

THE HIGH COURT

[2022] IEHC 240

[RECORD NO. 2021 1925 P]

BETWEEN

ADELINA LIMITED

PLAINTIFF

AND

KEN TYRELL

DEFENDANTS

Judgment of Mr. Justice Dignam delivered on the 26th day of April, 2022.

Introduction

1. This matter came before the Court by way of two motions: one seeking case management and/or a mandatory injunction in respect of certain works to a building owned by the First-named Defendant ("Lartigue") over which the Second-named Defendant had been appointed receiver; and the other seeking various reliefs including replies to particulars, inspection facilities, and disclosure of the identity of all parties exercising control over the building and/or in receipt of any income, rents or profits from the building. There was a considerable narrowing of the issues in respect of the second motion and I deal with that towards the end of this judgment.
2. On the evening before the matter came on for hearing the Plaintiff was informed that the building had been sold and, in circumstances where the injunction could no longer be obtained against the Defendants (as they were no longer the owners), the matter in respect of the first motion proceeded as a dispute about the costs of the motion only.

Background

3. At the material times, Lartigue owned a multi-storey building in Ballybunion which was previously used as a hotel, known as the Golf Hotel. The Plaintiff owned (and still owns) a corner unit of the building. The Plaintiff's unit is essentially enveloped by Lartigue's part of the overall building, other than the walls of the unit which face onto the street. Most relevantly, directly above the Plaintiff's unit are a number of floors of Lartigue's building.
4. It seems that the building, save for the Plaintiff's unit, has been disused for a considerable period of time. Expert reports were exhibited to the various affidavits and, while there is disagreement between the experts on various points, there is no disagreement that the building is in very poor condition indeed. It is the Plaintiff's case that the very poor condition of the overall building has caused significant damage to the Plaintiff's unit particularly through water ingress through the floors above the unit. The Plaintiff claims that its tenant ceased paying rent to the Plaintiff in January 2020 due to the very poor condition of the unit and that ultimately in November 2020 the tenant handed back the keys. It should be noted that the Defendants do not accept that this is why the tenant gave up the unit but this is not an issue which has to be resolved at this stage.
5. Builders engaged by the tenant around the time they ceased paying rent noted in a quotation that there was a large damaged area on the main roof of the hotel and that storm water was seeping through the floor onto the unit's ceilings, wall and floor. They

stated that repair works would involve removing the damaged area of the roof at the top of the hotel, replacing the damaged plywood and re-felting the roof with flashing to prevent further storm water entering the building.

6. The Plaintiff had been engaging with solicitors for Lartigue and directly with a director of the company prior to this quotation. It seems clear from those contacts that there was no dispute but that the source of the water ingress into the unit was the poor condition of the building and in particular the poor condition of the roof. Indeed, it was suggested on behalf of Lartigue that damage to the roof of the hotel had been caused by the installation of a mobile telephone mast. There was discussion between the parties that if the Plaintiff arranged to pay for repair works to the roof Lartigue would undertake to refund the costs of same to the Plaintiff from any compensation which Lartigue might receive from the mobile operator (whom it suggested it was going to sue) or from the net proceeds of sale of the building and this was put in writing by one of Lartigue's directors. It seems that these discussions stalled in July 2020.
7. On the 16th July 2020, the Second-named Defendant was appointed as receiver to Lartigue by Everyday Finance DAC. It seems the Plaintiff was informed of this by letter from the solicitor for Lartigue on the 18th January 2021. By letter of the 29th January 2021 to Lartigue's solicitor the Plaintiff's solicitor asked for confirmation that Lartigue had contacted the receiver and also referred to the possible need to seek injunctive relief. In a reply of the 3rd February Lartigue's solicitor confirmed that the receiver was aware of the condition of the building.
8. The Plaintiff's solicitor wrote directly to the receiver on the 29th January 2021 in relation to the condition of the property and specifically the ingress of water into the Plaintiff's unit coming through the roof of the building. They sought confirmation that the receiver would take immediate action to rectify the situation by repairing the roof, failing which an injunction would be sought.
9. The receiver replied on the 4th February 2021 stating that he had sought quotes to carry out significant repairs to the roof and to try to ensure that the works would actually resolve the issues but that he was awaiting clarity in relation to when the contractor could start due to the public health restrictions which were in place at the time.
10. There were further letters from the Plaintiff's solicitor and the receiver replied on the 18th February and stated:

"The Company has selected a contractor to carry out the repairs.

As the Company is insolvent and has no funds available, it is reliant on the chargeholder to provide the funding in order for the works to commence as the contractor requires an up-front deposit with tight payment terms thereafter once the works commence."

11. By letter to the receiver of the 1st March 2021 the Plaintiff's solicitor sought an undertaking that the receiver would remediate the leaking and water ingress prior to any sale of the property, failing which injunctive relief including "*a mandatory injunction directing remediation and prevention of the serial leaks and ingressions of water...*" would be sought.
12. At the same time, there was correspondence between solicitors for the Plaintiff and solicitors for Lartigue. The latter's position was that their clients were impecunious and not in a position to undertake the works to repair the roof and indicated that the Second-named Defendant was aware and concerned about the roof and had limited resources inclusive of the licence income from the mobile phone mast.
13. Up to this stage, the focus of the Plaintiff's concerns was the water ingress into its unit through the building's roof and how it adversely impacted the Plaintiff's ability to use or to rent the unit.
14. The Plaintiff obtained a report from a Mr. Fergus Merriman, Chartered Building Surveyor, dated the 24th March 2021, which broadened the Plaintiff's focus to concerns of structural collapse of the building unless action was taken to repair the roof damage. I refer to the contents of this report below. It led to a further letter from the Plaintiff's solicitor to the receiver of the 26th March 2021 which stated:

"...Our client has in previous correspondence complained to both Lartigue Enterprises Limited and the receiver in relation to the damage being done to our client's premises by water coming from the roof of the hotel building. Notwithstanding indications that repairs to the roof might take place no repairs have been carried out or even commenced.

We enclose an expert's report which indicates that unless immediate action is taken to remedy roof damage the building is at risk of substantial collapse or at least accelerated risk from storm damage leading to elements of the structure falling to street level or surcharging lower elements that might then lead to disproportionate collapse of already weakened elements of the structure.

...

A potentially catastrophic situation can be avoided if works are immediately carried out. If necessary our clients will seek an injunction to make sure that the dangerous situation is avoided."

15. These proceedings were issued by Plenary Summons dated the 24th March 2021 which was served on the 7th or 8th April. The Plaintiff sought, *inter alia*, a "*mandatory injunction directing remediation and prevention of the serial leaks and ingressions of water affecting the Plaintiff's ground floor premises*" and damages for nuisance and trespass.
16. A Statement of Claim was delivered on the 21st April 2021.

17. The Plaintiff then issued the motion seeking case management and/or a mandatory interlocutory injunction in the same terms as the Plenary Summons on the 10th May 2021. An application for short service was made on the 30th April 2021 and was refused. The motion was made returnable for the 19th July 2021.
18. While an injunction application had been threatened even before Mr. Merriman's report raised these concerns about the potential for structural collapse, it is clear from the affidavit of Mr. Arif Lakhani grounding the motion that by the time the application came to be made the core basis of the application was the danger of structural collapse, as identified in Mr. Merriman's report.
19. The Defendants delivered a replying affidavit on the 16th July 2021 in which two reports of Malachy Walsh & Partners ("MWP"), Engineering and Environmental Consultants, were referred to (only one was exhibited but this error was subsequently corrected). The matter was adjourned to the 7th October 2021 for the Plaintiff to obtain a further expert report. The matter was further adjourned and the Plaintiff delivered an affidavit exhibiting a second report of Dr. Merriman on the 30th November 2021. On the 2nd December 2021 the Plaintiff applied for a date for hearing of the motion and this was resisted by the Defendant on grounds of lack of urgency and that there was a dispute as to whether the building was dangerous. The matter was adjourned for mention to the 20th January 2022. On the 2nd December 2021 the Defendants informed the Court that contracts for sale had been signed and it was anticipated that the sale would be closing in the near future.
20. Storm Barra occurred on the 7th December 2021 and considerable damage was done to the hotel which led to Kerry County Council becoming involved. The parties fundamentally disagree as to the significance of the fact that this damage was done and as to the contributing factors in respect of same and I return to this below.
21. When the matter was back before the Court on the 20th January 2022 it was given a hearing date on the 10th February 2022.
22. As noted above, on the evening before that hearing date the solicitor for the Defendants informed the Plaintiff's solicitor that the building had been sold. Counsel for the Plaintiff indicated that this fundamentally altered matters in that the relief could no longer be obtained in light of the sale and that in those circumstances there was no purpose to proceeding with the application for relief and the matter was now one of costs. He also made a number of complaints, partly arising from the fact that a redacted copy only of the contract of sale had been provided, which I refer to below.
23. The Plaintiff and the Defendants seek their costs on the bases set out below. In the alternative, the Defendants say there should be no Order as to Costs.

Costs – Legal Framework

24. The legal framework in respect of costs is provided for by section 168 and 169 of the Legal Services Regulation Act, 2015 ("the 2015 Act") and Order 99 of the Rules of the Superior Courts.

25. Section 168 of the 2015 Act provides, *inter alia*:

"(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or

(b) ...

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay –

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before the judgment.

26. Section 169 of the 2015 Act provides, *inter alia*:

"(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including:-

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more of the

parties was or were unreasonable in refusing to engage in the settlement discussions or remediation.

(2) ...

(3) ...

(4) *Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment."*

27. Order 99 of the Rules of the Superior Courts provides, inter alia:

"(2) Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

(2) ...

(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

(3) (1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in s. 169(1) of the 2015 Act, where applicable."

28. I was referred to Murray J's judgment in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 18. While this is of some assistance, it must be noted that Murray J was dealing with the costs of the proceedings as a whole. He said:

"Reading these in conjunction with each other, it seems to me that the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:

(a) the general discretion of the court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99, r.2(1)).

(b) in considering the awarding of costs of any action, the court should "have regard to" the provisions of s.169(1) (O.99, r.3(1)).

- (c) *in a case where the party seeking costs has been "entirely successful in those proceedings", the party so succeeding "is entitled" to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).*
- (d) *in determining whether to "order otherwise" the court should have regard to the 'nature and circumstances of the case' and 'the conduct of the proceedings by the parties' (s.169(1)).*
- (e) *further, the matters to which the court shall have regard in deciding whether to so order otherwise includes the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s.169(1)(a) and (b)).*
- (f) *the court, in the exercise of its discretion may also make an order that where a party is 'partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s. 168(2)(d)).*
- (g) *even where a party has not been 'entirely successful' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).*
- (h) *in the exercise of its discretion, the court may order the payment of a portion of the parties costs, or costs from or until a specified date (s.168(2)(a))"*

29. The effect of these provisions is that the general position is that costs should follow the event but this is subject to the Court's overall discretion and, in the exercise of that discretion, the Court must have regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including the matters set out in section 169(1)(a) – (f) of the 2015 Act. Furthermore, under Order 99 Rule 2(3) the Court, upon determining any interlocutory application, must make an award of costs save where it is not possible to justly adjudicate upon liability for costs and, in considering the awarding of the costs of such interlocutory application, the Court must have regard to the matters in section 169(1) of the 2015 Act. Thus, the general position provided for in sections 168 and 169 that costs follow the event subject to the court's overall discretion applies to the costs of interlocutory applications. While the meaning or operation of Order 99 rule 2(3) was not really explored during the hearing, two points should be noted: firstly, as previously discussed by the courts, it will often be more difficult for a court to be able to justly adjudicate upon liability for the costs of an interlocutory injunction application than other types of interlocutory applications; and secondly, the obligation to make an award of costs of an interlocutory application under Order 99 Rule 2(3) only arises where the Court has determined the application. This obligation does not arise in this case because I did not determine the interlocutory application. However, there is nothing to preclude me from making an award of costs and, indeed, Order 99 Rule 3(1) expressly provides for a discretion to do so. I have therefore approached the matter on

the basis that it would be preferable for the liability for the costs of the application to be determined at this stage if it is "*possible justly*" to do so.

30. However, in my view, it is not possible to do so and I am of the view, for the following reasons, that the appropriate Order is to reserve the costs to the trial of the action.

Reserved Costs

The Parties' Positions

31. The Plaintiff submits two broad bases upon which it says that it should be awarded the costs of the motion for injunctive relief.
32. Firstly, the application for an injunction, and the Plaintiff's insistence on a date for hearing, was necessary and justified in circumstances where:
- (i) In pre-litigation correspondence, representations were made by or on behalf of the Second-named Defendant which proved ineffective and works were only carried out after the Plaintiff brought its application for an injunction;
 - (ii) The condition of the building was dangerous and urgent works were required;
 - (iii) While some works were carried out by the Second-named Defendant these were shown to be inadequate by Storm Barra.
33. Secondly, there was a lack of candour on the part of the Defendants, and in particular the Second-named Defendant. This, it was submitted, is relevant in four respects:
- (i) It is sufficient in itself to warrant an order for costs against the Second-named Defendant;
 - (ii) The lack of candour means that the Plaintiff, and the Court, was deprived of knowing who the appropriate and correct parties were in a 'dangerous building' case;
 - (iii) The Court can infer certain matters from the non-disclosure;
 - (iv) The Plaintiff was caused to incur additional costs by the non or late disclosure of information.
34. The Defendants also seek their costs or in the alternative seek no order as to costs. They do so on the following bases:
- (i) There was no merit to the application because the works which the Plaintiff sought were not necessary, works were carried out which in any event were adequate, and the Second-named Defendant was not liable to the Plaintiff;
 - (ii) From the outset of the proceedings the Defendants had flagged to the Plaintiff that it was the Receiver's intention to sell the hotel in early course and the matter was

listed for sale by public auction prior to the issuing of the Plaintiff's motion and again on the 23rd July 2021;

- (iii) On the 2nd December 2021 the Defendants told the Court and the Plaintiff that the hotel had been sold at public auction on the 18th October, that a completion notice had been served and that it was anticipated that the sale would close in early course and, notwithstanding this, the Plaintiff pushed for a hearing date. The sale closed on the 7th February 2022 and the Plaintiff was informed of the closing by letter from the Defendant's solicitor of the 9th February 2022.;
- (iv) The suggestion by the Plaintiff that there is an issue arising out of an alleged non-disclosure on the part of the Second-Named Defendant as to the extent or nature of the interests of Everyday has no basis because (a) all the facts concerning Everyday had been available to the Plaintiff from the start and there was nothing stopping them joining Everyday as a Defendant much earlier, (b) the Plaintiff did not raise it before the hearing and (c) the Plaintiff did not directly ask in the Notice for Particulars dated the 7th September 2021 if the Second-named Defendant was acting as agent for Everyday;
- (v) The Plaintiff was guilty of significant delay in respect of the application;
- (vi) At the hearing the Plaintiff focused on the risk to public safety due to the condition of the building whereas the pleadings do not make out any substantial claim for relief arising out of a public nuisance;
- (vii) The Plaintiff has elected to withdraw its application for a mandatory interlocutory injunction and the Defendants had been wholly successful in opposing the Plaintiff's application. This is not a case where any act on the part of the Defendants has rendered the Plaintiff's application moot. They did not perform the works sought by the Plaintiff or do anything to otherwise compromise the dispute

35. I have considered all of the points made on behalf of the Plaintiff and the Defendants but it is not necessary to deal with each of them in detail. I propose to deal with point (vii) raised on behalf of the Defendant first, that this was not a case where any act on the part of the Defendants had rendered the Plaintiff's application moot and that the Plaintiff elected to withdraw its application and the Defendants were wholly successful. I can then usefully address points (ii) and (iii) raised by the Defendant at this stage. While they are of relevance to my consideration, they do not seem to me to be in any way determinative of the plaintiff or the defendants' entitlement to the costs of the application. I will then consider the grounds advanced on behalf of the Plaintiff.

Mootness

36. A specific difficulty always arises as to what should happen the costs of a matter where it has not been necessary to determine the matter due to it being rendered moot because of some intervening circumstances: if the "*overriding starting point*" is, as it was put by Clarke J in *Veolia Water UK plc v Fingal County Council (No. 2)* [2007] 2 IR 81, that costs

should follow the event, there is, so to speak, no 'event' (in the sense of a determination of the matter) or it is at least more difficult to identify the relevant 'event'.

37. There was some discussion during the course of the hearing as to whether the situation in this case is properly seen as giving rise to moot. It seems to me that it is. At paragraph 37 of his judgment in *Godsil v Ireland & anor* [2015] IESC 103, referring to his own judgment in *Lofinmakin (A Minor) & ors v The Minister for Justice, Equality and Law Reform & ors* [2013] IESC 49, McKechnie J said:

"(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or as part of some tangible and concrete dispute then existing.

(ii) therefore, where a legal issue has ceased to exist, or where the issue has materially lost its character as a *lis*, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined..."

38. It seems to me that once the building was sold a decision on the Plaintiff's application for a mandatory injunction against the Defendants could "have no practical impact or effect on the resolution of some live controversy between the parties", i.e. the question of whether or not the mandatory injunction should be granted. The issue of whether or not the court should grant a mandatory injunction against the Defendants had lost its "essential foundation": even if the Court were satisfied that an injunction would have been warranted, it could not grant that injunction.

39. In relation to costs where a matter has become moot, Clarke J in *Cunningham v President of the Circuit Court & anor* [2012] 3 IR 222 referenced his own approach taken in *Telefonica 02 Ireland Ltd v Commission for Communication Regulations & Ors* [2011] IEHC 265:

"where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand, or, in reality, have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of the proceedings rendered moot should lie."

40. McKechnie J in *Godsil* agreed with the approach outlined by Clarke J in *Cunningham* where Clarke J said:

"...a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a

factor or occurrence outside the control of the parties but should lean in favour of awarding costs against the party through whose unilateral actions the proceedings have become moot.”

41. Of course, *Lofinmakin, Godsil, Telefonica and Cunningham* all predate the 2015 Act. Nonetheless, they offer a useful guide to the exercise of the court’s discretion, particularly where the circumstances rendering the proceedings moot may be part of the consideration of the “*particular nature and circumstances of the case*” and the parties’ “*conduct before and during the proceedings*”, all of which are matters which section 169 require to be considered.
42. The Defendants’ emphasised that the traditional rule, where proceedings became moot because of some change in circumstances or external event beyond the control of the parties, was to make no Order as to costs. The suggestion was that the sale of the building was an ‘*external occurrence or circumstance*’.
43. It seems to me that it is not correct to see the sale of the building (the circumstance which rendered the application moot) as a wholly ‘*external occurrence or circumstance*’ which should lead to an application of the “*traditional rule*” that no order as to costs should be made. The sale of the building was a direct action wholly within the control of the Defendants.
44. However, nor would it be appropriate, in the circumstances of this case, to see it wholly as a unilateral action of the Defendants of the type that would lead to an automatic or default position that they should pay Plaintiff’s costs. Indeed, the Plaintiff did not even make the argument that it should get its costs on this basis. The proposed sale of the building was well-flagged by the Defendants. It was listed for sale by public auction prior to the issuing of the Plaintiff’s motion and again on the 23rd July; on the 2nd December 2021 the Defendants told the Court and the Plaintiff that the hotel had been sold on the 18th October and, while the sale had not closed, it was anticipated that it would close in early course. I emphasise that the flagging of the sale by the Defendants does not in itself mean that the Plaintiff should not have pressed on with its application or was obliged to withdraw it. There can, of course, be significant delays in the sales process and proposed sales can fall through, and I could not conclude that the Plaintiff should not have continued with the application merely on the basis of the Defendants’ intentions or even on the basis of a contract having been entered. However, it seems to me that where the sale is flagged from the very beginning and the Plaintiff maintains its application, the Plaintiff cannot be automatically entitled to its costs when the application is rendered moot by the very sale that has been flagged.
45. Thus, I do not believe that I can determine the question of costs purely on the basis of the application having become moot following the sale of the building.
46. In my view, the suggestion that the Plaintiff had elected to withdraw the application and that the Defendants had been wholly successful in opposing the Plaintiff’s application is misconceived. It cannot be said that the Defendants were wholly successful simply

because the Plaintiff elected to withdraw its application in the circumstances in which that withdrawal occurred in this case., i.e. due to the sale of the hotel by the Second-named Defendant, that the sale had been well-flagged, and where the Court did not determine the application. The Plaintiff was quite correct to withdraw the application in circumstances where it could no longer obtain relief from the court by reason of the premises having been sold. Indeed, the Plaintiff could legitimately have been criticised if it had insisted on pushing on with its substantive application.

Notification of Intended Sale of the Building

47. In relation to points (ii) and (iii) raised by the Defendants, as touched on above, I do not believe that the fact that the Defendants had flagged that it was the Second-named Defendant's intention to sell the hotel or, indeed, that the Defendants had indicated on the 2nd December 2021 that the contract had been signed can mean that the Plaintiff was not entitled to prosecute the injunction application if it was otherwise entitled to do so or that the Defendants should be entitled to costs of same. At its core this submission amounts to the Defendants saying that because it was the Second-named Defendant's intention to sell the premises the Plaintiff should not have sought relief from the court or should have withdrawn its application. In my view that is incorrect. There is never certainty in any sale process and, I venture to suggest, there is the potential for even greater uncertainty when the building being sold has the acknowledged difficulties of this building. I see no basis for saying in this case that the Plaintiff should not have sought relief or that it was obliged to await the outcome of the sale process before doing so and should be penalised on costs for not doing so. That point is reinforced by the lack of any specificity in any of the Defendants' indications of when various steps in the sale process might occur.

Necessary and Justified

48. The Plaintiff submits that the application was necessary and justified on three bases. The Defendants, on the other hand, seeks their costs because the application was not necessary or justified because the works sought by the Plaintiff were not urgently necessary, adequate works were also carried out by the Defendants and the Second-named Defendant was not liable anyway. At this stage, in circumstances where I am dealing with costs, I am not required to be satisfied that the works were necessary or, indeed, unnecessary, or that the Plaintiff has established a strong case that they were necessary. That would require a determination on the substance of the application. Placing the application in the context of section 169 of the 1969 Act it seems to me that it is more appropriate that I examine the reasonableness of the parties' respective positions (section 169(1)(b)).

49. In order to assess the parties' respective positions in relation to the necessity of the application consideration has to be given to what was at issue in the application when it was first made. It strikes me that there was a degree of confusion between the parties in this regard. As noted above, while initially the interactions between the Plaintiff and the Defendants in January – March 2021 (pre-litigation) were in respect of the need to stop the water ingress into the Plaintiff's unit from the poor condition of the hotel roof because of the impact it was having on the Plaintiff's ability to use or rent its unit, the

focus of the Plaintiff's concerns broadened to the danger to the structural integrity of the building following receipt of Mr. Merriman's report of the 24th March 2021. There were two elements related to structural integrity: the risk of structural collapse; and the risk of elements falling off the building to ground level. While the Notice of Motion was limited to a *"mandatory injunction directing remediation and prevention of the serial leaks and ingressions of water affecting the Plaintiff's ground floor premises located..."*, in fact by that time that safety issue was central to the case the Plaintiff was making. The application was largely grounded on Mr. Merriman's report of the 24th March 2021. The major concerns identified in that report were (i) the impact on the Plaintiff's unit and its use of the unit and (ii) the risk to structural integrity. While it is noteworthy that there is no express reference to *"public nuisance"* in the Plenary Summons or Statement of Claim notwithstanding the emphasis that was placed on it at the hearing, paragraph 46 of the Statement of Claim does plead:

"In addition to the foregoing, Fergus Merriman observed accelerated dilapidation of at least three visible structural elements. Fergus Merriman's view was that unless the water ingression is soon halted, the property will continue to be uninhabitable and will be increasingly structurally unsafe eventually leading to structural collapse of major elements potentially rendering the property valueless with the further encumbrance of demolition or at least public safety temporary structures."

50. This was reflected in the grounding affidavit of Mr. Lakhani. For example, in paragraph 3, Mr. Lakhani stated:

"...The within application is being made in circumstances where the building in which the Plaintiff's ground floor retail outlet premises in Ballybunnion is situate is in danger of structural collapse of major elements and the defendants who are the owner of the building and a receiver appointed over that owner's assets have failed to take remedial action."

51. In paragraph 55 and 56 he stated:

"As is apparent from the expert report provided by Fergus Merriman, unless immediate action is taken to remedy the roof damage, the building is at risk of substantial collapse or at least accelerated risk from storm damage leading to elements of the structure falling to street level or surcharging lower elements that might then lead to disproportionate collapse of already weakened elements of the structure.

A potentially catastrophic situation can be avoided if works are immediately carried out. As detailed in correspondence already referred to, the receiver himself is "concerned" about the roof situation of the premises."

52. It therefore seems to me that a central question is whether the parties' positions in respect of the application on the grounds of a danger of structural collapse were reasonable. There is a clear difference of opinion between the experts on this point. While

there is a large element of agreement between them as to the very poor condition of the building and the reasons for it (for example, there is agreement about the risk of external elements such as fascia coming loose and falling to ground level) and the remedial works that will be required, they are in sharp disagreement as to the immediacy of any risk of structural collapse.

53. In his report of the 24th March 2021 Mr. Fergus Merriman stated, *inter alia*:

"We further consider that without immediate action the premises is at risk of becoming permanently derelict with potential for structural collapse"

54. He went on to state under the heading "*Consequences of inaction whether immediate danger of irreparable harm*":

"Generally speaking constructions of this nature are robust and can withstand a good proportion of abuse, however, I note in this situation that:

- 1. the structural concrete columns and floor plates appear to have been slightly constructed with minimal size elements and minimum cover forwarded to the reinforcement steel.*
- 2. The property is located in the extreme exposure marine environment meaning additional structural requirements may have been indicated for unprotected elements of structure that are not evident without invasive investigation.*
- 3. Water ingress has been occurring unchecked for a considerable period.*
- 4. Rainwater at this exposed location will contain a high quantity of deleterious salts carried from Ocean spray.*

Evidence visibly presents of cracking, delamination and Rust staining to large areas of structural elements indicating that accelerated dilapidation of at least these visible structural elements has commenced, is ongoing and remains unchecked.

We are unable to accurately quantify the full extent that distress to the structure has endured due to the limitations of a visual inspection alone, a more invasive investigation will be required.

We can state with certainty that unless the water ingress is soon halted, the subject property will continue to be uninhabitable and will be increasingly structurally unsafe eventually leading to structural collapse of major elements potentially rendering the subject property valueless with the further encumbrance of demolition costs or at least Public Safety temporary structures.

The enclosing structure in alternate ownership is a substantial bulk of construction immediately overhead the subject property. I believe that unless immediate action

is taken to remedy the roof damage the property it is at risk of substantial collapse or at least accelerated risk from storm damage leading to elements of the structure falling to street level or surcharging lower elements that might then lead to disproportionate collapse of already weakened elements of that structure.

The building owners have high potential for "dangerous building notice" under the Local Government (Sanitary Services) Act 1964, if the local authority becomes aware of the extent of deterioration, unattended past storm damage and the potential of further storm damage detaching large elements placing the public at risk in this exposed location. If this is not adequately responded to the LA's satisfaction they have a statutory duty to either enter and repair, or to compulsorily purchase the building."

55. The Defendants obtained a report from Malachy Walsh & Partners dated the 30th April 2021 in which it was stated:

"4. Review of the Merriman Solutions Former Bank of Ireland Premises Report of 24th March 2021

MWP have reviewed the report as developed, signed and issued by Mr Fergus Merriman, MSCSI MRCIS EurBE and make the following observations/comments hereunder.

It is our opinion that the general description given is accurate, the conditions of the hotel premises and bank premises are considered factual and accurate and the author's concerns with regard to the structural integrity are noted.

MWP cannot reasonably argue with the conclusions reached in section 4. 'Conclusions' for the most part and again no stick concern regarding "potential for structural collapse". MWP are further in broad agreement with the conclusions reached in section 5 'Remedial potentials' and with observations 1 to 4 inclusive in section 6 'consequences of inaction whether immediate danger or irreparable damage'.

MWP do not agree that it is possible, visual inspection, to state with certainty that continued water ingress will lead to structural collapse of major elements. MWP are wholly in agreement that short-term action is required to stave off the possibility of further degradation of the asset, but do not agree that lack of immediate action will lead to permanent dereliction with potential for structural collapse. Degradation of any structural element has the potential to lead to compromise of the integrity and eventual structural failure, there is no evidence to suggest at present that this is imminent.

We agree that the most reasonable and effective remediation for both properties is to seal the hotel premises at roof level. Appropriate remediation works carried out

in a timely manner will maintain the integrity of the structure and support the reinstatement of both premises are a habitable condition.

...

The former bank premises and building therein, for the most part, is not physically in danger of collapse at present. The hotel premises likewise. The hotel premises has however, as noted in the report, a number of elements in a poor state of repair, in an unsafe and dangerous condition and would pose a risk to the health and welfare of the general public...

...

MWP do not agree that it is possible, from visual inspection, to state with certainty that continued water ingress leads to structural collapse of major elements. MWP wholly in agreement that short-term action is required to stave off the possibility of further degradation of the acid, but do not agree that lack of immediate action will lead to permanent dereliction with potential structural collapse. Degradation of any structural element has the potential to lead to compromise of the integrity and eventual structural failure; there is no evidence to suggest at present that this is imminent.

..."

56. MWP provided a further report of the 1st July 2021 after works were carried out and after a number of visual inspections during May and June 2021. This was entitled "Additional Solicited Commentary" and was in a slightly unusual format whereby the Defendants sought confirmation of a number of matters and MWP responded directly to the questions that were asked:

"2.3 Brief summary of findings in relation to the main issue affecting the BOI unit

...

MWP are of the opinion that the issues as outlined have considerably degraded internal finishes, fixtures, fittings, furnishings building services, ceiling and partition structures and finishes. MWP are further of the opinion that there is no evidence to suggest that the above issues have specifically affected the structure (structural frame, supporting walls, structural slab over ceiling, floor slab, foundational elements, etc) to any significant degree.

2.4 Confirm that the structure is for the most part in good condition and not in imminent danger of collapse, i.e. there is no evidence that the property is structurally unsound

MWP confirm that there is no visual evidence to suggest that structure is unsound or in imminent danger of collapse.

2.5 Confirm that the compromised column is not of immediate concern to the integrity of the property in the immediate to short term.

The compromised column is in the southeast corner of the hotel property (to the rear of the 6-storey section). This column will not affect the former bank premises. MWP does not anticipate any immediate failure of the structure associated with this defective column."

57. Mr. Merriman prepared a second report following an inspection on the 19th October 2021. He was denied access to the roof on that occasion by personnel from the security company who told him that they were instructed that he should not be allowed onto the roof due to health and safety concerns. This became part of the Plaintiff's second motion addressed below.

58. Mr. Merriman reported:

"At the top/5th floor level it was immediately apparent that considerable ingress of water was ongoing with pools of water on the floor and consistent dripping of water falling from the partially collapsed ceiling as evidenced in the photographs below.

...

Given the current quantity of water ingress and without being allowed sight of the roof deck at this inspection it must be concluded that the situation has either not changed or in fact deteriorated further.

Whilst no access was possible to the ground floor former bank premises in ownership of my client during this inspection, it is very evident, given the prolonged ingress of rainwater containing marine salts emanating from above, that the ongoing deterioration to the fabric and finishes within my client's premises previously recorded has continued unabated

There was no indication during my inspection that the condition of my client's premises could in any manner without the repair to the structures the timely lack of relatively inexpensive repairs has accelerated the damage beyond proportion and continues so.

...

Despite not being afforded access roof level it is evidentially clear that little or no work to attempt any effective repairs have taken place by the encompassing buildings owners since my last inspection.

Accordingly, the general condition of the building and my clients ground floor premises have considerably worsened due to the constant and considerable stream of rainwater containing marine derived salts that have entering the fabric of the

building from the roof area over a very prolonged period due to negligent lack of normal action the building owners to enact sensible repairs in a timely manner.”

59. This report was exhibited to the second affidavit of Mr. Arif Lakhani. Some of Mr. Lakhani’s affidavit consists of argument. I think it is fair to note that Mr. Lakhani emphasises parts of MWP’s reports which identified a risk of accidental environmental damage to the building and the need for works to secure elements of the building from falling loose. To that extent there is a shift to a greater emphasis on the injunction being necessary to prevent such risks. Indeed, that is reflected in the points that were later made about elements of damage that were caused by Storm Barra and the underlying criticism of the alleged remedial works carried out on MWP’s recommendations. However none of that can not take from the fact that a core basis of the bringing of the application was the concern about risk of structural collapse (see paragraph 3 of Mr. Lakhani’s grounding affidavit quoted above).

60. MWP carried out further inspections on the 7th December and 18th December 2021 after Storm Barra and provided a report dated the 20th December 2021 which was exhibited to a second affidavit of Mr. Tyrrell. The Report stated:

“MWP carried out an inspection of the golf hotel premises on 7 December 2021 in the aftermath of the Storm Barra and again on 18 December 2021 following completion of emergency remedial works to remove loose/damaged façade and roof elements to temporarily secure the building and make safe. MWP had previously inspected the property in April 2021 and July 2021 and instructed similar works.

...

All previously noted visual inspections and associated assessments have informed MWP’s opinion of the structure as outlined in previous reports. We have previously confirmed that the structure is, in our opinion and for the most part, in relatively acceptable condition and not in imminent danger of collapse, i.e., there is no visible evidence that the property is structurally unsound.

MWP also previously confirmed in July 2021 that the property had not significantly degraded since the end of April 2021...”

61. As noted above, there was agreement between the experts in many areas of their assessments and in respect of certain works which were required to be carried out. However, on one of the fundamental issues which was at the heart of the application – that if the roof was not repaired the building would be at short-term, if not immediate, risk of structural collapse – there was acute disagreement. (There is also, of course, disagreement between the parties in relation to whether the remedial works that were carried out in June were adequate to stop elements coming loose and falling off the building). If it had been necessary to determine the injunction application these disputes, particularly in relation to the first issue, would have had to have been resolved at least to the extent of deciding whether the Plaintiff had established a strong case. However,

where there is such a clear dispute and the question is one of costs it seems to me that I should not embark on trying to resolve the dispute between the experts even to the extent necessary to attempt to determine liability for costs. To enter into a resolution of such a clear dispute of expert opinion would turn costs applications into mini-trials. Furthermore, it seems to me that the trial judge will be in a much better position to resolve the dispute between the experts as he or she will have had the benefit of hearing the experts' evidence with the benefit of cross-examination. In circumstances where there is such a clear dispute, in the absence of determining the substantive issue it seems to me that it is not possible justly to adjudicate on the liability for costs at this stage.

62. To approach this from a slightly different perspective and in the context of section 169(1)(b) – the position of both parties is supported by reputable expert opinion. It seems to me that prima facie their positions must be seen as being reasonable and, in the absence of a determination as to which expert opinion is correct or should be preferred, it is impossible to fix one or other party with liability for costs. To do so on a costs application without the opinions being interrogated through cross-examination risks an injustice.
63. In those circumstances, I am satisfied that the appropriate order as to costs is to reserve the costs.
64. It seems to me that this determines the matter. However, lest I am incorrect I propose to address the other points raised by the parties.

Representations by the Second-named Defendant

65. The Plaintiff also relies on the fact that representations were made by or on behalf of the Second-named Defendant before the institution of the proceedings that works would be carried out but they were only carried out after the application for an injunction was made. There would be considerable force to the argument that the Plaintiff should get its costs if the works which were sought by the Plaintiff (or indeed promised by the Second-named Defendant) were carried out by the Defendants but only after the issuing of the motion. However, it is not as straightforward as that because it appears that the works that were carried out were not the same as had been sought.
66. The pre-litigation correspondence from the Plaintiff on foot of which the alleged representations were given demanded repair works to the roof to stop the water ingress into the Plaintiff's unit. For example, by letter of the 29th January 2021 to the receiver the Plaintiff's solicitor stated:

"... Take note that substantial damage has been occasioned and is ongoing to our client's premises, being the owner of the Ground Floor of the Golf Hotel, Ballybunion as a result of the ingress of water coming from and through the roof of the premises owned by the Company in respect of which you are Receiver.

Take note, that as Receivers over the property, it is now within your responsibility to ensure the immediate repair of this roof to prevent any further water ingress and ongoing damage and deterioration of our client's premises.

We require your open confirmation within 10 days from the date hereof that you will take immediate action to rectify the situation by repairing the roof in question to stop ongoing ingress of water and ongoing damage to our client's premises

...

Our client is not prepared to allow this situation to continue and will have no option unless the roof is repaired forthwith but to take injunctive proceedings against you as Receiver."

67. The receiver replied to say that he had sought quotes to carry out repairs to the roof. By letter of the 1st March the Plaintiff's solicitor sought:

"...a written undertaking to us wherein you undertake to remediate the leaking and water ingress and that same would be carried out prior to any sale of the property. Further, that such remediation works will be carried out expeditiously and in any event no later than one month from the date of the undertaking..."

68. As noted above, there was also correspondence between the Plaintiff's solicitor and the First-named Defendant's solicitor and the focus of this was the repairs to the roof; to such an extent that there was discussion that the problem had been caused by works connected with the erection of a mobile phone mast on the roof.

69. Even after delivery of Mr. Merriman's report of the 24th March the Plaintiff was seeking repairs to the roof. By letter of the 26th March 2021 the Plaintiff's solicitor stated:

"...Our client has in previous correspondence complained to both Lartigue Enterprises Ltd and the receiver in relation to the damage being done to our client's premises by water coming from the roof of the hotel building. Notwithstanding indications that repairs to the roof might take place no repairs have been carried out or even commenced.

We enclose an expert report which indicates that unless immediate action is taken to remedy roof damage the building is at risk of substantial collapse or at least accelerate risk from storm damage leading to elements of the structure falling to street level or surcharging lower elements that might then lead to disproportionate collapse of already weakened elements of the structure..."

70. It is equally clear that any indications or representations that were made on behalf of the receiver were with regard to the roof.

71. As noted above, if the works that were carried out after the issuing of the motion were the works that had been sought (and promised) it would be easy to see how that might

give rise to an entitlement to costs. However, at this stage, they do not appear to be the works that were carried out. While MWP acknowledged that "*the most reasonable and effective remediation for both parties is to seal the hotel premises at roof level*", that was not in fact done. It seems from the Schedule of Works attached to the MWP Report that the extent of the works to the roof that were carried out were:

- Secured fixings on metal sheeting on south balcony
- Secured roof flashings
- Removed debris and rubbish
- Secured the deck on roof

72. These do not appear to have been directed towards stopping the water ingress into the Plaintiff's unit. Indeed, Mr. Merriman in his report of 24th March estimated the works that were needed to the roof to be in the region of €40,000- €60,000. MWP assessed the required works as being:

"...the roof at high level should be completely stripped down to the metal deck and all existing coverings, insulations, flashings, weatherings, cappings, fascias, etc removed and replaced. The metal deck will require replacement (possibly allow for 30% estimated on visual evidence) and all existing retained fixings checked. These may require replacement, especially adjacent to the compromised areas. The existing steel roof trusses should be checked at connections and for any compromised members. Bolts, welds plates etc may require upgrading or replacement. All roof steelwork should be shotblasted and primed.

The balcony level roofs/decking should be cleaned down to the existing concrete slab and insulated and re-covered. All and any fixtures removed and replaced as necessary..."

73. The purpose of the works that were in fact carried out to the roof (per the Schedule of Works) was revealed in MWP's Report entitled "Additional Solicited Commentary" where MWP note that they were asked for confirmation "whether any of the proposed works at item 4 of the Report (to *protect the health and welfare of the public from risk of falling debris* etc) have been completed and provision of a summary of the works carried out" [emphasis added]. It is clear from the question that was asked that the purpose of the works, including the works to the roof, was simply to "protect the health and welfare of the public from risk of falling debris", rather than to address the substantive damage to the roof or the water ingress arising from that damage. I emphasise that I am not considering the adequacy of the works or liability for same on foot of the representations by the Second-named Defendant but simply the question of whether the Plaintiff has an entitlement to its costs on the basis that it sought certain works in the motion and they were done after the motion was issued. It is not open to me to conclude at this stage that the works that were done were those that were sought by the Plaintiff. It must, however,

also follow on the basis of the current state of the evidence that the Defendants could not be entitled to their costs on the basis that they carried out works which were adequate. I discuss the adequacy of the works in the next section but in the context of this discussion, if the works were not directed towards the problem *raised by the Plaintiff* which lay at the heart of its application and did not amount to the works that were recommended by their own expert to address the problem raised by the Plaintiff then it is impossible to see how they can be said to be adequate (they may, of course be adequate to address the risk of falling debris etc, but as discussed in detail above that is not what was raised by the Plaintiff prior to the litigation or what lay at the core of the application when it was made). It must also be noted that in point (vii) raised by the Defendants they stated that they did not perform the works sought by the Plaintiff. Thus, based on the evidence as it currently stands I cannot see how it can be said that either party is entitled to its costs on the basis that what was sought by the Plaintiff was done shortly after the issuing of the motion.

Adequacy of the Works

74. The Defendants seek their costs on the basis that adequate works were carried out in June 2021 and the Plaintiff contends that any works that were done were not adequate. As time went on, the dispute between the parties did become more focused on works concerned with avoiding risk to the public from debris falling of the building. As noted above, the Plaintiff placed greater emphasis on this towards the end of December 2021. This is seen in the third basis on which the Plaintiff says it is entitled to the costs that “while some works were carried out by the Second-named Defendant, these were shown to be inadequate by Storm Barra” and the Second-named Defendant’s assertion that the works that were carried out were adequate.
75. I do not believe that I have sufficient evidence upon which to conclude, even to the limited extent necessary to deal with the costs issue, that the works that were carried out were inadequate. Of course, that begs the question of what is meant by “adequate” and “inadequate”: “inadequate” for what? It must mean inadequate to prevent elements coming loose and falling to ground level because Storm Barra is only relevant to that type of damage.
76. MWP say in their report “Additional Solicited Commentary” of July 2021 that:
- “MWP confirm that the works as completed will secure the building from accidental environmental damage and risk to the health and safety of adjacent public in the immediate term in so far as it is reasonably practicable to affirm. MWP further recommend that the building should be inspected and monitored on a regular basis hereafter for any change to the present condition and actioned thereafter accordingly.”*
77. Mr. Merriman’s report of the 10th November 2021 (which was prepared without the benefit of being allowed onto the roof of the building) was focused on the condition of the building as it affected the Plaintiff’s unit and did not really comment on this assertion.

78. Notwithstanding MWP's stated opinion that "*the works as completed [in June 2021] will secure the building from accidental environmental damage and risk to the health and safety of adjacent public in the immediate term so far as it is reasonably practicable to affirm*", elements did become loose and fall off the building during Storm Barra on the 7th December. I am invited by the Plaintiff to conclude that the motion was necessary and justified because the works that were carried out were inadequate (to prevent items falling from the building) because materials fell from the building in Storm Barra. While on an instinctive level there is an attractiveness to this contention, I do not believe that I can safely reach a conclusion on this point in light of the absence of evidence to support the proposition that the fact that debris fell off the building during the storm must mean that the June works were inadequate and in the face of the opinion of MWP on the 20th December 2021, the implication of which seems to be that as Storm Barra "was a significant and unprecedented storm event in strength and duration" damage could have been caused even if the works that had been carried out earlier were adequate.

Lack of Candour

79. Turning to the Plaintiff's argument that the Second-named Defendant was guilty of a lack of candour such as to give rise to an entitlement to costs on a number of bases set out at paragraph 33 above.

80. It is undoubtedly the case that a lack of candour is a factor to be taken into account in determining who should pay the costs of an application. It clearly falls within the conduct of the parties and the conduct of the proceedings by the parties, both of which are matters which I am required to have regard to by section 169 of the 2015 Act and Order 99 of the Rules of the Superior Courts. It goes without saying that it is necessary to be careful to avoid confusing the duty of candour on a party moving, for example, an *ex parte* application with the duties of parties in adversarial proceedings.

81. There are a number of different aspects to the alleged lack of candour. One is that the sale closed on the 7th February and the Defendants did not inform the Plaintiff until the evening of the 9th February, thereby causing the Plaintiff to incur the costs of preparing for the hearing, including submissions, on the basis that the Defendants were still in possession and ownership of the building. It would, of course, have been better if the Plaintiff had been told immediately the sale closed but in circumstances where the delay was a matter of two days it does not seem to me to amount in itself to a lack of candour which is determinative of the liability for costs. In the event that ultimately the Plaintiff is held to be entitled to its costs after the substantive issues discussed above are determined any additional costs caused by the two day delay in the Defendants informing the Plaintiff of the closing of the sale can be dealt with at the adjudication of costs. For example, there would seem to me to be no basis at all upon which the Defendants could contend that the full cost of submissions and preparation for the hearing are not allowable because the building had been sold prior to the hearing.

82. The Plaintiff also makes the point that even when the Defendants informed it of the closing of the sale it did not provide a copy of the assurance by which the sale was effected, and only provided a redacted copy of the contract of sale. The Plaintiff then

obtained another copy of the contract with less (though still some) redactions and the Defendants consented to this being referred to by the Plaintiff. This point is part of the Plaintiff's core point in relation to lack of candour. The Plaintiff says that it learned from the second copy of the contract of sale (the less redacted version, which it only received on the second day of the hearing) that the Second-named Defendant was acting as agent of the mortgagee; that the special conditions provided that the conveyance was to be from Everyday Finance DAC. The Plaintiff says that it had been trying to obtain information since September 2021 as to who was in control of the building and that its requests for information had gone unanswered. The Plaintiff's second motion sought this information at relief number 6.

83. The Plaintiff submitted that the significance of the information which it obtained from the contract is that presumably it means that Everyday Finance DAC was a mortgagee in possession and this would have had a bearing on the appropriate parties to have before the court.
84. I am not satisfied in the circumstances at this stage that the failure by the Second-named Defendant to expressly state whether or not he was acting as agent for Everyday, as mortgagee in possession, amounts to a lack of candour which should attract an order for costs against the Second-named Defendant. While the precise status of Everyday remains unclear, this will have to be resolved at the full trial and the Plaintiff may well explore this issue fully using all the court's procedures but for present purposes it is noteworthy that Everyday's involvement as the chargeholder was known to the parties from the outset and Everyday could have been joined to the proceedings or an appropriate O'Byrne type letter could have been sent prior to the institution of the proceedings. It is also noteworthy that while the Plaintiff did seek information as to the identity of all parties in possession of or exercising control over the hotel building or in receipt of any income, rents or profits in respect thereof, it did not, until late January 2022, expressly ask whether the Second-named Defendant was acting on behalf of Everyday despite being aware of their involvement. It did not raise any issue in the context of this motion about Everyday's possible involvement until late January 2022. Of course, this may partly be explained by the fact that the contract of sale was not provided but in circumstances where Everyday's involvement was known, and where the questions about who was in control of the building may have been partly directed towards this, the issue could have been raised expressly at a much earlier stage. The Plaintiff could have brought the appropriate motion at a much earlier stage when the Second-named Defendant did not respond to the Plaintiff's query raised, for example, in the Plaintiff's Notice for Particulars in September 2021.
85. I am not satisfied at this stage that the Plaintiff has established a lack of candour that gives rise to an entitlement to costs.
86. The role of Everyday may well be very important including to the question of liability for any failure on the part of the Defendants and damage to the Plaintiff's unit and, possibly therefore, the costs of this motion. However, that role and those issues could only be

determined at the full trial and it seems to me that this suggests further that the appropriate order is to reserve the costs.

Delay

87. There is no doubt that the Plaintiff could have moved the application sooner and, indeed, could probably have moved it on quicker. However, I am not satisfied that this amounts to a culpable delay which in itself would have disentitled the Plaintiff to relief (if the Court had to determine the application) or which entitles the Defendants to the costs of the motion; nor do I accept that I can conclude, as suggested by the Defendants, that the 'delay' means that the Plaintiff did not really believe that there was an urgency to the matter. Any delay in moving the application in the first place has to be seen in the context of the indications given by the receiver that works were going to be done and in the context of correspondence from the Plaintiff and the Second-named Defendant asking the Plaintiff to hold off applying to the Court. The following chronology is instructive:

(a) The Second-named Defendant sent a letter on the 4th February 2021 stating:

"I hope to be able to instruct a contractor to repair the roof in the coming weeks but I await clarity from the contractor as to when they can start the works and if they're permitted under the current Government guidelines/restrictions."

(b) The Plaintiff's solicitor sent two letters to the Second-named Defendant (8th and 15th February 2021) seeking a time line for the works and an urgent response.

(c) The Second-named Defendant replied on the 18th February:

"The Company has selected a contractor to carry out the repairs.

As the Company is insolvent and has no funds available, it is reliant on the chargeholder to provide the funding in order for the works to commence as the contractor requires an up-front deposit with tight payment terms thereafter once the works commence."

(d) On the 23rd February 2021, the Plaintiff's solicitor sought a start and finish date and on the 1st March 2021 they gave 10 days for a written undertaking to remediate the leaking and water ingress.

(e) The Plaintiff's solicitor wrote to the Second-named Defendant on the 26th March 2021 enclosing Mr. Merriman's report and required, within 14 days, "a commitment to undertake immediate emergency works failing which an application will be made to Court". The Plaintiff's solicitor also wrote to the First-named Defendant's solicitor but did not send the Merriman Report.

(f) There was no reply so the Plaintiff's solicitor served the Plenary Summons on the First-named Defendant on the 7th April and the Second-named Defendant on the 8th April.

- (g) By letter of the 9th April 2021 solicitors on behalf of the Second-named Defendant indicated that they were taking instructions and hoped to be in position to respond the following week and stated:

"In the interim we would ask that you desist from issuing any motion against the named Defendants.

In the event that you decide to issue a motion, then we will use this letter to fix you with the costs of defending any motion that issues against the Defendants."

- (h) By letter of the 12th April the Second-named Defendant's solicitor stated:

"...We have now taken instruction and are advised that our client is currently engaging the services of a Surveyor to inspect the property. To facilitate this inspection, you might please confirm that you will provide access to the ground floor property when called upon to do so..."

- (i) The Plaintiff's solicitor agreed the following day to provide access and on the 14th and 16th April they sought confirmation that the solicitors had authority to accept service and that an undertaking in relation to the remedial works would be forthcoming.
- (j) The Plenary Summons and Statement of Claim were served directly on the Second-named Defendant on the 21st April.
- (k) The motion seeking the interlocutory injunction was issued on the 10th May 2021. However, it is important to note that an application for short service of that motion was made on the 30th April grounded on the affidavit of Mr. Lakhani of the 26th April 2021. That application was refused and when the motion was issued on the 10th May it was given a return date of the 19th July 2021.

88. Two things are apparent from this sequence: first, it was reasonable for the Plaintiff to hold off coming to Court in the belief that works were going to be carried out at least until that letter of the 16th April (the precise legal effect of all of this correspondence and the indications given by the Second-named Defendant will have to be determined at the full trial) and, indeed, it could have been criticised for launching proceedings prior to that stage; second, once the Second-named Defendant's solicitors became involved they sought time to take instructions.

89. It seems to me that, within reason and depending on the circumstances, a party should not be penalised on costs on the grounds of delay for attempting to resolve matters before going to Court. Furthermore, in my view, where one party asks the other to hold off making an application and they accede to that request it is very difficult to see how the requesting party can have an entitlement to costs on the grounds of the other party not moving sooner.

90. As noted above, while the motion seeking an injunction was issued on the 10th May, an application for short service of the motion had been made on the 26th April. This was refused and the motion when issued was given a return date of the 19th July 2021. This was a slight delay in the Plaintiff actually issuing the motion for injunctive relief but it was in the order of a few days which, given the return date which was actually given for the motion, is insignificant. The period between the issuing of the motion and the 19th July can not be seen as a culpable delay on the part of the Plaintiff in circumstances where it had made an application for short service and where the 19th July was the return date given for the motion when it was issued.
91. What followed was that a replying affidavit was delivered by the Second-named Defendant on the 16th July 2021 in which two reports of MWP were referred to and one of them was exhibited. That affidavit referred to works having been completed by the Second-named Defendant and the Plaintiff asked for the matter to be adjourned for the purpose of obtaining a further report in light of the suggestion that works had been carried out. When the matter came back before the Court on the 7th October it was adjourned to the 2nd December because the report was not available. That report was then exhibited to an affidavit of Mr. Lakhani which was delivered on the 30th November 2021.
92. It seems to me that it was reasonable for the Plaintiff to seek time following receipt of the replying affidavit of the Second-named Respondent just three days before the return date in circumstances where a central point in the Second-named Defendant's reply was that works had been carried out which had rendered the premises safe. That had to be considered by the Plaintiff. That consideration could possibly have led to the resolution of the matter but, at the very least, time was needed for the Plaintiff to consider the development in consultation with Mr. Merriman and, if necessary, for a further report to be prepared by Mr. Merriman. The matter was adjourned to very early in the new term and I do not believe that this can be a basis for fixing the Plaintiff with the costs of the motion. On that occasion (the 7th October) the matter was adjourned again and Mr. Merriman's report only became available after the 10th November. His inspection which formed the basis for this report only took place on the 19th October. No explanation was given for the delay up to the 30th November but it is quite clear that the Plaintiff could not engage with MWP's reports (even if both had been properly exhibited in the affidavit) or the Second-named Defendant's affidavit without a further report from Mr. Merriman. In the absence of an explanation for the delay in obtaining Mr. Merriman's report it seems to me that the delay is certainly less than ideal. However, I do not think that it is as significant as would disentitle the Plaintiff to relief and nor do I consider in the circumstances of the case that the period between the institution of proceedings to the 2nd December 2021 amounts to a culpable delay.
93. I am reinforced in this view by the fact that the Defendants were not demanding that the Plaintiff move the application on any quicker (indeed the Defendants resisted a hearing date being given on the 2nd December) and particularly by the fact that the Plaintiff prosecuted the proceedings throughout this period by seeking the delivery of a Defence

and by timely delivery of a Notice for Particulars and Rejoinders to the Defendants' Replies.

Liability of the Second-named Defendant

94. While the question of whether the Second-named Defendant had any liability to carry out the works would have been a fundamental part of the injunction application (and obviously will be a fundamental part of the substantive action), in light of my conclusions on the other issues above, I do not address it in any detail other than to say that there will have to be much fuller argument on this issue and this may have to await the establishment of factual matters. Any fuller argument is likely to encompass the status and legal effect of the indications given by the Second-named Defendant in the correspondence referred to above that works would be carried out, and the role of Everyday and the relationship between the Second-named Defendant and Everyday (which may well be fact dependent). It seems to me that in some respects these issues have not fully crystallised yet and in those circumstances it would be inappropriate to do anything other than to reserve the costs.

Conclusion

95. In all of those circumstances, it seems to me that the appropriate Order in respect of the costs of the Plaintiff's motion for a mandatory injunction is to reserve the costs to the trial of the action.

The Plaintiff's Second Motion

96. In its second motion the Plaintiff sought a number of reliefs relating to particulars, inspection (of documents and of the building), and disclosure of information.

97. Before and during the course of the hearing the issues were narrowed and the only Orders which the Court was asked to make were Orders directing a limited number of replies to particulars and an Order directing the Defendants to provide certain information. The Plaintiff also sought its costs of having sought the other relief, in particular, the Order at paragraph 5 of the Notice of Motion seeking inspection of the building, which had been rendered unnecessary by the sale of the premises. The Defendants sought their costs on the basis that the Plaintiff is not entitled to the relief which it was still seeking and would not have obtained any of the other relief which it originally sought.

98. In respect of particulars the Plaintiff was seeking an Order pursuant to Order 19 Rule 7 of the Rules of the Superior Courts compelling the Defendants to provide replies to paragraphs 3(f), 3(g), 4 and 7 of the Plaintiff's Notice for Particulars delivered on the 7th September 2021. They read:

"3. Further in respect of paragraph 2 of the Defence, and the plea that the second-named Defendant "is and was at all material times the agent of the first-named Defendant", please:

(f) *State whether either the first-named Defendant or the second-named Defendant has taken instructions from any other party in relation to any of the matters the subject of these proceedings giving particulars.*

(g) *State whether the first-named Defendant accepts responsibility for the conduct of the second named defendant on the basis that it "is and was at all material times the agent of the first-named Defendant";*

...

5. *Further arising from paragraph 2 of the Defence, please particularise in detail the material facts relied upon in grounding the plea that the first-named Defendant is insolvent.*

...

7. *In respect of paragraph 6 of the Defence, please state each and every person or entity who occupies and who exercises control over the floors owned by the first-named Defendant."*

99. The Defendants' replies to particulars stated, inter alia:

"3. *This is a matter for legal submission and for evidence.*

...

5. *This is a matter for evidence. Without prejudice to the foregoing, the second named Defendant was appointed following the failure of the first named Defendant to pay its debts as they fell due.*

...

7. *The property is unoccupied. It is in the control of the second named Defendant as agent of the Plaintiff."*

100. The Plaintiff delivered rejoinders in which it stated:

"3 *With respect, while legal submissions may arise in relation to the request, the request itself is for particulars of the defence pleaded, and, pleas which are central to these proceedings. The question of whether the second named defendant is acting on instructions from any party other than the first named defendant bears on the maintainability of the plea that it is an agent of the first named defendant, (which appears to suggest that the second named defendant is an agent for the first named defendant alone).*

...

4. *The request is repeated, please provide particulars of the material facts relied upon in grounding the plea that the first named defendant is insolvent. If it is alleged to be an insolvency grounded on failure to pay a particular debt or debts please identify the debt or debts. If it is alleged that the first named defendant has a balance sheet insolvency please give particulars.*

...

7. *In relation to the reply provided, please give particulars of the control that has been exercised by the second named defendant as agent of the first named defendant and please state whether any control has been exercised at the direction of any party other than the first named Defendant."*

101. Counsel for the Defendants directed the Court to *Quinn Insurance Ltd (Under Administration) v PriceWaterhouseCoopers (A Firm)* [2019] IESC 13 as confirming the test in respect of Particulars and this was not disputed by the Plaintiff. O'Donnell J said at paragraph 20:

- "i. The basic rule remains the classic formulation in Mahon v. The Celbridge Spinning Co. Ltd. [1967] I.R. 1, at p. 3. A party is entitled to know the nature of the case being made against them. However, the role of particulars is not to require a party to furnish detailed particulars or specific aspects of the case. It is sufficient that the issues between the parties should be adequately defined and the parties should know in broad outline what is going to be said at the trial of the action.*
- ii. This reflects the classic distinction, dating at least from O. XIX, r. 4 of the Rules of Court scheduled to the Supreme Court of Judicature Act 1875 enacted in England and Wales, and also to be found in O. XIX, r. 4 of the 1905 Rules of the Superior Courts made pursuant to s. 61 of the Supreme Court of Judicature (Ireland) Act 1877, that pleadings should contain facts and not evidence. This is now set out in O.19, r. 3 RSC, which provides:- "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved [...]"*
- iii. The purpose of particulars may be viewed in the light of the fact that they are directed towards a trial, which in most cases will ultimately be decided by reference to oral evidence. Particulars in pleadings should facilitate the trial and not be a substitute for it: McGee v. O'Reilly [1996] 2 I.R. 229, at p. 234.*
- iv. The defendant is entitled to be told of the facts as the plaintiff alleges them to be, and it is not a ground for refusing particulars that the defendant may know the true facts: Moorview Developments Ltd. v. First Active plc [2005] IEHC 329, (Unreported, High Court, Clarke J., 20 October 2005), para. 7.2.*

- v. *In complex cases, more detailed particulars may properly be required: Playboy Enterprises International Inc. v. Entertainment Media Networks Ltd. [2015] IEHC 102, (Unreported, High Court, Baker J., 19 February 2015), para. 14.*
- vi. *The party is entitled to know the range of evidence (rather than any particular item of evidence) with which he or she will have to deal with at the trial: Cooney v. Browne [1985] I.R. 185, p. 191.*
- vii. *The procedures requiring an exchange of witness statements may reduce the risk of a party being taken by surprise at a trial, but does not mean that less is required by way of particulars. One important function of particulars is to limit the range of discovery, which can be burdensome and expensive for the parties: Thema International Fund plc v. Institutional Trust Services (Ireland) Ltd. [2010] IEHC 19, (Unreported, High Court, Clarke J., 26 January 2010), para. 4.1."*

102. O'Donnell J went to say:

"23 *The distinction at issue in this appeal (and indeed in most cases of difficulty) is not between facts that must be proved, and the evidence which may prove them (sometimes referred to as a distinction between what would be proved and how it will be proved): it is a distinction as to the level of detail which is required at the stage of pleadings. At a certain point, the other party will have been sufficiently informed of the case it has to meet, and further detail can be left to evidence at the trial. At that stage, any further detail is not a matter for particulars or pleadings in advance of trial, but for evidence at the trial. In that sense, it is properly said in response to any request for particulars that the information sought is not a matter for particulars, but rather for evidence. However, that distinction is not drawn by asking if the particulars seek an explanation of why or how something is alleged to have occurred. If a plaintiff simply pleaded that a defendant was negligent or careless or failed to take sufficient care, a defendant would be entitled to require particulars of how or why that is so, and if the plaintiff refused to provide such details, a court would order the necessary particulars be delivered.*

24 *What is a sufficient level of detail must be viewed against the background of the case that is sought to be made. For that reason, I am satisfied that the more complex the case is, the more detailed the particulars that should be required. Accordingly, I doubt that much guidance is to be gained from a consideration of perhaps the simplest and certainly most familiar cause of action encountered in the courts. Even in a routine personal injuries action arising out of a road traffic accident, however, a plaintiff is required to go beyond the standard boilerplate of alleging that the defendant failed to stop, slow down, swerve, or control their vehicle so as to avoid the collision."*

103. Taking the disputed replies in turn, it seems to me that paragraph 3(f) is an appropriate matter for particulars and does not amount to a request for evidence. It arises from paragraph 2 of the Defence in which it is pleaded:

"The second named Defendant was appointed as receiver over the assets of the first named Defendant on or about the 16 July 2020 pursuant to a mortgage debenture dated 19 December 2001 as between the Plaintiff of the first part and EBS Building Society (now EBS DAC) of the other part *and is and was at all material times the agent of the first named Defendant, which is insolvent.*" [emphasis added].

104. The Defendants have chosen to plead that the Second-named Defendant is and was at all material times the agent of the First-named Defendant. Presumably, this plea was included at least in part because it may go to the question of the Second-named Defendant's liability. Indeed, this was confirmed by the position taken by the Second-named Defendant in response to the Plaintiff's motion for an injunction. The Defendants having done so, it seems to me that the Plaintiff must be entitled to full particulars of the agency, or more precisely, particulars of the limits or parameters of that agency. The particular that is sought arises from the plea and is directly relevant to the question of whether the Second-named Defendant was in fact agent of the First-named Defendant. However, particulars of any instructions that may have been given do not arise from the plea. Thus, I will make an Order directing the Defendants to give particulars of any party who has given instruction to either the First or Second-named Defendant in relation to any of the matters the subject of these proceedings.
105. I am not satisfied that paragraph 3(g) is an appropriate matter for particulars. What is sought by the paragraph is an admission (or denial) by the Defendants of the legal effect of the agency referred to in paragraph 2 of the Defence. It does not seek further details of the material facts pleaded in the Defence.
106. Paragraph 4 is an unusual item for a Notice for Particulars and at first glance it would appear that it may be straying into seeking evidence rather than facts and may therefore not satisfy Quinn Insurances. However, it seems to me to properly arise in the particular circumstances of the case. It is expressly pleaded in the Statement of Claim that the First-named Defendant is "insolvent" and it seems to me that the Plaintiff can appropriately seek further particulars of the plea and its factual underpinning in circumstances where the insolvency has been expressly pleaded, where the Second-named Defendant's involvement is dependent on the First-named Defendant being insolvent (or being otherwise in default of the charge under which the Second-named Defendant was appointed but solvency is the only default referred to) and where the Defendants raised the First-named Defendant's impecuniosity in response to the Plaintiff's demands that works be carried out to the building. This last point is not pleaded in the Statement of Claim but was raised in correspondence on more than one occasion. It is not clear what the purpose(s) of raising the First-named Defendant's impecuniosity were but, given that its "insolvency" is pleaded in the Defence (even if only in the context of the appointment of the receiver) it seems that it may form some part of the First-named Defendant's defence. In those circumstances, it is appropriate that the Defendants provide the particulars sought in paragraph 4.

106. I am also satisfied that a reply should be given to paragraph 7 of the Notice for Particulars and the Plaintiff's Rejoinders and Notice for Further and Better Particulars. There are in fact two elements to the particular that is sought: (i) particulars of the control that has been exercised by the Second-named Defendant as agent for the First-named Defendant, and (ii) whether any control has been exercised at the direction of any party other than the first named Defendant. The need for these particulars stems directly from paragraph 6 of the Defence in which it is expressly denied that the floors above the Plaintiff's unit were controlled by the second named Defendant. When particulars of this paragraph were first sought the Notice for Particulars stated:

"please state each and every person or entity who occupies and who exercises control over the floors owned by the first-named Defendant."

107. Despite the express terms of paragraph 6 of the Defence the Defendants replied to say:

"The property is unoccupied. It is in the control of the second named Defendant as agent of the Plaintiff."

108. The second sentence is clearly inconsistent with the original plea in the Defence and the Plaintiff is entitled to raise further particulars. This is also an appropriate matter for particulars where the reply clearly suggests that the First-named Defendant was acting solely as agent of the Plaintiff but where an issue has emerged on foot of the contents of the contract for sale as to whether the Second-named Defendant might have been acting as agent of Everyday also. In this regard, my comments at paragraph 104 are also relevant.

109. The remaining live matter which was being sought by the Plaintiff was:

"An Order requiring the defendants to disclose the identity of all parties exercising any control over the Golf Hotel Building Ballybunnion and/or in receipt of any income rents or profits in respect thereof."

110. It was submitted on behalf of the Plaintiff that the Court has a stand-alone inherent jurisdiction to direct a party to provide information to the other side as opposed to documents. No authority for this broad proposition was opened to me and, in fact, the Plaintiff indicated that it may be better to view this as an application for disclosure of a class of documents and that the relief could perhaps be amended to read: *"An Order requiring the defendants to disclose documents relating to the identity of all parties exercising any control over the Golf Hotel Building Ballybunnion and/or in receipt of any income rents or profits in respect thereof in the period 16th July 2020 to date."* [emphasis added]

111. This was not brought or framed as an application for discovery and the submission was made that there is a broad inherent jurisdiction, outside of the Court's discovery procedures, to order the disclosure of documents. The example of an Order directing disclosure of medical records prior to a Plenary Summons in tobacco litigation was given.

There may be such a jurisdiction (and that may be argued in an appropriate case) but where the Rules of Court make provision for disclosure/discovery it would have to be established that there is some particular reason why a demand for documents should not be dealt with using those processes. Nothing to that effect has been advanced in this case. Furthermore, there can be no doubt that as a matter of general principle the entitlement to disclosure even outside a formal discovery process must be framed by the issues in the case, as set out in the pleadings.

112. There does not seem to me to be anything particular in this case requiring or permitting me to make an Order in terms of paragraph 6 other than by way of discovery. However, the Plaintiff has not brought this application by way of a discovery application and the application does not comply with any of the rules in relation to a discovery application. Those rules are in place to protect the interests of both parties whereby a reasoned request for documents must be made and the respondent must be afforded an opportunity to decide whether or not to make voluntary discovery. It seems to me that where none of the procedural steps in respect of an application for discovery contained in Order 31 have been complied with it would not be appropriate for me to make an Order in terms of paragraph 6.
113. Finally, as noted above, the Plaintiff also originally sought orders for inspection of documents and of the buildings. The Defendants submitted that the Plaintiff would not have been entitled to those reliefs and that the Defendants should therefore get their costs.
114. The application for those reliefs came about as follows.
115. As noted above, Mr. Tyrell's first affidavit referred to two reports prepared by MWP but only one report was exhibited to the affidavit (it was exhibited twice). The motion sought inspection of the report which had been referred to but not exhibited. Prior to the motion the Plaintiff's solicitor had written to the solicitor for the Defendants and a copy of the report had been provided. The Defendants' solicitor stated "*This report should have been at tab 4 of the booklet of exhibits to the affidavit of Ken Tyrrell but in error the 'Additional Solicited Commentary' was inserted twice, at tab 4 and tab 5.*" The Plaintiff sought this report in the motion on the basis that certain queries arose on foot of the metadata attached to the electronic copy of the report that had been sent. However, the demand for inspection of this document was not maintained when the motion came on for hearing so I have not been asked to determine those issues. It seems the Plaintiff is now satisfied (at least for present purposes) with the copy of the report which has been furnished.
116. The Plaintiff also originally sought inspection of the building as part of the motion (this was withdrawn because the building was sold). This came about because, as noted above, when Mr. Merriman conducted his inspection on the 19th October 2021 he was not allowed on to the roof by the security staff. Of course, Mr. Merriman, in order to conduct a full inspection needed access to the roof. However, there was no engagement with the Defendants' solicitor in relation to him being denied access to the roof until this motion was issued. The Plaintiff did not write to the Defendants to take issue with him being

denied access to the roof or to seek a further opportunity to conduct an inspection with access on to the roof. It is difficult to see how there could be any basis upon which such an inspection could have been refused if it had been sought. Unfortunately, a further inspection was not sought and instead the motion was issued raising the point for the first time.

Conclusion

117. The Plaintiff was successful in obtaining some of the reliefs and was unsuccessful in respect of others and, in respect of the reliefs which were withdrawn, it is difficult to see how it could be entitled to its costs in respect of the MWP report when ultimately it did not pursue any issues in relation to the copy that was provided prior to the issuing of the motion or in respect of inspection of the building due to the lack of any warning letters or pre-application correspondence.
118. I am inclined to the view that taking all the different aspects of the Plaintiff's second motion into account (including the fact that both parties succeeded to some extent) that the appropriate course is to make the costs of the motion costs in the cause. However, if either party feels that I should make a different Order I will hear submissions on the point.