Neutral Citation No: [2020] NIQB 6 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC11164** *Delivered Ex Tempore:* **14/01/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (Commercial List)

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JP MURPHY LTD

v

DAVID DOWNEY and MICHAEL DOWNEY

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McCLOSKEY LJ

[1] The application before the court is interlocutory in nature. It arises in proceedings whereby a specially endorsed writ of summons was issued on 14th August 2014. The Plaintiff, J P Murphy Ltd trading as JPM Consulting Engineers, brought proceedings against the two Defendants, David Downey and Michael Downey, claiming a liquidated sum, totalling £129,986.29. The course of proceedings thereafter was that the Plaintiff took steps to enter judgment in default of appearance. This stimulated an application to the court on behalf of the Defendants by a summons, dated 28th September 2015. The summons sought two forms of relief: [1] an order pursuant to Order 19, Rule 9, setting aside the judgment and [2] an order pursuant to Order 12, Rule 8 setting aside the writ and/or the purported service thereof on the ground that it had expired before service.

[2] A lengthy delay of almost two years then ensued. This delay came to an end when the Master of the Queen's Bench Division made an order on 23rd June 2017. This order purported to determine paragraph 1 of the Defendant's summons. It states:

> "*It is ordered that the judgment herein, dated 14th September 2015 be set aside.*"

It was further ordered that the Defendants be granted leave to issue a conditional appearance. Thirdly, and finally, it was ordered that the costs of the application be reserved to a hearing on 14th September 2017.

[3] Chronologically, the next step occurred on 3rd July 2017, when the Defendants entered a conditional appearance. Next, there was a further listing before the Queen's Bench Master on 14th September 2017. This gave rise to an order with four components:

1. Paul Murphy was granted leave to represent the Plaintiff company.
2. The application by the Defendants to set aside service of the writ was granted.
3. The court further ordered that the judgment of 14th September 2015 be set aside.
4. Finally, the court ordered the Plaintiff to pay the Defendants the cost of entering and setting aside the judgment.

[4] It will be seen at once that the third component of that order repeats the main operative part of the immediately preceding order, dated 23rd June 2017. Nothing of any substance turns on that issue at this stage. Indeed, that repetition enured to the benefit of the Plaintiff, because it meant that the next step taken was both valid and timeous. There having been no appeal against the order of 23rd June 2017 there is, nonetheless, an existence a *prima facie* valid and timeous Notice of Appeal challenging the order of the Queen's Bench Master dated 14th September 2017. As of today, 14th of January 2020, that appeal remains undetermined.

[5] The intervening period of some two years and four months has been marked in particular by further applications brought on behalf of the Plaintiff. These are of no concern in today's discrete interlocutory context. This court is seized today of an application, dated 30th May 2019. This application pursues two forms of interlocutory relief. These are rehearsed in paragraphs 9 and 10. First, the Plaintiff seeks an order for discovery of "*all relevant papers and documents in the possession and/or power of the second Defendant, due to their ready availability from other parties, who/which have confirmed their possession of same, parties that are obliged to furnish the defendants with same on request.*" The second order is pursued in the terms of an order permitting amendment of the Plaintiff's previous application of 19th April 2018 to a Khanna subpoena for the discovery or provision of "*relevant papers and documents from those persons or companies not party to the proceedings but who or which have possession of same.*"

[6] It is important to appreciate the context in which this application is brought. While the appeal against the Queen's Bench Master's Order of 14th September 2017 remains undetermined, pleadings in the substantive action have been frozen. This means that no defence to the specially endorsed Writ has been served. One consequence of that is that the time limit for service of the Defendant's list of documents has not yet arisen. Accordingly, there is no breach of the Rules of Court by the Defendants in this respect. Nor is there any breach of any case management or other order of the court requiring the provision of discovery, whether by the mechanism of serving a list of documents or otherwise.

[7] The court will treat this as an application for discovery of specific documents, as it is commonly labelled, under Order 24, Rule 7 of the Rules of the Court of Judicature. I have drawn attention to the current litigation context because the court is obliged to apply a test of relevance in determining this application. Thus the primary and fundamental question becomes: to what issue or issues do the documents pursued by the Plaintiff relate? Does the Plaintiff's application identify any material issue or issues in the still undetermined appeal against the Master's order which can be linked with the documents pursued by this application? The following excerpt from the transcript of the hearing is revealing:

> "LORD JUSTICE McCLOSKEY: If you were to receive the documents you are seeking, what is your expectation concerning the nature and content of those documents?
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> MR MURPHY: The contents - the documents that the architect has, they include formal minutes of meetings of the project design team. And those meetings were - they were attended by the various members of the project design team, who were appointed by the defendants. And those minutes set out and confirm that we were the appointed structural - civil and structural engineers, and it also confirms, in the list of the tasks and the various things that the respective members of the design team have to undertake, it confirms our role as established appointed members of the design team, and the other documentation which the architect has - which we did have but our computer archive is corrupt - confirms that there's a whole swathe of correspondence and documentations and drawings and everything that we submitted in relation to this project. Which fully confirms that not only that we were fully fledged members of the project design team, as (inaudible) by the defendants, but we conducted a vast scope of works, and that the client was present for every step of that, or the defendant was present for every step of that. And they knew from Day 1 that we have conducted all of that work. So their claims in the sworn affidavits that our work was only peripheral or preliminary, or that we didn't, even in the second, the first named defendant's second affidavit, he denied that we did any work. But that's lies."

[8] The answer provided by Mr Murphy, in summary and in substance, was "documents which would have a bearing on the substance and merits of the claim

itself, namely the various claims and assertions which the Plaintiff would make in relation to their asserted legal relationship with the Defendants, together with services provided and the foundation of the amount of money claimed." None of those documents is of any relevance whatsoever to the only issue before the Queen's Bench Division at this moment in time, namely the determination of the appeal against the order of the Master, dated 14th September 2017, setting aside the default judgment and setting aside service of the Writ. The Plaintiff's application fails to identify any material issue or issues in that appeal which can be linked with the documents pursued. That is the fundamental frailty in the application. Furthermore, and in any event the application fails to lay the foundation for a *prima facie* case that the specified documents are, or were, in the Defendants' custody, possession or power, the more so on account of the vague emphasis on third parties.

[9] It follows that neither of the forms of relief which the Plaintiff seeks by this application is appropriate. Both applications are misconceived on the basis that I have indicated. Accordingly, this court dismisses the Plaintiff's twofold application dated 9th May 2019.

[10] There are two ancillary matters. The first is the question of costs. The court directs that the Defendants' legal representatives make any application for costs in writing, in the form of a single A4 page, no greater, by 18th January - and the Plaintiff will reply with the same spatial limitation, that is one A4 page, by 23rd January.

[11] The second ancillary matter concerns the further conduct of the proceedings and in particular the long overdue listing of the appeal for hearing.

[Having considered the parties' submissions]

This case is approaching its sixth anniversary. The appeal has been in existence for some two and a half years. I am entirely confident that there will not be the slightest injustice to the Plaintiff if I, today, list the appeal for hearing before the appropriate allocated judge, whoever that may be, on 6th February 2020. That will add another month or so to the protracted period of two years and almost four months which has elapsed since the appeal was first listed for hearing.

[12] Both parties will have to liaise regarding a bundle before the judge. Unless the court has made previous directions to the contrary, the bundle that will have to be filed by the Plaintiff will be the product of direct interaction between the parties, which will result in the bundle being provided at the very latest by 28th January.

[13] The extant bundle before this court will form the nucleus of the appeal bundle. It will have to be augmented and extended by a number of items, which we have identified in the course of today's hearing, which may not be exhaustive, and therefore the most expeditious, sensible and efficient thing which can be done is for the Defendants' solicitors to take this index, to be emailed to them by close of business on 17th January, and with the benefit of an electronic document at their

disposal to prepare a proposed new index for the appeal bundle. That step should be taken by the Defendants' solicitors by 22nd January and that will result in the parties being able to agree an appeal bundle by 28th January. The Plaintiff is hereby directed to file the agreed appeal bundle by that date.

POSTSCRIPT: COSTS

Both parties' costs submissions have been received. The Plaintiff's costs submission made obscure reference to two other Orders of the Queen's Bench Masters on specified dates in 2018 and 2019 without coherent elaboration, any basic details or relevant documents. The Defendants' costs submission invoked the general 'follow the event' rule. The Defendants' submission is unanswerable. The Order of the court will, therefore, be a dismissal of the Plaintiff's summons, with costs to the Defendants to be taxed in default of agreement.