert reports"; proposed a meeting of experts with a view to ascertaining whether factual matters or issues to be decided could be agreed; gave notice of an intention to certify the case as ready; and indicated that the view of the Plaintiff's legal team that the case would take approximately two weeks to hear, with the Second Defendant's solicitors invited to comment on that estimate.

Acquiescence

200. What occurred in the wake of the aforesaid letter is, in my view, very significant. Fully on notice of the Plaintiff's belief that the case was ready for trial and squarely on notice that the Plaintiff intended to certify the case as ready and was desirous of obtaining a trial date, the Second Defendant raised a Notice for Particulars on 15 May 2020. I have previously referred to its contents. It did not merely seek particulars in relation to the Reply to Defence which the Plaintiff had delivered (dated 31 January 2020). It also sought particulars in relation to the Further Particulars of Negligence and Breach of Duty as against the Second

Defendant, which the Plaintiff had served (dated 12 November 2019). Particulars were also sought in relation to the Further Particulars of Loss Damage and Expense as served by the Plaintiff (on 13 November 2018).

201. In my view service of the Notice for Particulars on 15 May 2020 can fairly be said to constitute acquiescence on the part of the Second Defendant with regard to the Plaintiff's prior delay. This is not at all to criticise the Second Defendant. It is, however, to recognise the fact that, whilst clearly aware of the Plaintiff's intention to progress the matter to trial and notwithstanding the prior delay of which the Plaintiff was undoubtedly guilty, the Second Defendant sought further particulars of the case as pleaded by the Plaintiff. It did not do so "without prejudice to the question of delay". It simply engaged with the case which the Plaintiff had made, regardless of how tardy he had done so. Indeed, the Notice for Particulars raised on behalf of the Second Defendant on 15 May 2020 sought particulars in relation to *inter alia* a Notice served by the Plaintiff 1 year and 6 months earlier (on 13 November 2018).

202. To serve the Notice for Particulars of 15 May 2020 was to meet the Plaintiff's case 'head on' and no defendant could fairly be criticised for so doing. It was also, however, to acquiesce in respect of prior delay on the Plaintiff's part. It is also fair to say that there was no material delay on the part of the Plaintiff thereafter. It was on 9 June 2020 that the Plaintiff's solicitors furnished the Second Defendant with the Replies to the latter's 15 May 2020 Notice. Soon thereafter, the Plaintiff served a formal Notice of trial, dated 21 July 2020. What occurred at this stage is also of significance in my view.

"The hearing of this action"

203. As of 21 July 2020, the Second Defendant sought voluntary discovery from the Plaintiff of 6 categories to which I have referred earlier in this judgment. Although one of those categories was focused very much on documentation concerning what party retained the Second Defendant and/or MMP PM, the requests for 5 other categories concerned documentation of relevance to other issues in the proceedings. Moreover, one of the reasons given in respect of the requirement for voluntary discovery of each and every one of the 6 categories was "*discovery of these documents will save the parties time and money* ***at the hearing of this action***" (emphasis added).

Conduct which induced the Plaintiff to incur further expense in pursuing the action

204. It is incontrovertible that this request for voluntary discovery was made by the Second Defendant full in the knowledge that the Plaintiff was anxious to obtain a trial date. To my mind, the voluntary discovery request not only amounted to acquiescence on the part of the Second Defendant with regard to the Plaintiff's delay, but it also amounted to conduct by the Second Defendant which induced the Plaintiff to incur further expense in pursuing the action towards a trial which both sides anticipated. That is underlined by the series of letters to which I have referred earlier in this judgment (dated 21 September 2020; 06 October 2020; 03 November 2020; 07 December 2020) all of which letters demonstrate the mutual efforts gone to by the respective legal advisors to ensure that voluntary discovery was made of appropriate categories of documentation, with the wording of those categories revised and honed, with care, in order that the categories were not too broad or limited, the focus being, as the 21 July 2020 request by the Second Defendant's solicitors confirmed, on saving both parties time and expense at the *hearing* of the action.

205. In my view, on the particular facts of the present case the (i) acquiescence on the part of the Second Defendant with respect to the prior delay on the Plaintiff's part; as well as (ii) the fact that there was no meaningful delay on the part of the Plaintiff from the point of the Second Defendant's acquiescence; along with (iii) the Second Defendant's conduct which induced the Plaintiff to incur further expense in pursuing the action constitutes very weighty considerations insofar as determining where the balance of justice lies in the present case, namely considerations weighting in favour of the case being permitted to proceed to the *hearing* which both sides envisaged.

Mr Walsh - no longer available as a witness

206. I have also carefully considered all other relevant matters in the context of an assessment of where the balance of justice lies in these unique facts and circumstances. These include the averments on behalf of the Second Defendant with regard to prejudice to it. At para. 24 of his grounding affidavit, sworn on 21 June 2021, Mr. Porter made the following averment:

> "*I say that, as is evident from the minutes of meetings exhibited hereto, Mr. Patrick Walsh was responsible for much of the day to day management of MMP – PM's role in this project. Mr. Patrick Walsh left MMP – PM on secondment in mid-2011 and left the company permanently in February 2012 to take up other employment. Since that time, he has had no connection with either MMP – PM or the Second Defendant, or any related company and is no longer available as a witness. Mr. Walsh*

is a critical witness as he was the MMP-PM director in charge of the project and was the client contact person."

Mr Walsh's Affidavit sworn 11 November 2021

207. The foregoing averment must be seen in light of subsequent events and it is self-evident that the Second Defendant was, in fact, able to contact Mr. Walsh who, on 11 November 2021, swore a detailed affidavit (running to 7 pages and comprising 30 paragraphs) in support of the primary relief. In the manner explained earlier in this judgment, Mr. Walsh made averments with regard to the crucial issue in dispute in the present proceedings, namely, which entity entered into an agreement which was reached at a meeting between Mr. Walsh and the Plaintiff in 2006. Moreover, Mr. Walsh exhibited his handwritten note concerning that meeting, which note is dated "22-05-06". Precisely when that note was created is not a matter for this Court to determine, but it appears to be contended that it is a contemporaneous note. The probative value of same will be a matter for the trial court but it seems to me that the existence of same has a relevance for the question of prejudice. It seems uncontroversial to say that if one makes a hand-written note of a meeting, it may well act as an *aide-memoire* in terms of recollecting events, even at a distance of years. A reading of Mr. Walsh's affidavit seems to bear this out, in circumstances where he nowhere avers that he cannot remember the particular meeting which is at the heart of the present dispute. On the contrary, he makes specific averments as to what was, and was not, said. Thus, what initially appeared to be significant prejudice as a result of the non-availability of a crucial witness in the form of Mr. Walsh, would appear to have been ameliorated to a material degree insofar as that single, but crucial, meeting is concerned, i.e. not only is Mr. Walsh in fact available, he has made averments regarding the meeting itself and also proffers documentary evidence concerning it.

Other Witnesses Unavailable

208. Mr. Porter also averred that Mr. Michael Ferry was a key employee of MMP-PM and was the senior project manager on the relevant Project and carried out week to week management. Mr. Porter averred that "*Mr. Ferry left MMP-PM in or around 2008 and has had no contact with either MMP-PM or the Second Defendant, or any related company and is also no longer available as a witness.*" Mr. Porter further averred that Mr. Cornelius O'Sullivan ceased his directorship with MMP-PM in June 2015 and retired at that time. Mr. Porter averred that Mr. O'Sullivan had planned to move to Portugal in 2020 and that Mr. O'Sullivan is 71 years of age and would have difficulty taking any part in the proceedings as he was planning to move to Portugal later in 2021 and also would no longer be available as a witness. Mr. Porter also averred that, due to the passage of time, there would be serious difficulties in witnesses giving evidence and also having the necessary documentation available in respect of the Project.

209. With regard to the foregoing, it is fair to say that neither the Plaintiff nor Mr. Walsh (who agree that they met each other in mid-2006, albeit dispute the date of the meeting) claim that either Mr. Ferry or Mr. O'Sullivan were present at that crucial meeting. It is equally fair to say that the single most important issue in the present case and (apart from a plea that the Plaintiff's claim is statute barred) the Second Defendant's primary line of Defence to the proceedings, is that the outcome of the meeting in 2006 between Mr. Dooley and Mr. Walsh was not that the Second Defendant was retained to provide project management services, but that MMP-PM was. It seems clear that neither Mr. Ferry nor Mr. O'Sullivan can give any evidence as to what was or was not said at the crucial meeting. It is also fair to say that Mr. Porter has nowhere set out what *enquiries* were made with regard to the availability of either Mr. Ferry or Mr. O'Sullivan and, thus, unsafe for this Court to regard it as an established fact that neither witnesses will be available to a future trial. The foregoing factors seem to me to 'dilute' to a very significant extent any alleged prejudice.

210. In submissions on behalf of the Plaintiff, counsel points out that in exhibit "FD2" to the Plaintiff's supplemental affidavit sworn on 2 November 2021, which comprises a print-out of company information dated 25 October 2021, Mr. O'Sullivan is named as company secretary of "Dalemin Limited", company no. 149303, which also has its registered address at 46/48 Pembroke Road, Dublin 4, being the same registered office as the Defendants. Counsel for the Plaintiff also submits that, whilst the Second Defendant was only joined in the present proceedings in 2013, it is clear that from around early 2009, there were already issues relating to the project. In this regard, counsel referred to (i) a letter from the Second Defendant, dated 22 January 2009, to Wexford County Council referencing threatened action against Ocean Point, which letter comprises exhibit "FD10" to the Plaintiff's supplemental affidavit sworn on 2 November 2021; (ii) the interview of the Second Defendant by Watts Consultancy Limited, which firm issued a report dated 21 August 2009; and (iii) the existence of the separate proceedings brought by the Plaintiff in 2011 all of which were *prior* to the departure of Mr. Walsh.

Reputation and professional indemnity insurance

211. Mr. Porter also averred that, as a consequence of the wrongful joining of the Second Defendant into the proceedings, ongoing damage to the Second Defendant's reputation and to its professional indemnity insurance status arose which could only be remedied by a dismissal of the proceedings. The averments made by Mr. Porter as to the damage to the Second Defendant's reputation and professional indemnity insurance are uncontroverted.

Prejudice

212. Taking all the foregoing into account, it seems to me that prejudice of at least a moderate degree has been established. Prejudice has certainly been established in relation to the Second Defendant's reputation and professional indemnity insurance status, having regard to Mr. Porter's uncontested averments regarding same. In circumstances where Mr. Walsh has sworn an affidavit, and given the fact that no averments are made as to the steps taken to ascertain the availability of any other witnesses said by the Second Defendant to be essential, and in the absence of averments that any vital witness will be unavailable, I regard myself as entitled to assume for the purposes of the present application that it has not been established that any essential witness will be unavailable at a future trial.

213. That the passage of time from relevant events to the date of a future trial may adversely impact on the memories of witnesses does, however, seem to me to give rise to some potential prejudice. That witness memories degrade as the years pass is hardly a controversial proposition and, in the present case, the crucial meeting is said to have taken place in mid-2006 (i.e. 16 years before a likely trial date, assuming a trial takes place in 2022). However, the weight to attach to the likely prejudice to witness memories, in the very particular circumstances of this case, would seem to be modest. I say this for several reasons.

- Firstly, the availability of and averments made by Mr. Walsh who does not assert that he has any difficulty in remembering what occurred at the crucial meeting in 2006;

- Secondly, the documentation available, including what is said to be a handwritten note made by Mr Walsh in relation to the crucial meeting which appears to provide him with an *aide memoire* regarding same;

- Thirdly, the circumstances giving rise to prejudice to the Second Defendant, in respect of the degrading of witness memories, were known to it when the Second Defendant acquiesced in respect of the Plaintiff's prior delay (i.e. by serving a Notice for Particulars, dated 15 May 2020);

- Fourthly, the circumstances giving rise to the foregoing prejudice were known to the Second Defendant when it induced the Plaintiff to incur further cost with a view to progressing the case towards a trial (discovery being sought by the Second Defendant with the explicit aim of saving the parties time and costs at the hearing).

214. Similar comments apply in respect of prejudice to the Second Defendant's reputation and professional indemnity status. In short, although some prejudice has been established, it seems clear that the Second Defendant, in these specific proceedings, felt that the optimum way to address any and all prejudice was proceed to a full trial. That is plain from the statements and acts taken by or on behalf of the Second Defendant, specifically, (i) the raising of Particulars and (ii) the seeking of Discovery all of which was done in the wake of the Plaintiff's inordinate and inexcusable delay and with a view to preparing for a future trial.

215. To say the foregoing is not for a moment to criticise the approach the Second Defendant adopted, but fairness requires this Court to take into account, when determining where the balance of justice lies, not only the prejudice which has been established or likely to arise, but the actions taken by the Second Defendant to progress these proceedings towards a trial in the knowledge of that prejudice.

Decision on the balance of justice assessment

216. Weighing up all relevant matters and doing so in accordance with the *Primor* principles, I am satisfied that the balance of justice tilts in favour of declining the order striking out the proceedings and in favour of permitting the Plaintiff's claim to proceed to trial as was envisaged when the Second Defendants sought discovery. I want to make clear that this was a decision which came down to fine margins, given (a) the inordinate and inexcusable delay on the part of the Plaintiff for which the Second Defendant was not responsible and (b) which the Plaintiff did not even attempt to excuse in any meaningful way and (c) in light of the prejudice which was established.

217. In other words, but for the weight which this Court has had to give to the Second Defendant's acquiescence and its actions which caused the Plaintiff to devote additional time and cost to progressing

these proceedings towards a trial, the balance of justice would have required the dismissal of the Plaintiff's claim.

Conclusion Summarised

218. It is fair to say that a great deal of documentation has been put before the Court which, on its face, appears to be consistent with the position contended for by the Second Defendant. This included documentation which, on its face, indicates that a dozen years ago the Plaintiff regarded "*MMP Project Management Limited*" as the party responsible for project managing the development. I say this in circumstances where, by letter dated 31 January 2008, the Plaintiff (in his capacity as Director of Ocean Point Development Company Limited) wrote to Mr. Walsh (in the latter's capacity as Managing Director of "MMP Project Management Limited") and stated: "***We are writing to ask you, as Project Manager**, to address the matter of quality of workmanship on this project with the Design Team…*" (emphasis added).

219. In light of the foregoing, it would be difficult to criticise the Second Defendant for bringing the present application. It has been unsuccessful, not because there is any lack of documentation which, on its face, is consistent with the Defence which the Second Defendant has pleaded. Rather, the application for the primary relief was unsuccessful because the bar facing the Second Defendant is set so high and the present application cannot be a form of summary hearing. This is in circumstances where this Court cannot resolve disputes of fact which the various affidavits disclose and which touch on issues of central importance to the dispute, including (i) what did or did not occur at a meeting in mid-2006 (be that in May or June); (ii) the question of Mr. Walsh's authority, ostensible or actual; and (iii) the circumstances in which the Plaintiff tendered a cheque to the Second Defendant in 2006.

220. This Court may well have a view on the significant challenges faced by the Plaintiff in 'bringing home' his case, having regard to the contents of documents put before the Court in the present application, but that is *not* the test in respect of the granting of the primary relief sought by the Second Defendant and, regardless of what might appear to be the weaknesses in the Plaintiff's claim, I take the view, for the reasons detailed in this judgment, that the applicant has not cleared the very high bar which faces any applicant seeking the primary relief in the present motion.

221. Similarly, it would be very difficult to criticise the Second Defendant for bringing an application to strike out proceedings on grounds of delay, in circumstances where this Court has found the delay to be, without doubt, both *inordinate* and *inexcusable*. Indeed, little or nothing was averred to by the Plaintiff in an attempt to explain or excuse his delay. Rather, his attitude was that there was *no* delay. In that assertion, the Plaintiff was wholly incorrect.

222. I am also satisfied that prejudice (including to the Second Defendant's reputation and professional indemnity insurance) was demonstrated and that at least moderate prejudice, insofar as the likely adverse effect on witness memories caused by the passage of time is concerned, is also a feature, albeit ameliorated to a material degree in the very particular circumstances of this case. These are significant considerations, but they are not the *only* considerations and, in my view, very considerable weight also has to be given to acquiescence on the part of the Second Defendant, as well as to conduct which induced the Plaintiff to expend additional time and resources on progressing the proceedings toward a trial, knowing the potential prejudice to it but plainly taking the view, by its actions, that meeting the Plaintiff's claim 'squarely' and progressing the matter towards a trial was the optimum way to deal with matters.

223. To say the foregoing is not to criticise the Second Defendant. Plainly, they decided to focus on interrogating the Plaintiff's case and preparing for a trial, so as to meet the claim 'head on' notwithstanding the very significant delay which had occurred. No doubt it was to ensure that the Second Defendant's defence to the claim was well-prepared that Particulars were sought in May 2020 in relation to a range of pleadings. Furthermore, the Second Defendant sought discovery in the wake of the Plaintiff's delay. Indeed, that request, which post-dated the Plaintiff's delay, gave, as a reason for each of the 6 categories sought, the saving of time and costs at a trial. Based on a review of the relevant correspondence concerning discovery, it seems fair to say that same was sought by the Second Defendant and agreed to by the Plaintiff who subsequently made same, on the shared understating that a trial was anticipated and that the making of discovery was a necessary step in terms of preparing for same.

224. Although, as I have said, there could be no criticism of the Second Defendant for seeking discovery and interrogating the results of the discovery exercise prior to instituting a motion which sought the primary relief, in my view the situation is different with regard to an application to strike out the proceedings on delay grounds. Self-evidently, to require a party to make discovery is to require them to devote not inconsiderable time, effort and expense to the task of properly making discovery. That occurred in the

present case, and like acquiescence, it was a very weighty consideration when it came to a determination of the balance of justice.

225. It also seems to me that the Second Defendant's acquiescence as well as the request that the Plaintiff make discovery were both made at a time when the Second Defendant knew or had readily available to it, all relevant information touching on the prejudice to the Second Defendant flowing from (a) the passage of time between the relevant events and the date of a likely trial, insofar as a degrading of witness memories, and (b) the damage to the Second Defendant's reputation and professional indemnity insurance status. In other words, despite being aware of the foregoing prejudice, the Second Defendant made the choice to press matters towards a trial. The fact that it did so allows this Court to conclude that, from the Second Defendant's perspective, it took the view that such prejudice as arose was best addressed by pressing the case towards and preparing for a trial, rather than by applying to have the proceedings dismissed on delay grounds.

226. In summary, the 'bar' which the Second Defendant faced in the application for the primary relief was undoubtedly a very high one and, as regards the secondary relief, the Plaintiff has undoubtedly been guilty of inordinate and inexcusable delay, with his claim being 'saved' by only a fine margin on an application of the 'balance of justice' test. What merit the underlying claim has is something which remains to be determined, in the context of a testing of competing witness testimony, with issues such as the significance of the statute of limitations also being for determination in the future. These are all issues for a trial judge and, in light of all the foregoing, it seems to me that in this unique set of circumstances, the justice of the situation is best met by reserving the costs of this Motion to the trial.

227. The foregoing is my preliminary view and if either party contends for an alternative order as to costs, short written legal submissions should be filed. In this regard the attention of the parties is drawn to the fact that 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."*

228. In light of the foregoing, the parties should, forthwith, engage in correspondence *inter se* and should file short written submissions within 14 days if it is not possible to reach agreement on the form of final order.