THE HIGH COURT

[2013 No. 5879P]

BETWEEN

DAVID COLEMAN, JOHN JOSEPH MURPHY

AND

LIMESTONE PROPERTY PARTNERSHIP

PLAINTIFFS

AND

MYTHEN CONSTRUCTION LIMITED

DCS&P ARCHITECTS LIMITED

DESIGN COSTS STUDIOS LIMITED

JOHN MARTIN CREED TRADING AS JOHN CREED & ASSOCIATES

AND

MYTHEN DEVELOPMENTS LIMTED

DEFENDANTS

AND

THE HIGH COURT

[2013 No. 7407 P]

BETWEEN

THE FAYTHE MANAGEMENT COMPANY LIMITED

PLAINTIFF

AND

MYTHEN CONSTRUCTION LIMITED

DCS&P ARCHITECTS LIMITED

DESIGN COSTS STUDIO LIMITED

JOHN MARTIN CREED TRADING AS JOHN CREED & ASSOCIATES

AND

MYTHEN DEVELOPMENTS LIMTED

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 20th day of March, 2018

1. The above matters come before the Court by way of two motions by the first and fifth named defendants for orders pursuant to Order 8, rule 2 of the Rules of the Superior Courts (RSC) setting aside an order of the High Court dated 7th November, 2016, renewing the plenary summons in the above proceedings bearing record number 2013/5879P and the order made on 23rd January, 2017, renewing the plenary summons in the above proceedings bearing record number 2013/7407P. For ease of reference, the two sets of proceedings will be referred to hereafter as, respectively, "the Coleman proceedings" and "the Faythe proceedings".

The Coleman proceedings

2. The plaintiffs (hereinafter referred to as "the developers") in the Coleman proceedings were the developers of an office and an apartment complex known as the Maltings situate at Faythe, Co. Wexford. The first and fifth named defendants (hereinafter "Mythen" save where the first and fifth defendants are individually referred to) were the contractors engaged by the developers. The second and third defendants (hereinafter "the architects" save where individually referred to) were the architects engaged on the project. The fourth defendant was the project engineer. The second named defendant is now in liquidation. The third named defendant has been dissolved.

3. The construction of the Maltings was governed by a contract entered into between the developers and Mythen Construction Limited in or about November, 2003. Works started on the project in July, 2004. The development consisted of the demolition of existing courtyard structures and the construction of an apartment complex comprising 41 apartments, 195 sq metre of office space, car parks spaces and associated site works. Certificates of practical completion were issued on 14th September, 2007 and 2nd October, 2007.

4. The project has spawned myriad litigation.

5. The developers issued the Coleman proceedings on 11th June, 2013, for an order referring the dispute the subject matter of the proceedings to arbitration, or in the alternative, damages for negligence and/or breach of contract and/or mis-representation and/or mis-statement arising from the design and construction of the Maltings apartment complex.

6. On 9th September, 2013, the developers instituted other proceedings bearing record number 2013/9593P against the architects and related persons.

7. The Coleman proceedings were not served on the defendants within the requisite twelve months provided for in the RSC. The reason advanced by the developers for not serving the proceedings were set out in the affidavit of Oisin McAsey of Coleman Legal Partners, sworn 4th November, 2016, which grounded the *ex parte* application for the renewal of the plenary summons. He averred, *inter alia*, as follows:

> "…[O]n or about December, 2014 a Conciliator was appointed by agreement between the Plaintiffs, the Mythen Companies and the Architects with a view to entering a joint conciliation process
>
> …
>
> I say and believe that the details of the conciliation process were and remain confidential and I am accordingly limited in the extent to which I am at liberty to describe that process and the various steps taken during same. The position now is however, regrettably, that a resolution of the proceedings was not achieved and the process came to an end formally on 28th October, 2016
>
> …
>
> I say and believe that in any event given the parties' participation in the conciliation process which has only [recently] terminated as described above, it was reasonable not to proceed to serve the Plenary Summons herein. In circumstances where as noted the conciliation process has come to an end it is now intended to serve the proceedings and progress the matter as necessary before the Courts."

8. The order of McDermott J. extending the time for service of the plenary summons, together with the proceedings, was served on Mythen by letter dated 11th November, 2016. The order was also served on the architects. The second named defendant entered an appearance on 21st November, 2017. In the course of the within hearing, it was confirmed that the developers were not proceeding against the fourth defendant.

9. In his affidavit sworn 23rd November, 2016, grounding the within application to set aside the order of 7th November, 2016, Mythen's solicitor, Mr. Aiden Carey of BLM Solicitors, avers as follows:

> "[Mr. McAsey's] grounding Affidavit discloses … that the "*other good reason*" advanced by the Plaintiffs for their failure to serve the proceedings within the time limited was the appointment of a Conciliator in or around December, 2014.
>
> I say and believe that it is noteworthy the said Grounding Affidavit does not explain why the appointment of a Conciliator led to the proceedings not being served, other than to suggest … "*it was reasonable not to proceed to serve the plenary summons herein*." In the circumstances I say that the Plaintiffs have failed to explain how the appointment of a Conciliator can or does amount to a "good reason" for their failure to serve the proceedings."

10. He further avers that "it is a matter of concern" that the affidavit grounding the plaintiff's *ex parte* application sought to rely on an event (the agreement to go to conciliation) which occurred in December, 2014, "to justify the expiry of proceedings which had occurred some six months earlier". He thus asserts that the appointment of a Conciliator in December, 2014, could not in any circumstances amount to a "*good reason*" to explain a failure to serve the proceedings by the previous June, because the consolation process "evidently could not be responsible for the delay in serving the proceedings". It is further averred that the renewal of the proceedings has or will have the effect of occasioning prejudice to Mythen, given the lapse of time since the alleged events the subject matter of the proceedings and given that the renewal of the proceedings has the practical effect of extending the limitation period applying to the plaintiffs' claim.

11. In the course of the hearing, the Court was referred to a series of correspondence which passed between Lavelle Coleman (the developers' then solicitors) and McCann Fitzgerald in the period July, 2012 to April, 2014.

12. On 13th July, 2012, Lavelle Coleman wrote to Mythen Construction Limited advising that the purchasers of the apartment units at the Maltings had notified the developers of various structural defects, and that proceedings had been issued by apartment owners against the developers for damages for alleged breach of contract and/or negligence. Lavelle Coleman advised that the purpose of the letter was to advise of the developers' intention to hold Mythen Construction Limited responsible for the defects and to seek a full indemnity in default of which proceedings would issue. It was advised that the developers intended to seek a further indemnity from DCS&P Architects.

13. With no indemnity having been forthcoming from Mythen Construction Limited, on 13th March, 2013, Lavelle Coleman advised of its proposal to refer the dispute to arbitration pursuant to Clause 38 of the Articles of Agreement between the developers and Mythen Construction Limited dated 1st June, 2005.

14. On 25th July, 2013, the Royal Institute of Architects of Ireland ("RIAI") appointed Mr. Michael Counihan S.C. as arbitrator.

15. On 5th September, 2013, McCann Fitzgerald wrote to the nominated arbitrator saying that they had sought a referral of the dispute to conciliation, as provided for in Clause 38(a) of the contract entered into between the developers and Mythen, and advising that the arbitrator had no jurisdiction "in the advance of the referral of the disputes to Conciliation …"

16. On 13th September, 2013, Mr. Counihan S.C. replied to the effect that he would take no further step in the arbitration until all parties had an opportunity of stating their position.

17. On 4th March, 2014, Lavelle Coleman wrote to McCann Fitzgerald noting that Mythen had referred the dispute to conciliation and that while the developers did not accept the position adopted by Mythen, they were willing to proceed with a conciliation process in order to avoid any further delays, once the conciliation process was entered upon and progressed with all possible efficiency.

18. On 7th March, 2014, McCann Fitzgerald replied in the following terms:

> "We confirm that our client is agreeable to referring to Conciliation disputes which have arisen between Mythen Construction Limited and your clients, David Coleman, John Joseph Murphy T/a The Limestone Partnership. Such

> Conciliation will take place in accordance with the provisions of the main contract entered into.
>
> In relation to any claim by the Faythe Management Company Limited … we request that you arrange to provide to us a copy of the "RIAI Agreement" which we note was entered into between our client and the Faythe Management Company Limited …
>
> In relation to the proposed Conciliation it will of course be necessary that there be clarification in relation to the status of other proceedings which have been commenced and/or threatened. Any claims made by David Coleman, John Joseph Murphy T/a The Limestone Partnership including claims for indemnity or contribution, ought properly to be stayed pending the referral of disputes under the main contract to Conciliation and, if necessary, to Arbitration. Please confirm your client's agreement that any such claims for indemnity or contribution by Mr. Coleman and Mr. Murphy t/a The Limestone Partnership will be stayed."

19. On 21st March, 2014, Lavelle Coleman replied advising, *inter alia*, that there was no "RIAI" agreement between Faythe and Mythen and that, accordingly, proceedings had been commenced against Mythen Construction Limited by the Faythe Management Company Limited ("the Faythe proceedings").

20. The letter went on to state:

> "In relation to other proceedings, the position is that our clients have commenced proceedings against the Design Team, and as against your client for indemnities and damages. Meanwhile, 13 apartment owners have instituted proceedings as against our client, as has the Faythe Management Company Limited.
>
> We agree that our clients' claim as against your client should in principle be stayed pending Conciliation and/or Arbitration. Also, it would appear sensible that the claim of the Faythe Management Company Limited ought to be stayed pending Conciliation and/or Arbitration.
>
> …
>
> Our proposal at this stage is that we correspond with the solicitors acting the Architects and invite them now to participate in the Consolation process, and to make a similar proposal to the solicitors acting for the apartment owners … While neither you nor this office can compel those parties to take part in a conciliation it seems that objectively there would be distinct advantages for them in doing so. Equally, from the perspective of our respective clients it seems that the likelihood of a successful Conciliation process will be greatly enhanced if all stakeholders are involved.
>
> You might indicate that you are agreeable to us proceeding as outlined. In the meantime we confirm that our clients will take no step to prosecute proceedings against your client. Agreement to participate in Conciliation by the other parties named above would have to incorporate their willingness that their proceedings and the proceedings against them similarly held in abeyance."

21. McCann Fitzgerald replied on 1st April, 2014, advising, *inter alia*, that a search on the High Court website has established that the Coleman proceedings had issued on 11th June, 2013, and the Faythe proceedings on 17th July, 2013. The letter noted that neither proceedings had been served on Mythen. It was also advised that Mythen Construction Limited had at all times been agreeable to engaging in conciliation in relation to the disputes which arose under the contract but that it was not agreeable to engaging in conciliation with a party who was not a party to the contract. It was further stated that it was inappropriate that the developers would have sought reference to conciliation and/or arbitration while at the same time issuing proceedings which related to the dispute under the Contract.

22. Notwithstanding those comments, McCann Fitzgerald advised that Mythen Construction Limited would be agreeable in dispensing with conciliation and going immediately to arbitration subject to, *inter alia*, the Coleman proceedings being discontinued immediately.

23. Ultimately, on 19th December, 2014, Mr. Carey of BLM Solicitors (who by now had replaced McCann Fitzgerald as Mythen's solicitors) wrote to Coleman Legal Partners (who had replaced Lavelle Coleman as solicitors for the developers) advising that they had received instructions to engage in the proposed conciliation, subject to the developers, the apartment owners and the architects agreeing to participate.

24. The conciliation process duly took place and, as already outlined, it formally ended in failure in October, 2016.

25. In his affidavit replying to Mr. Carey, Mr. David Coleman, the first named plaintiff, disputes Mr. Carey's assertion that the lapse of time will cause Mythen prejudice, in circumstances where it is alleged that Mythen were aware of the existence of the within proceedings no later than 7th March, 2014 "and in fact quite likely some date before that", through their then solicitors McCann Fitzgerald.

26. In his supplemental affidavit sworn 1st March, 2017, Mr. Carey takes issue with the suggestion that there was agreement or some form of understanding between the developers and Mythen that the developers would take no steps to prosecute the within proceedings once Mythen agreed to the conciliation process. He avers that, on the contrary, the offer which had emanated from Mythen was that if the parties went to arbitration, "Court proceedings were superfluous and should be discontinued". Mr. Carey also avers that it followed, as a corollary to no arbitration having been commenced, that the developers must have been aware that they were required to serve the Coleman proceedings in order to preserve them, even where conciliation was being proposed. He further avers that even if the agreement to enter conciliation had been agreed prior to the expiry date for service of the plenary summons (which did not happen), that still did not alleviate the requirement on the developers to serve the proceedings on Mythen.

27. It is also averred that given that the agreement for the conciliation process was only arrived at in the December, 2014, there could not have been any basis for the developers to believe in or about June, 2014 (being the expiry period for service), that there was no necessity to serve the proceedings since, at that stage, no agreement on conciliation had been reached.

28. Contrary to the developers' position that engagement in the conciliation process will have equipped Mythen to know the case being made against them, Mr. Carey asserts that participation in a conciliation process does not remedy the effect which the delay can be expected to have on Mythen's ability to secure discovery after such a lapse of time, on the deterioration of witnesses evidence over time or the possible change in the position of co-defendants against whom an indemnity might be sought.

29. As regard the question of indemnity, Mr. Carey makes the case that since DCS&P Architects Limited is now in liquidation it is no longer amenable as a party from whom Mythen can secure a meaningful indemnity. Mr. Carey goes on to state:

> "… I beg to refer to para. 12 of the Plaintiffs' Replying Affidavit, in which it is indicated that the Plaintiffs are desirous of resolving the alleged subject matter of these proceedings by way of arbitration. I say and believe that this suggests that the Plaintiffs' true motivation in resuscitating these proceedings is to avoid the time limit applying to arbitral proceedings, and I further say that the First and Fifth Defendants will suffer prejudice insofar as the renewal of these proceedings will deprive them of the defence provided for [in] the Statute of Limitations, whether applying to arbitration proceedings or to these proceedings".

30. On 23rd November, 2017, Mr. McAsey swore an affidavit in response to Mr. Carey. He avers that the developers' arbitral proceedings were commenced within time as evidenced by the letter of 13th March, 2013, referring the dispute to arbitration. He avers that an arbitrator has in fact being appointed, albeit it is acknowledged that Mythen contends that the arbitrator has not been validly appointed given that he was appointed prior to the commencement of the conciliation. Mr. McAsey goes on to state:

> "The position is that the Mythen Defendant's have taken inconsistent and puzzling positions in response to attempts by the Plaintiffs to deal with the issues arising from the defects in the apartment complex which is at the centre of this dispute. As can be seen from the correspondence referred to … at different times they declared through their solicitors they were willing to proceed to arbitration without the need for conciliation. They then resiled from this causing the need for the parties to expend significant resources over the course of the lengthy conciliation. There are now attempting to prevent the Arbitrator appointed in regards the dispute in conducting arbitration.
>
> I say and believe that it is reasonable to presume if the arbitration which was commenced in 2013 had been permitted to continue, the matter would by now have been resolved, and there would have been no need for the Plenary Summons herein to be renewed and served.
>
> Further, the substantive matters at issue in regards to the defective design and construction of the Maltings development fall to be determined by reference to expert evidence. The reality is that the Mythen Defendants have fully prepared their position in this regard given that they have been aware of the fact the development suffers from significant defects since those defects came to light, and have participated in a formal conciliation process which was incepted only after the parties were in the course of preparing for arbitration and litigation. I say and believe that the suggestion that the Mythen Defendants have been prejudiced in their defence in any meaningful way which has not arisen from their own conduct is entirely artificial."

31. Mr. McAsey goes on to refer to Mythen having settled one set of proceedings initiated by an apartment owner in the Malting, against both Mythen Construction Limited and the developers.

The Faythe proceedings

32. The plaintiff in the Faythe proceedings is a limited liability company which carries on business as the management company for the Maltings apartments. The Faythe proceedings issued on 17th July, 2013, seeking damages for negligence arising from the design and construction of the apartments.

33. Separately, on 17th June, 2013, Faythe issued proceedings bearing record number 2013/ 7397P against David Coleman and John Joseph Murphy (the first and second plaintiffs in the Coleman proceedings), seeking damages as a consequence of defects in the apartment complex.

34. On 9th September, 2013, Faythe issued proceedings bearing record number 2013/ 9592P against DCS&P Architects and related persons.

35. As averred to in the affidavit of Sam Saarsteiner of Galligan Johnston (Faythe's solicitors) which grounded the application for the renewal of the plenary summons in the Faythe proceedings, "the existence of the two sets of proceedings stems from the desire to have all issues resolved in one of set arbitral proceedings, coupled with the need however to ensure that the Plaintiff's ability to pursue a recovery from those involved in the design of the Development was not hampered, in the events that those persons chose not to participate in the arbitration."

36. Mr. Saarsteiner made clear that as far as the Faythe proceedings were concerned, it was Faythe's intention to pursue only Mythen Construction Limited and the second defendant, DCS&P Architects.

37. At the time of the institution of the Faythe proceedings, Faythe's solicitors were Lavelle Coleman (also the developers' solicitors).

38. Lavelle Coleman's letter of 21st March, 2014 (already referred to above) to McCann Fitzgerald advised, *inter alia*, that Faythe had instituted proceedings against Mythen. As already seen, Lavelle Coleman wished to have the Faythe proceedings stayed pending conciliation and/or arbitration.

39. In his affidavit grounding the within application to set aside the renewal of the plenary summons, Mr. Carey disputes that Faythe's reliance on the conciliation process could constitute "good reason" for the non service of the summons. He also rejects the fact that Mythen were on notice of the proceedings constitutes a good reason for the failure to serve the proceedings. Moreover, he rejects any suggestion that the Faythe proceedings were not served on Mythen because it had been felt that conciliation process might resolve the issue of whether Mythen would indemnify the developers for the purpose of meeting Faythe's claim against the developers. Mr Carey asserts that this could not be so because Faythe had allowed its proceedings bearing record number 2013/7397P against the developers to expire. However, this was not in fact the case. In her replying affidavit on behalf of Faythe, Ms. Karen O'Brien, of Galligan Johnston solicitors, corrects an error which had been made by Mr. Saarsteiner in his affidavit grounding the renewal application and she confirms that the proceedings bearing record number 2013/7397P were in fact served on the developers.

40. Mr. Carey further contends that the proceedings bearing record number 2013/ 9593P, issued by the developers against the architects, and where an indemnity is sought, do not name Mythen as defendants.

41. He further avers that in circumstances where the Coleman proceedings have not sought an indemnity from Mythen, it is not plausible that Faythe were awaiting confirmation that such an indemnity would be provided.

42. In similar vein to the arguments advanced in the application to set aside the renewal of the summons in the Coleman proceedings, Mr. Carey avers that Faythe cannot rely on an event which commenced in December, 2014, to justify the non-service of proceedings which expired in June, 2014. It is further averred that given that Faythe was not a party to the conciliation, it could not reasonably have contemplated that the proposal to initiate the conciliation process would justify a failure to serve the plenary summons. He further contends that Faythe cannot rely on correspondence which passed between the parties' respective solicitors in March to April, 2014, and which discloses that Mythen were on notice of the Faythe proceedings, in circumstances where the same correspondence explicitly excluded Faythe from the conciliation process.

43. Mr. Carey makes the case that given that Faythe's explanation for the multiple proceedings it initiated is that it was an effort to ensure that it would be able to recover on foot of its claims in the event that the subject matter of the claims was not resolved at arbitration, it follows that Faythe were required to prosecute their proceedings where no arbitration was in fact taking place.

44. At paras. 26 – 29 of his affidavit, Mr. Carey repeats his arguments as to the prejudice that will be caused to Mythen if Faythe is permitted to prosecute their claim.

45. He goes on to aver:

> "As far as the application of the Statute of Limitations is concerned, I say that the balance of prejudice is in favour of the First and Fifth defendants, for the following reasons. First, the Plaintiff's current predicament is entirely of its own doing or that of its former advisors. Secondly, to the extent that the Plaintiff's former advisors are responsible for the very substantial delay in prosecuting these proceedings, the Plaintiff can pursue other routes of recourse if it is prevented from maintaining this action by the limitation period applicable. Finally, I say that permitting the Plaintiff to prosecute this action at this remove would undermine the application of the Statue of Limitations to cases of this nature and would have the effect of preventing the First and Fifth Defendants' reliance on a defence conferred by statute."

46. In her replying affidavit, Faythe's solicitor, Ms. O'Brien, asserts that the fact that Faythe's proceedings bearing record numbers 2013/7397P and 2013/9592P, respectively, against the developers and the architects were in fact served did not undermine Faythe's decision not to serve the Faythe proceedings on Mythen.

47. Ms. O'Brien repeats the assertion made earlier by Mr. Saarsteiner that Mythen were on notice of the Faythe proceedings and that their former solicitors acquiesced and/or agreed in correspondence over the period March to April, 2014, to Faythe's former solicitors' proposal that the proceedings would be stayed pending the outcome of conciliation. She avers that at no stage did Mythen request to be served with a copy of the plenary summons; nor did they expressly reject the proposal that the proceedings should be stayed pending the outcome of conciliation and/or arbitration.Ms. O'Brien points to the letter of 7th March, 2014 sent by Mythen's former solicitors, in aid of Faythe's contention that it was reasonably anticipated that the developers' claims for an indemnity and/or contribution from Mythen Construction Limited would be agreed at conciliation.

48. She further avers that Mythen's position, as set out in its former solicitors' letter of 1st April, 2014, that the proper forum for the resolution of disputes arising under the contract was arbitration, supports Faythe's contention that it was expected that Mythen Construction Limited would agree to provide indemnities in the course of alternative dispute resolution process.

49. She makes the case that in light of the correspondence of March to April, 2014, it is of no significance that the conciliation process only began some months after the expiry of the plenary summons.

50. She rejects any suggestion that Mythen are prejudiced by the order of 23rd January, 2017, and relies on the fact that albeit on notice of the Faythe proceedings from April, 2014 Mythen took no steps to issue an application to dismiss the proceedings. She further contends that Mr. Carey's affidavit refers only to broad issues of potential prejudice, without any specific allegation thereof.

51. Ms. O'Brien also rejects any suggestion that the liquidation of the second defendant has any bearing on the within application given that it was likely that this could equally have occurred even if the proceedings had been served.

52. Ms. O'Brien points out that the Statute of Limitations period had not expired when the Faythe proceedings were instituted. She contends however that Faythe will suffer the ultimate prejudice if the renewal order of 23rd January, 2017 is set aside as Faythe will then be compelled to issue outside the statute period.

53. Ms. O'Brien further avers:

> "Further, I say and believe that the nature of the proceedings is also of relevance in assessing the prejudice caused to the Plaintiff. The Plaintiff was incorporated subsequent to the contract being entered into between the Developers and the First Named Defendant. As a consequence of the negligent construction of the Development serious latent defects subsequently emerged in the premises. The First Named Defendant, as the main contractor, was the party most centrally connected to the negligent construction of the defective Development. The Plaintiff has been required to arrange the performance of substantial remedial works. As aforementioned, the costs of the remedial works have been valued as being in the approximate sum of €1.75 million. In circumstances where the renewal of the proceedings is set aside the Plaintiff will, accordingly, suffer serious prejudice".

54. In his supplemental affidavit sworn 30th June, 2017, Mr. Carey describes as "entirely disingenuous" for Faythe to characterise the letter of 1st April, 2014, as Mythen's "acquiescence" in Faythe's failure to serve the proceedings, in circumstances where Faythe itself admits that it was not a party to the conciliation process, and where Mythen's former solicitors expressly drew attention to that fact in the letter of 1st April, 2014, and where Faythe must have known that it could only prosecute its claims through litigation. Mr. Carey further maintains that it is not rational for Faythe to suggest that Mythen could have moved to strike out the proceedings, when those proceedings were not served on Mythen.

55. As regards the indemnity issue, he avers that it is contrary to common sense that Faythe would have let its direct claim against Mythen expire in the hope of securing an indirect prospect of recovery against Mythen on foot of an entirely different cause of action. Contrary to Ms. O'Brien's averments, Mr. Carey contends that Mythen had been caused specific prejudice by the inevitable deterioration of witness evidence and by the fact of the second defendant (the architects) having gone into liquidation.

Mythen's submissions

56. It is submitted that for the purpose of the renewal the plenary summons, it fell to the developers to invoke the "other good reason" provision Order 8, rule 1 of the RSC. Counsel contends that in the application made on 7th November, 2016, there was no

elaboration by the developers as to why the appointment of a Conciliator would excuse not serving the plenary summons. It was not the case that the dispute had gone to arbitration. The question has to be asked as to why the plenary summons was allowed to lapse when it was merely conciliation that was being contemplated.

57. It is submitted that, either the plenary summons could have been served on Mythen, or an application brought for renewal within twelve months of issue. Counsel asserts that the stance adopted by the developers is all the more surprising in circumstances where the proceedings bearing record number 2013/9593P instigated by the developers against the architects and related persons on 9th September, 2013, were in fact served on the architects, to which an appearance was entered on 18th October, 2013.

58. Accordingly, Mythen queries why the within proceedings, which also names the architects as defendants, were not served. Furthermore, the developers saw fit to serve the architects with proceedings bearing record number 2013/9593P despite their wanting that the architects would be part of the conciliation process that was being contemplated in 2014.

59. Whatever the reason for not serving the Coleman proceedings, it could not have been because of the proposed participation of the developers and the architects in the conciliation process, given that the developers had seen fit to serve the architects in the proceedings bearing record number 2013/9593P.

60. It is submitted that at no stage did Mythen say or intimate that the within proceedings should not be served. Accordingly, no question can arise of Mythen being estopped from objecting to the renewal of the summons because of the contents of the letter from their previous solicitors of 1st April, 2014. Furthermore, as averred by Mr. Carey, far from Mythen acquiescing to the non-service of the proceedings, their prior solicitors had to resort to an online High Court search before they could ascertain the parties to the within proceedings, as the letter of 1st April, 2014, shows.

61. It is also Mythen's contention that the dispute the subject matter of the within proceedings is not before an arbitrator, albeit it is acknowledged that it is not for the Court to decide what has or has not been put before the arbitrator. It is submitted however that what is of relevance is that the developers are now contending that the matter has been referred to arbitration. If that is in fact the case, it begs the question as to why they sought to renew the plenary summons. It is submitted that the developers have not at any stage contended that the summons was not renewed because the matter had gone to arbitration.

62. Counsel further submits that given that the developers have not adduced "other good reason" for the non-service of the plenary summons, they cannot invoke the balance of justice as a reason for renewal. Accordingly, the developers cannot meet the test set out in *Chambers v. Kenefick* [2007] 3 I.R. 526.

63. Alternatively, Counsel submits that the developers should not be allowed to rely on the balance of justice since no credible or consistent reason has been put forward for renewal. Nor should they be entitled to rely on the balance of justice solely on the basis that they have also instituted other proceedings.

64. It is also submitted insofar as the developers seek to rely on the course of dealing which came to pass in respect of proceedings which were instituted by an apartment owner, Mr. Smith, against Mythen and other parties, same is of no relevance to the developers' failure to serve the plenary summons in the within proceedings.

65. With regard to the Faythe proceedings, it is submitted that, as with the case of the developers, Faythe cannot meet the test set out in *Chambers v. Kenefick*.

66. Counsel's central submission is that given that Faythe were not a party to the contract providing for alternative dispute resolution, there is no logical or reasonable basis for the reliance placed on the outcome of conciliation as a reason not to serve the within proceedings on Mythen. It is submitted it is manifestly not the case that Mythen acquiesced or agreed to the proceedings being stayed. It is further contended that it is not plausible for Faythe to assert that Mythen acquiesced in the non-service of proceedings. Moreover, it is entirely disingenuous for Faythe to say they were awaiting whether the conciliation process would result in their being indemnified by the developers, and/or that the developers might in turn be indemnified by Mythen, in circumstances where the developers have not sought an indemnity from Mythen in the Coleman proceedings.

67. It is further contended that Faythe will not be prejudiced if the renewal order is set aside in circumstances where Faythe has extant proceedings against the developers (specifically Mr. Coleman and Mr. Murphy) and the architects (the proceedings bearing record numbers 2013/7407P and 2013/7397P respectively).

The submissions advanced by the developers

68. On behalf of the developers, counsel submits that Mythen's application to set aside the order for renewal of the plenary summons is misguided and unwarranted. It is submitted that Mythen's prior solicitors' letter of 19th December, 2014, wherein they agree to engage in conciliation once the developers, architects and residents are involved, fundamentally undermines the arguments now being advanced. This is so in circumstances where the letter of 14th December, 2014, issued against a backdrop where the developers had specifically stated on 21st March, 2014, that the within proceedings would be stayed pending the outcome of the conciliation. By December, 2014, all parties, including the developers, Mythen and the residents had come together to prepare for conciliation – a process that was then ongoing for some eighteen months, albeit it ultimately ended in failure

69. The essential basis of the application to renew the plenary summons (which was made within a week of the conciliaton process having ended) was that the parties had been involved in conciliation aimed at resolving their differences, which process had not resulted in a resolution. It is submitted that Mythen were not prejudiced in circumstances where the matters the subject of the dispute had been the subject of extensive correspondence between the parties and given that the developers' objective, after conciliation had failed, was to have the dispute arbitrated in accordance with a contractual right to do so, at least insofar as Mythen are concerned. In all of those circumstances, there is an air of unreality to Mythen's argument that the renewal of the summons was not a proper order for the Court to have made. It is submitted that the developers did not go into depth in the *ex parte* application solely because the present reaction of Mythen was not anticipated. Counsel contends that Mythen are attempting to use the system to defeat the developers' valid claim against them.

Faythe's submissions

70. On behalf of Faythe, it is submitted that the fundamental issue is that Mythen were aware in early course that the within proceedings had been issued against them and that Faythe's previous solicitors were expressly countenancing the proceedings being stayed, as set out in the letter of 21st March, 2014.

71. There is no relevance to the argument that Faythe was not a party to any contract with Mythen given that Faythe was indirectly

represented at the conciliation via the developers, specifically Mr. Coleman and Mr. Murphy, who are directors of Faythe.

72. There is no basis for Mythen to say that they were not acquiescing in the Faythe proceedings being stayed given that Mythen was pushing for the principal dispute to go to arbitration, as evidenced by their former solicitor's letter of 1st April, 2014. Moreover, no request was made in the 1st April, 2014 letter that Faythe should discontinue its proceedings notwithstanding that such a request was made by Mythen of the developers, on the basis that the matter would go to arbitration.

73. Counsel submits that insofar as there has been any refinement in Ms. O'Brien's affidavit of Faythe's reason for not serving the plenary summons, such refinement is permissible given that the present application is effectively a hearing *de novo* of the renewal application, as recognised by Peart J. in *Moynihan v. Dairygold Cooperative Society Limited* [2016] IEHC 318.

74. It is further submitted that in so far as Mythen say they cannot obtain an indemnity from the second defendant (the architects) it has to be noted that the second defendant went into liquidation in 2016 – a time when Mythen were engaged in conciliation. It is contended therefore that no fault can be laid at the door of Faythe on this basis.

Considerations

75. In *Chambers v. Kenefick*, Finlay Geoghegan J. succinctly set out the manner in which the Court should consider application for a renewal of a summons. She stated:

> *"Firstly, the court should consider is there a good reason to renew the summons. That good reason need not be referrable to the service of the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interests of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."* (at p. 530)

76. Thus, the first issue to be determined is whether there is substance to Mythen's argument that neither the developers nor Faythe have advanced good reason for the renewal of the respective summonses. Mythen's arguments as to why a referral to conciliation should not be found to constitute good reason in either case have been well rehearsed, both on affidavit and in submissions to the Court.

77. As far as the Coleman proceedings are concerned, I am satisfied that the developers have established good reason why the plenary summons was not served within the requisite twelve month period. The Court is so persuaded for the following reasons. In the first instance, it is of some significance that the initial proposal for a referral to conciliation came from Mythen on 5th September, 2013, in response to Lavelle Coleman having advised that they had referred the subject matter of the dispute between the developers and Mythen to arbitration. On 4th March, 2014, the developers, through their solicitors, confirmed their agreement to the matter going to conciliation. Secondly, Mythen's response of 7th March, 2014 is significant, namely, its request that any claims commenced or threatened by the developers would be stayed pending the referral of the dispute to conciliation and, if necessary, to arbitration. This request was positively acknowledged by Lavelle Coleman on behalf of the developers on 21st March, 2014. This latter correspondence was in turn replied to by Mythen's then solicitors by letter of 1st April, 2014, wherein the existence of the Coleman proceedings were acknowledged and which contained, *inter alia*, a counter proposal that the parties proceed directly to arbitration and that the developers' proceedings would then be discontinued. This counter proposal notwithstanding, the developers and Mythen (and others) duly embarked on a lengthy conciliation process in December, 2014, which was ongoing for some twenty two months approximately until the process ended in failure in October, 2016. To my mind therefore, all the circumstances of this case, particularly the content of the correspondence referred to above, the fact of the conciliation process itself, and the nature of the dispute between the parties, meet the "other good reason" requirement of Order 8, rule 1 of the RSC.

78. In the course of their submissions, Mythen argued that the fact that there was a conciliation process cannot constitute good reason in circumstances where the plenary summons expired some six months or so before the appointment of the conciliator. Albeit that the conciliation process commenced outside the time limit for the service of the proceedings, I am not persuaded that that factor negates, in any substantial regard, the good reason requirement in the RSC, particularly where there was copious correspondence regarding the proposed conciliation during the currency of the plenary summons.

79. I now turn to the Faythe proceedings. Mythen submits that in terms of advancing a good reason for the non service of the plenary summons in the Faythe proceedings, Faythe's position is even more tenuous than that of the developers. I accept that the position is not straightforward given that it cannot be said that Faythe participated in the conciliation process. Can therefore Faythe advance the fact that there was a conciliation process ongoing as constituting a good reason for not serving the Faythe proceedings? On balance, I am satisfied that Faythe have made out "other good reason" as required by the Rules.

80. At para. 21 of his affidavit grounding the application to renew the plenary summons, Mr. Saarsteiner acknowledged that Faythe was not a party to the conciliation process that commenced in December, 2014. This was because Faythe was not a party to the contract under which Mythen had been engaged by the developers. Albeit that on 1st April, 2014, Mythen's previous solicitors had advised that Mythen were not agreeable to engaging in conciliation with any party who was not a party to the main contract, Mr. Saarsteiner accounted for the non-service of the plenary summons on the basis that the Mr. Coleman and Mr. Murphy, who were directors of Faythe Management Company Limited, were participating in the conciliation. Mr. Saarsteiner averred that it was therefore considered reasonable to await the outcome of the conciliation and to see whether Mythen would provide indemnities to the developers for the purpose of meeting Faythe's claim in its proceedings bearing record number 2013/7397P against the developers. The case made in the renewal application was that that in light of the correspondence of March/April, 2014, Mythen were on notice of the fact that the Faythe proceedings had issued against them, notwithstanding that they had not been served, and that the proceedings were to be stayed pending the outcome of the conciliation.

81. I am satisfied that the non service of the Faythe proceedings was not an unreasonable approach for Faythe to take, particularly in circumstances where Mythen were aware from at least 21st March, 2014 that Faythe had instituted proceedings against them. While it is the case that Mythen did not brook any participation by Faythe in the proposed conciliation process, I accept the submission advanced on behalf of Faythe that Mythen did not in its letter of 1st April, 2014 expressly demur in response to Lavelle Coleman's suggestion that it would be sensible that the Faythe proceedings be stayed pending the outcome of the conciliation process. Nor was Faythe expressly told by Mythen that it should not await the outcome of the conciliation that was being proposed in March/April, 2014 between Mythen and the developers and others. It seems to me that the extent to which Mythen knew of the existence of the respective claims in both the Coleman and Faythe proceedings and of the fact that proceedings had issued on foot

of the claims, constitutes good reason for the purposes of the Rules, to paraphrase Clarke J. in *Moloney Lacey Building and Civil Engineering Limited* [2010] 4I.R. 417. (at para. 24)

82. In submissions to the Court, Mythen takes issue with the argument advanced by both the developers and Faythe that it acquiesced in the postponement of the respective plenary summonses. I do not characterise Mythen's actions or inaction, as the case may be, as acquiescence. Rather, the Court's focus is whether in all the circumstances it was reasonable for the developers and Faythe to defer service of their respective proceedings, pending the outcome of the conciliation process. For the reasons stated, the Court has answered this in the affirmative.

The interests of justice

83. Albeit satisfied that there is good reason to renew the plenary summonses in both the Coleman and the Faythe proceedings, the Court must now address whether it is in the interests of justice to do so. Mythen submits that the while the apartment complex the subject matter of the within proceedings was completed in 2007, the said proceedings were not served until November, 2016, and January, 2017, respectively, and that, accordingly, such delay will cause prejudice to its defence of the proceedings given the adverse effect of the lapse of time on Mythen's ability to secure discovery, together with the deterioration of witnesses evidence over time. It is also submitted that as DCS&P Architects (the second defendant) are now in liquidation, they are no longer amenable to Mythen for purposes of a meaningful indemnity. Moreover, the case is made that if the summonses are renewed, Mythen will be deprived of the defence provided for in the Statute of Limitations.

84. In aid of the prejudice that will enure to Mythen if the renewal order is not set aside, counsel points to the fact that the delays in the present cases are similar to that deprecated by Peart J. in *O'Keeffe v. G. & T. Crampton Limited* [2009] IEHC 366. It is submitted that the features of prejudice identified by Peart J. in O'Keeffe, and which gave rise to the setting aside of the renewal order in that case, arise in the present cases: the delays are of a similar order of magnitude and other defendants from whom indemnity or contribution might have been sought are no longer available to Mythen Construction Limited. It is contended that where proceedings are issued towards the end of the applicable six year limitation period, as is the case here, "*there [is] all the greater need for expedition and all the greater need for the court carefully to scrutinise and weigh up any excuse or explanation for delay in serving the issued proceedings*", as per O'Sullivan J. in *Allergan Pharmaceuticals Limited v. Noel Deane Roofing & Cladding Limited* [2009] 4 I.R. 438 (at para. 26).

85. On behalf of the developers, it is submitted that Mythen have not established any specific prejudice. A similar submission is made on behalf of Faythe who also submit that the fact of the second defendant having been placed into liquidation in August, 2016 and the third defendant having been dissolved in January, 2014 should not be determinative factors in the application to have the Faythe renewal set aside. Counsel submits that even if the Faythe proceedings had been served on Mythen by June, 2014, it is reasonable to expect that Mythen would have entered the conciliation process in December, 2014 and participated therein until the process ended in failure in October, 2016. It is further submitted that the third defendant had been dissolved since 7th January, 2014, and that, accordingly, even if Faythe had served its proceedings in June, 2014, as it was entitled to do, the third defendant would nevertheless have already been dissolved. The case is also made that the Faythe proceedings will be statute barred if the renewal order is set aside.

86. As put by Delaney and McGrath, Civil Procedure in the Superior Courts, (3rd Edn. Roundhall, 2012):

> "If the failure to effect service can be satisfactorily explained or excused in some way, then the prejudice to the plaintiff from the statute barring of the proceedings will be regarded as causing an injustice to him or her and this may constitute a good reason for the renewal of the summons. However, if the failure to serve the summons cannot be satisfactorily explained so that the court concludes that the plaintiff or his or her solicitor is culpable for the delay in service, then no injustice will result from the statute barring of the plaintiff's proceedings which is attributable to her or her own default." (at p. 195)

87. Delaney and McGrath also opine:

> "If a lengthy period has elapsed before the defendant became aware of the plaintiff's intention to sue and/or since the cause of action accrued, then prejudice to the defendant in terms of his ability to defend the claim will be presumed. In that regard, the inevitable passage of time before pleadings will be closed and the case heard must be taken into account. Conversely, if the defendants were aware of the claim at an early point of the possible claim and had an opportunity to take steps to defend it, prejudice is unlikely to be presumed or found to exist. In addition, a presumption of prejudice may not arise if the case is one that is not likely to be contested on liability will proceed as an assessment only or is otherwise regarded as straightforward. Further, any prejudice arising from delay may be discounted if the defendant is regarded as having contributed in some way to the delay or has acquiesced in it. It will also be relevant if the claim against the defendant would not be statute-barred if the summons is not renewed.
>
> *In some of the authorities, relatively little weight has been accorded to the presumptive prejudice that arises from significant delay in the institution and prosecution of the proceeding and the inability of a defendant to demonstrate actual prejudice has proven decisive in determining that the balance of justice is in favour for renewing the summons". (at pp.199-200)*

88. In *Creevy v. Kinsella* [2008] IEHC 100 Dunne J. had cause to consider the point at which a party to litigation became aware of the proceedings. She stated:

> *"It is undesirable that any party seriously contemplating litigation should not inform the party or parties against whom litigation is contemplated of that fact at an early stage. Once a party is informed of the possibility of litigation in contemplation against them, they may, if they chose to do so, take steps to prepare for any threatened litigation. They may make enquiries to establish the facts, to ascertain the identity of witnesses, to preserve evidence and so on. In the case of the first and fourth defendants, they could have informed their insurers and prepared appropriate statements from their recollection of the relevant facts. They were deprived of that opportunity until long after the events giving rise to these proceedings. In my view, that is not the way litigation should be conducted. The effect of the failure to inform the defendants of the possibility of proceedings is something that could, in some cases, tip the balance against a plaintiff in favour of a defendant when considering the question of prejudice."*

89. In *Kearns v. Roches Stores* [2009] IEHC 272, Cooke J. balanced, *inter alia*, the "*very considerable delays*" that had occurred in the case against the defendant's awareness of the threat of a claim.

> *"21. In spite of the very considerable delays that have occurred and the casual attitude adopted by the plaintiff's solicitors towards compliance with the rules of court governing effective and timely service of proceedings, it can at least be said that the defendant was alerted to the threat of the claim by the letter of 26th February, 2002 and that it had placed itself in a position to deal with the claim by nominating solicitors for the purpose in July, 2003. The additional facts placed before the court by the defendant on this application do not materially alter the position as it was on the* ex parte *application. The only new facts so indicated post-date this renewal of the summons namely, the rejection of service of the summons as renewed on 18th June, 2004, and the alleged defectiveness of the service by registered post in October, 2004."*

90. The level of scrutiny which should be applied to delay in serving proceedings was also considered in *Moloney v. Lacey Building and Civil Engineering Limited* [2010] 4I.R. 417. There, Clarke J. found some parallels between the case law on dismissal for want of prosecution and the principles to be applied in cases such as the present. He stated:

> *"There are at least some parallels between the question of whether any delay which might be inordinate might be regarded as excusable (as arises in delay jurisprudence), and whether there may be said to be a 'good reason' for the renewal of the summons in renewal jurisprudence."*

91. In *Tangney v. Ring* [2010] IEHC 39, the High Court found that, albeit not a very strong one, there was good reason established for the renewal of a summons where there was confusion as to whether the file in the case had been transferred to other solicitors following an amalgamation of solicitors firms and a change of personnel. As to the issue of the balance of justice, Ryan J. stated:

> *"8…. I think that the plaintiffs' interest in being permitted to make their claim outweighs the disadvantage to the defendants and the unascertainable - at this stage - prejudice that may affect them. My reasons are briefly as follows.*
>
> *First, I think that the delay that is critical to the application between the 18th September, 2007 (the last day for normal service of the summons) and the 18th February, 2008 is not grossly unacceptable.*
>
> *Second, every point the defendants can rely on will be available to them, except for the statute of limitations, which had not expired when the summons was originally issued.*
>
> *Third, the defendants were notified of the basis of the claim on 28th February, 2002 and 5th January, 2004, although the amount has substantially increased since then. Nevertheless, all appropriate defences are open to the defendants."*

92. Accordingly, he refused the application to set aside the renewal.

93. In a recent decision, *Crowe & Ors. v. Kitara* [2016] IECA 62, the Court of Appeal had to consider whether the "other good reason" requirement of Order 8, rule 1 of the RSC had been satisfied and where the interests of justice lay. Mahon J. found that in respect of two of the plaintiffs it had "just about been reached". He noted as follows:

> *"41. …In their cases, the renewal of the plenary summons was a first six month renewal. Problems had arisen on the plaintiffs' side during the initial twelve month renewals of the summonses in relation to the retention of expert witness, and while that on its own may not have provided a sufficient excuse for failing to serve the summonses it may well have been the case that the difficulty in relation to the retention of an expert witness acted to deflect the plaintiffs and their solicitor from the important task of ensuring the survival of the proceedings by serving them on Mr. Kelly. It is also a factor that the limitation period referable to these proceedings had not expired at the time of the institution of the proceedings. That limitation period probably expired at some late point within the first twelve months of the life of the proceedings. To this extent the limitation period had only relatively recently become a feature in this case.*
>
> *42. The nature of the proceedings is also of particular relevance. The plaintiffs proceedings relate to properties purchased by them in circumstances where, many years later, it is discovered that deficiencies in the fire prevention measures incorporated in the development are so great as to render the development unsafe for human habitation. The consequences for the plaintiffs are therefore catastrophic.*

94. Having regard to the established jurisprudence, and bearing in mind that each case must turn on its own particular facts, in determining where the balance of justice lies in relation to the renewals in the present cases I consider the following to be the relevant factors:

> 1. Both sets of proceedings were instituted within the requisite statutory time limit.
>
> 2. Mythen were informed and/or became aware of both proceedings within the currency of the summonses, albeit it was some number of months after the institution of proceedings in both cases. As regards the Coleman proceedings, Mythen were aware as of September, 2012, that proceedings were being contemplated by the developers.
>
> 3. In any event, Mythen knew of the fact of both sets of proceedings within the twelve months of their institution and it was intimated by the plaintiffs' solicitors that both sets of proceedings would be stayed pending the outcome of conciliation. Insofar as Mythen places reliance on the decision of Peart J. in *Moynihan* (where the renewal of the plenary summons was set aside), I am satisfied that that case can be distinguished from the factual matrix in the Coleman and Faythe proceedings given that in Moynihan, the first notification that the defendant might face proceedings came some six years after the plenary summons issued, whereas in the present case, Mythen became aware of the Coleman and Faythe proceedings during the currency of the twelve months time limit for the service of the proceedings. As already stated, Mythen was aware of the prospect of the Coleman proceedings some two years prior to the plenary summons issuing. Furthermore, Mythen knew as of 1st April, 2014 at the latest, that proceedings had in fact issued in both cases, still within the currency of the respective summonses.
>
> 4. More significantly, Mythen engaged in a wide conciliation process involving the developers over a period of twenty two months and were aware that the developers (and Faythe) would take no further steps in the proceedings while the conciliation was ongoing.
>
> 5. Both the Coleman and Faythe proceedings involve allegations of defects in the design and construction of an apartment complex. While quite understandably and properly, neither the developers nor Mythen apprised the Court of the content or nature of the conciliation, it cannot be but that in the course of the conciliation Mythen was apprised of the

nature of the alleged defects such as allows the Court to factor into the equasion, for the purpose of its consideration of the interests of justice, the likelihood that, albeit some considerable number of years have elapsed, Mythen will not have to meet the within proceedings in a vacuum. It has not been shown that Mythen are unaware of the nature of the allegations made against them, unlike the position which pertained in respect of the defendants in *Moloney v. Lacey Building and Civil Engineering Limited*. To my mind, Mythen's undoubted awareness of the nature of the allegations being made against them (together with their participation in a conciliation process in which the developers were involved) renders less compelling Mythen's argument that the renewal of the summonses will deprive them of the benefit of the Statute. I also find Mythen's Statute argument in the Faythe proceedings less than compelling. While it is the case that Faythe were not involved in the conciliation, all of the information available to the Court reasonably suggests that Mythen must be aware that Faythe's claims against Mythen arise from alleged defects in the apartment complex, effectively the same factual matrix as alleged by the developers.

6. While a considerable amount of time has elapsed since the completion of the apartment complex in 2007 and the institution of the within proceedings on 11th June, 2013, and 17th July, 2013, respectively, it has not been suggested by Mythen that due to the lapse of time relevant evidence has been put beyond reach, or that any person, including any relevant expert who might be a witness, is no longer available. Given the nature of the dispute in the present cases, it seems to me that the Court would require at least some specifics of prejudice pertaining to the issue of discovery or witness evidence.

7. It is the case that the second defendant, DCS&P Architects, are in liquidation, a factor which Mythen contends make the second defendant less amenable to indemnity or contribution. However, albeit the second defendant was not a party to the within applications to set aside the renewal of the plenary summonses, counsel for the second defendant advised the Court that as far as both the Coleman and Faythe proceedings are concerned, the second defendant is insured. Moreover, a notice of indemnity has been served by the second defendant on Mythen in both cases. It is submitted by the second defendant that if the Court were minded to set aside the renewal orders, then the second defendant would effectively be the sole defendant and they would then have to seek to join Mythen to the proceedings. In response to this submission, counsel for Mythen made the point that the joinder of third parties is not an issue for the Court. While I accept counsel's argument in the latter regard, the contemplated participation of the second defendant in the proceedings and the options open to Mythen as a result (including service of the requisite notices for indemnity and contribution), if the summonses are renewed, are factors to be taken account of for the purposes of the within applications.

8. Faythe points to the prejudice it will suffer if the renewal orders are set aside: it argues that if the order of 23rd January, 2017 is set aside, it will be compelled to issue outside the statutory time period. The Court must place some weight on this factor although it is now well established in case law that the expiry of the Statute is no longer the dominant factor it once was.

95. Weighing up all of the aforesaid factors I am of the view that the Court's discretion should be exercised in favour of upholding the renewal orders in both cases. The dominant factor, to my mind, is Mythen's undoubted awareness of the nature of the proceedings initiated by the developers and Faythe, and the absence of any compelling evidence that Mythen will be unable or unduly inhibited in defending the proceedings. Accordingly, I find that no substantial injustice arises by reason of the renewal of the plenary summonses.

96. The relief sought by Mythen in both applications is denied.