

**THE HIGH COURT**

**[2012 No. 5484 P.]**

**BETWEEN**

**EMMETT MCLOUGHLIN**

**PLAINTIFF**

**AND**

**BALLYMORE RESIDENTIAL LIMITED, CROSS WINDS COTTAGE LIMITED, ROADSTONE DUBLIN LIMITED, MURPHY CONCRETE (MANUFACTURING) LIMITED AND CRH PLC**  
**DEFENDANTS**

**AND**

**BALLYMORE RESIDENTIAL LIMITED AND CROSS WINDS COTTAGE LIMITED**  
**THIRD PARTIES**

**AND**

**ROADSTONE DUBLIN LIMITED, CRH PUBLIC LIMITED COMPANY AND WILLIAM MILEY LIMITED**  
**FOURTH PARTIES**

**THE HIGH COURT**

**[2017 No. 1284 P.]**

**BETWEEN**

**MARY FLANNERY**

**PLAINTIFF**

**AND**

**ROADSTONE DUBLIN LIMITED, MURPHY CONCRETE (MANUFACTURING) LIMITED AND CRH PLC**  
**DEFENDANTS**

**AND**

**BALLYMORE RESIDENTIAL LIMITED AND CROSS WINDS COTTAGE LIMITED**  
**THIRD PARTIES**

**AND**

**ROADSTONE LIMITED, CRH PUBLIC LIMITED COMPANY AND WILLIAM MILEY LIMITED**  
**FOURTH PARTIES**

**JUDGMENT of Mr. Justice Robert Eagar delivered on the 23rd of November, 2020**

1. This is a judgment in respect of the third party notice of motion dated the 21st August, 2020. The court proposes to set out the history of the proceedings in this matter before dealing with the issues arising in the notice of motion.
2. The court's judgment will deal with the Emmett McLoughlin case and the effect of this will also cover the issues in the Mary Flannery case.
3. Pyrite is found in many types of rock and is known to be responsible for swelling in some cases. The mineral can react with other minerals to form a new substance. This newly formed substance occupies a much greater volume than Pyrite and is the cause of extreme swelling which can lead to structural problems in buildings.
4. Allegedly, a number of housing developments had in-fill material supplied by the defendants in these cases which contained a high level of the mineral pyrite which as a matter of probability caused the floors of the buildings to heave upwards causing severe structural damage.

5. Initially, individuals whose homes and commercial properties had been damaged as a result of the presence of the mineral Pyrite had to take proceedings. Subsequently, Premier Guarantee, the insurance brokers in respect of the buildings, took over the actions and acted on behalf of the individual plaintiffs.
6. At an early stage in the proceedings, there were over 600 actions in relation to the existence of pyrite in houses owned by individuals who had purchased them in twelve different developments.
7. In September 2010, the Ballymore Group was notified by the owner of a house in the Drumnigh Wood Estate of structural deterioration of his property which included inter alia doors sticking and floors cracking. An examination of the property was undertaken on foot of the complaint made by the homeowner. The result showed that there were raised levels of pyrite in the stone infill used in the construction of the house. A number of other homeowners subsequently raised similar issues in connection with their properties. There were multiple subrogated proceedings issued in the names of various homeowners against Ballymore, Cross Winds, Roadstone, Murphy Concrete and CRH between 2012 and 2014. These proceedings were initiated at the direction of the underwriters of insurance policies arranged by Ballymore for the benefit of the houses in the Drumnigh Wood Estate through the Premier Guarantee Scheme for Ireland.
8. The proceedings were commenced by plenary summons which was issued on the 5th June 2012. On the 11th September 2012, an appearance was entered for Ballymore and Cross Winds and on the 9th November 2012, an appearance was entered on behalf of Murphy Concrete. On the 5th April 2013, a statement of claim was delivered and on the 22nd July 2013, a notice for particulars was delivered on behalf of Ballymore and Cross Winds. On the 11th October 2013, an amended statement of claim was delivered and on the 15th October 2013, replies to notice for particulars of Ballymore and Cross Winds were delivered. On the 13th December 2013, a motion was issued on behalf of the plaintiff seeking case management and other reliefs. On the 8th January 2014, a notice for particulars arising from the amended statement of claim was delivered on behalf of Ballymore and Cross Winds. On the 18th March 2014, a motion seeking to compel the delivery of replies was issued on behalf of Ballymore and Cross Winds and on the 1st October 2014, a notice of discontinuance of the action against Ballymore and Cross Winds was served. At that time, Ballymore and Cross Winds were no longer involved in the proceedings.
9. However, on the 20th April 2016, a motion was issued on behalf of Murphy Concrete in the proceedings herein whereby Murphy Concrete sought an order granting liberty to issue and serve a third party notice on Ballymore and Cross Winds in these proceedings and thirteen related proceedings. On the 30th May 2016, Moriarty J. made an order granting liberty to Murphy Concrete to issue and serve third party notices on Ballymore and on Cross Winds in all of the fourteen sets of proceedings.

10. On the 23rd June 2017, this Judge was appointed to case manage these proceedings. The court made various directions in connection with the delivery of pleadings in a number of lead cases.

**The Subrogated proceedings and third party proceedings**

11. On or about the 16th March 2018, Murphy Concrete delivered a third party statement of claim to the third parties. On 17th July 2018, Ballymore and Cross Winds were granted liberty to issue and serve fourth party proceedings against Roadstone and CRH.
12. The following are the relevant dates in relation to the Subrogated proceedings and the third party proceedings.
  - (1) 21st June 2016, third party notice was served by Murphy Concrete on Ballymore;
  - (2) 1st July 2016, appearance entered by Byrne Wallace on behalf of Ballymore in the third party action;
  - (3) 16th March 2018, Murphy Concrete delivered third party statement of claim against Ballymore;
  - (4) 17th July 2018, an order granting liberty to Ballymore to issue and serve fourth party notices on Roadstone and CRH;
  - (5) 11th October 2018, Ballymore delivered notice for particulars to Murphy Concrete in the third party action;
  - (6) 20th November 2018, there were replies of Murphy Concrete to notice for particulars of Ballymore in third party action;
  - (7) 4th February 2019, Ballymore issued deliverance of defence of Ballymore to the third party statement of claim in the third party action;
  - (8) *11th February 2019, Ballymore delivered notice for further and better particulars to Murphy Concrete in the third party action;*
  - (9) 1st April 2019, the replies of Murphy Concrete to Ballymore's notice for further and better particulars in the third party action;
  - (10) 3rd April 2019, there was a reply of Murphy Concrete to the defence of Ballymore in the third party action;
  - (11) 16th December 2019, an order was made by this Court striking out the proceedings of the plaintiff against Murphy Concrete;
  - (12) 20th January 2020, an order was made striking out the proceedings of the plaintiff against Roadstone and CRH.
13. When these proceedings were settled, the only matters outstanding out of all of the litigation were the third party actions against Ballymore and Cross Winds and the fourth

party action between Ballymore and Cross Winds against Roadstone and CRH Property Management Company. The relevant estate is Drumnigh Wood Estate.

14. There are two further sets of proceedings which are being case managed by Murphy J. in this Court: -
  - (a) The Homeowner Proceedings (since late 2015): 41 sets of High Court proceedings have issued and been served by other homeowners of properties in the Drumnigh Estate on Ballymore and/or Cross Winds. Six of the homeowner proceedings have been discontinued. In the homeowner proceedings, the homeowners are claiming damages and ancillary relief in respect of alleged negligence and/or breach of contract on the part of Ballymore and/or Cross Winds in the construction of the properties and/or the materials used.
  - (b) The Stone Suppliers' proceedings. In December 2015 plenary proceedings entitled "*Ballymore Contracting Ltd., Ballymore Residential Ltd. and Cross Winds Cottage Ltd. v. Roadstone Ltd., CRH Public Ltd. Company, Murphy Concrete Manufacturing Ltd. and William Miley Ltd.*" were issued.
15. The Stone Supplier's proceedings seek to establish the principle that Ballymore is entitled to contribution, amounting to a full indemnity from the suppliers of stone to the Drumnigh Wood development – namely Roadstone, Murphy and William Miley in respect of any damages due to homeowners.
16. The court will mention those sets of proceedings as they arise in the opposition by Murphy Concrete to the notice of motions in these cases.

**Notice of motion dated 21st August 2020**

17. On the 21st August 2020, Ballymore Residential Ltd. and Cross Winds Cottage Ltd. being third parties to the proceedings, applied by way of notice of motion for: -
  - (i) An order pursuant to O. 19, r. 7 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Court compelling Murphy Concrete (Manufacturing) Ltd. to provide full and proper particulars in response to the requests at paras. 1(a), 1(b), 2(d), 3(a), 3(b), 3(c), 4(a), 5(a), 5(b), 5(c), 6(a), 6(b), 7(a) and 7(b) of the notice for further and better particulars dated the 7th April 2020.
  - (ii) An order pursuant to O. 19, r. 7 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Court directing that in default of the said particulars being provided by such date as the court may direct the pleas in the third party's statement of claim shall be struck out as and from the said date and the costs of and incidental to the proceedings should be awarded to the third parties.
  - (iii) Such further or other consequential and directions as this honourable Court shall deem fit and proper.

18. The application was grounded on the affidavit of Helen Gibbons, solicitor, of the firm Byrne Wallace Solicitors who were the solicitors on record for Ballymore Residential Ltd. (Ballymore) and Cross Winds Cottages Ltd. (Cross Winds), the third parties in these proceedings. Ms. Gibbons' affidavit sets out the history of the subrogated proceedings and includes therein the history of third party proceedings initiated by Murphy Concrete on Ballymore and Cross Winds on the 30th May 2016.

**Homeowner Proceedings and the Stone Supplier proceedings**

19. Attached as an exhibit to Ms. Gibbons' affidavit is a procedural chronology of the events in the Stone Supplier proceedings and the Homeowner proceedings which was prepared on behalf of Ballymore and Cross Winds and was adopted by Murphy J. in her judgment dismissing the strike out / stay motion issued on behalf of Roadstone and CRH in April 2018. Additionally, she attaches a further procedural chronology of events in the Stone Supplier proceedings and the Homeowner proceedings since the date of the hearing of that motion upon.
20. She then raises the settlement of the claims against Murphy Concrete in the subrogated proceedings and noted that it was indicated to this Court at the hearing on the 4th November 2019 that the plaintiffs had concluded negotiations with Murphy Concrete and that they were on the verge of formalising a settlement agreement. In response to correspondence from Byrne Wallace Solicitors, by letter dated 10th December 2019, LK Shields Solicitors on behalf of Murphy Concrete stated the following: -

"A settlement agreement has recently been executed between our clients and the plaintiffs in the McLoughlin proceedings and the Flannery proceedings. The terms of the settlement are currently being implemented but the proceedings against our client remain alive pending the implementation of these terms. *However, any such agreement between our client and the plaintiffs does not impact on our client's entitlement to a contribution or indemnity from your clients.* (This Court's emphasis)

Our client is fully prepared to continue the prosecution of its third party claims against your client in the McLoughlin proceedings and the Flannery proceedings. It seems to us, however, that a more cost – effective and sensible way forward would be for our respective clients to agree, subject to the approval of the court to *stay the third party claims pending the outcome of the related proceedings* (this Court's emphasis) concerning 32 properties constructed at Drumnigh Development entitled Ballymore Residential Units Ltd. and Cross Winds Cottage Ltd. v. Roadstone Ltd., CRH Public Limited Company, Murphy Concrete Manufacturing Ltd. and William Miley Ltd".

These are the stone supplier proceedings being case managed by Murphy J.

21. The subrogated proceedings were before the court for case management hearing on the 16th December 2019 and on that date the court made an order striking out all of the

proceedings in which Murphy Concrete was a defendant with no order as to costs and any costs order vacated.

22. By letter dated the 20th December 2019, Byrne Wallace referred to the letter from LK Shields dated the 10th December 2019 and said as follows: -

*"In fact it appears from the application that was made to the court on the 16th December 2019 on the consent of your clients and the plaintiffs in the proceedings that each of the plaintiffs in the other proceedings in which your client joined our clients as third party that a settlement agreement has been executed between our client and each of these plaintiffs.*

*In your letter of the 10th December 2019, you also asserted that 'any such agreement between your client and the plaintiffs does not impact on your client's entitlement to a contribution or indemnity from our clients put in any such agreement'. That contention is, with respect, plainly misplaced as appears from the reliefs claimed in your client's third party notice your client claims (a) an indemnity against the full amount of the plaintiff's claim together with the plaintiff's costs and; (b) in the alternative, a contribution to the extent of the entire amount of the plaintiff's claim together with the plaintiff's costs or alternatively a contribution to such extent as the court seems fit. In circumstances where it has transpired that you have now settled the plaintiff's claims against your client, the immediate questions which arise and which your client is required to answer insofar as it wishes to maintain its third party claims against our client is: - What are the terms upon which your client has settled the plaintiff's claims against your client in the proceedings in which our clients have been joined as third parties and by extension what is 'the amount of the plaintiff's claim' and the amount of 'costs' which your client claims against our clients in its third party proceedings against our clients? Accordingly, please furnish by return a copy of the executed settlement agreement with the plaintiffs in the McLoughlin proceedings and the Flannery proceedings to which you refer and also please furnish by return a copy of the executed settlement agreements in respect of each of the other proceedings in which your client joined our client as third parties.*

*For the avoidance of doubt, it has been made clear at all material times the position of our clients in connection with each of the third party claims of your client against our client is that they are wholly without merit and insofar as any of the houses and/or related infrastructure in the Drumnigh Estates sustained damage, that was caused by the supply of defective stone infill which derived from the quarries owned and/or operated by your client and/or Roadstone Ltd. and/or Belgard Quarry from which William Miley Ltd. obtained and supplied stone infill".*

23. On the 20th January 2020 the court made an order on the consent of the plaintiff dismissing proceedings against Roadstone and CRH with no orders as to costs and vacating existing costs orders.

24. Ms. Gibbons refers to the third party statement of claim in which Murphy Concrete claims against Ballymore and Cross Winds:
- (a) an indemnity against the full amount of the plaintiff's claim together with the plaintiff's costs and;
  - (b) in the alternative, a contribution to the extent of the entire amount of the plaintiff's claim together with the plaintiff's costs, or alternatively a contribution to such extent as the court seems fit.
25. She states that circumstances where the plaintiff is no longer maintaining any claim against Murphy Concrete – such claim having been compromised by Murphy Concrete – and Murphy Concrete is apparently seeking to maintain a claim against Ballymore and Crosswinds in respect of the compensation and/or costs of any which it paid by way of compromise to the plaintiff's claim. She states that it is necessary for Murphy Concrete to provide full and detailed particulars in respect of each of the payments made and/or to be made including the amounts of each of the payments which it seeks to claim against Ballymore and Cross Winds.
26. In its replies to particulars, Murphy Concrete pleads that the plaintiff's claim against it was "*compromised pursuant to a confidential agreement*" and that it is "*not at liberty to discuss publish or disseminate any details of the compromise save for the fact that the parties to the compromise have reached a final and binding compromise in respect of all disputed matters between them*".

**Submissions by counsel**

27. Mr. Gardiner SC with Mr. Clarke SC acted on behalf of Ballymore Residential Ltd., and Cross Winds Cottage Ltd., instructed by Ms. Helen Gibbons, Byrne Wallace Solicitors.
28. He said that Murphy Concrete says in response to his application that it should not be ordered to tell the third parties because it would breach the sanctity of the mediation process which gives rise to a settlement entered into between Murphy Concrete and the various plaintiffs.
29. He submitted that the two points raised by Murphy Concrete were the sanctity of the mediation agreement and secondly that Ballymore and Cross Winds settled with the plaintiff McLoughlin and that his clients did not tell Murphy Concrete the terms of that settlement agreement. He referred to the latest affidavit of Ian Lavelle, solicitor in LK Shields Solicitors on record for Murphy Concrete.
30. Mr. Gardiner characterised this affidavit as short but massively consequential and identifies first of all that the raising of particulars is characterised by Mr. Lavelle as an interrogation. He also points to the statement of Mr. Lavelle "*that may have been made by Murphy Concrete*" and he characterises this as his being told "*I may or may not have made a payment to Mr. McLoughlin but I'm not telling you*".

31. Mr. Gardiner referred to the order made by this Court on the 16th December 2019 on consent as follows: -

*"It is ordered that the proceedings issued against Murphy Concrete Ltd. is only as identified in the second schedule hereto shall be struck out on the consent of the parties thereto with no orders and any existing costs already be vacated".*

The second schedule refers to the recovery actions in the Drumnigh Wood development.

32. Mr. Gardiner referred to the mediation process which took place between the plaintiffs and the defendants in the subrogated proceedings. He says that he wants to know what was paid to McLoughlin/ Liberty Insurance in settlement of the proceedings because the case has been settled.
33. Mr. Gardiner submitted that the third party's statement of claim says that *"I, Murphy, want an indemnity from you, Ballymore, for the damages I have to pay the plaintiff, if any"*. He characterises this as a matter of complete simplicity and the usual event that the court will be familiar with in the usual run of litigation, because what would ordinarily happen is that the plaintiff would give evidence at a trial and would establish McLoughlin / Liberty that it cost, for example €100,000 to take out the infill from Mr. McLoughlin's house and replace it with good infill because that is what this is about. He said Mr. McLoughlin would say, *"well that's what happened, my infill was defective, persons came along, removed it, it cost €100,000 and I want €100,000 and I want it from Murphy Concrete"*.
34. The relevant notice for further and better particulars which are referred to in the notice of motion is dated the 7th April 2020 and contained in a letter from Messrs Byrne Wallace on behalf of Ballymore Residential Ltd. and Cross Winds Cottages Ltd. and sent to LK Shields Solicitors, the solicitors on record for Murphy Concrete and the notice for further and better particulars reads as follows: -

*"Take notice that as solicitors for the Third Party, we hereby request the following particulars arising from the third party statement of claim herein in circumstances where you have confirmed by letter dated the 10th December 2019 that: '[a] settlement has recently been executed between [Murphy Concrete (Manufacturing) Limited] and the [plaintiff] in the McLoughlin proceedings".*

The court proposes to concentrate on the particulars sought in the notice of motion dated the 21st August 2020 as following: -

1. *"With reference to para. 11 of the third party's statement of claim:*
  - (a) *Please clarify whether Murphy Concrete (Manufacturing) Ltd. made any payments to the plaintiff in connection with his claim against Murphy Concrete arising from the supply by Murphy Concrete of infill material to Ballymore for use in the construction of the development and more specifically the construction of 74 Drumnigh Wood.*

(b) *If Murphy Concrete did make such payments, please provide full and detailed particulars in respect of each of the payments made and/or to be made including the amount(s) of each of the payments.*

ii. *Each of the terms of the settlement agreement by which Murphy Concrete settled the claim of the plaintiff and;*

iii. *The date of the settlement agreement by which Murphy Concrete settled the claim of the plaintiff.*

2. *With reference to paragraph 13 of the Third Party Statement of Claim:*

(d) *strictly without prejudice to the foregoing, if Murphy Concrete purports to continue to seek an indemnity from Ballymore and/or Cross Winds*

i. *please confirm the basis upon which Murphy Concrete purports to seek an indemnity or contribution from Ballymore and/or Crosswinds and please provide full and detailed particulars of its allegations in that regard;*

ii. *Insofar as Murphy Concrete purports to seek an indemnity or contribution by reference to the amount(s), if any, that is paid to the plaintiff in settlement of the claim of the plaintiff against Murphy Concrete please provide full and detailed particulars in respect of*

1. *each of the payments made, and/or to be made, including the amount(s) of each of the payments and;*

2. *each of the terms of the settlement agreement by which Murphy Concrete settled the claim of the plaintiff and;*

3. *the date of the settlement agreed by which Murphy Concrete settled the claim of the plaintiff.*

3 (a) *With reference to para. 14 of the third party's statement of claim in circumstances where the plaintiff no longer has a cause of action against Murphy Concrete and is no longer making claims against Murphy Concrete – the cause(s) of action and claims herein having been settled as confirmed by letter dated the 10th December 2019 from LK Shields – and the existence of such cause(s) of action and claims disputed is the sole basis for Murphy Concrete seeking an indemnity or contribution from Ballymore and/or Cross Winds please confirm that Murphy Concrete no longer asserts an entitlement to seek an indemnity or contribution from Ballymore and/or Cross Winds and no longer seeks such an indemnity or contribution.*

(b) *Strictly without prejudice to the foregoing, if Murphy Concrete purports to continue to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek such an indemnity or contribution,*

i. *please confirm the basis upon which Murphy Concrete purports to do so and please provide full and detailed particulars in that regard;*

- ii. *insofar as Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek such an indemnity or contribution by reference to the amount(s) if any that it paid to the plaintiff in settlement against Murphy Concrete please provide full and detailed particulars in respect of these.*
    - I. *Each of the payments made and/or to be made including the amounts of each of the payments.*
    - II. *Each of the terms of the settlement agreement by which Murphy Concrete settled the claim of the plaintiff.*
    - III. *The date of the settlement agreement by which Murphy Concrete settled the claim of the plaintiff.*
- (c) *Please clarify whether Murphy Concrete alleges that the plaintiff suffered any loss or damage and if it is so alleged:*
- i. *please quantify the alleged loss and damage and provide full and detailed particulars in that regard;*
  - ii. *please clarify whether Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek an indemnity or contribution by reference to such alleged loss and/or damage and;*
  - iii. *insofar as Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek an indemnity or contribution by reference to such loss and/or damage please provide full and detailed particulars in respect of the claim of Murphy Concrete in that regard.*
4. *With reference to para. 15 of the third party's statement of claim:*
- a) *Please clarify whether Murphy Concrete alleges that the plaintiff suffered any loss or damage and if it so alleged:*
    - i. *please quantify that alleged loss and damage and please provide full and detailed particulars in that regard;*
    - ii. *please clarify whether Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek an indemnity or contribution by reference to such alleged loss and/or damage;*
    - iii. *insofar as Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds, and to seek an indemnity or contribution by reference to such loss and/or damage please provide full and detailed particulars in respect of the claim of Murphy Concrete in that regard.*
5. *With reference to para. 24 of the third party's statement of claim:*
- a) *In circumstances where Murphy Concrete has not been held liable to pay to the plaintiff any damages or costs – the cause(s) of action and*

*claims herein having been settled as confirmed by letter dated the 10th December 2019 from LK Shields – please confirm that Murphy Concrete no longer asserts an entitlement to seek an indemnity or contribution from Ballymore and/or Cross Winds and no longer seeks such an indemnity or contribution.*

*b) Strictly without prejudice to the foregoing, if Murphy Concrete purports to continue to assert an entitlement to an indemnity or contribution from Ballymore and/or Crosswinds and to seek such an indemnity or contribution:*

- i. please confirm the basis upon which Murphy Concrete purports to do so and please provide full and detailed particulars in that regard;*
- ii. insofar as Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek such an indemnity or contribution by reference to the amounts (if any) that is paid to the plaintiff in settlement of the claim of the plaintiff against Murphy Concrete, please provide full and detailed particulars in respect of:*
  - 1) each of the payments made and/or to be made including the amount(s) of each payments;*
  - 2) each of the terms of the settlement agreement by which Murphy Concrete settled the claim of the plaintiff and;*
  - 3) the date of the settlement agreement by which Murphy Concrete settled the claim of the plaintiff, and*

*(c) Please clarify whether Murphy Concrete alleges that the plaintiff suffered any loss or damage and if so alleged:*

- i. Please quantify the alleged loss and damage and please provide full and detailed particulars in that regard;*
- ii. Please clarify whether Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek an indemnity or contribution by reference to such alleged loss and/or damage and;*
- iii. insofar as Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek an indemnity or contribution by reference to such loss and/or damage, please provide full and detailed particulars in respect of the claim of Murphy Concrete in that regard.*

*6. With reference to para. 24 and 25 of the third party's statement of claim:*

- a) in circumstances where the plaintiff no longer has a cause of action against Murphy Concrete and is no longer making claims for damages against Murphy*

*Concrete – the cause(s) of action and claims for damages herein having been settled as confirmed by letter dated 10th December 2019 from LK Shields and the existence of such (causes) of action and claims is pleaded as the sole basis for Murphy Concrete seeking an indemnity or contribution from Ballymore and/or Cross Winds, please confirm that Murphy Concrete no longer asserts an entitlement to seek an indemnity or contribution from Ballymore and/or Cross Winds and no longer seeks such an indemnity or contribution and;*

*b) Strictly without prejudice to the foregoing if Murphy Concrete purports to continue to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek such an indemnity or contribution:*

*i. please confirm the basis upon which Murphy Concrete purports to do so and please provide full and detailed particulars in that regard;*

*ii. insofar as Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds and to seek such an indemnity or contribution by reference to the amount(s) if any that is paid to the plaintiff in settlement of the claim of the plaintiff against Murphy Concrete, please provide full and detailed particulars in respect of:*

- 1. each of the payments made and/or to be made including the amount(s) of each of the payments and;*
- 2. each of the terms of the settlement agreement by which Murphy Concrete settled a claim of the plaintiff and;*
- 3. the date of the settlement agreement by which Murphy Concrete settled the claim of the plaintiff.*

*7. With reference to the reliefs claimed in the third party's statement of claim:*

*a) in circumstances where the plaintiff no longer has a cause of action against Murphy Concrete it is no longer making claims for damages against Murphy Concrete – the cause(s) of action and the claims for damages herein having been settled as confirmed by letter dated the 10th December 2019 from LK Shields and the existence of such cause(s) of action and claims as pleaded as the sole basis for Murphy Concrete seeking an indemnity or contribution from Ballymore and/or Cross Winds please confirm that Murphy Concrete no longer asserts an entitlement to seek an indemnity or contribution from Ballymore and/or Cross Winds and no longer seeks such an indemnity or contribution.*

*(b) Strictly without prejudice to the foregoing, if Murphy Concrete purports to continue to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds, and to seek such an indemnity or contribution:*

- i. *please confirm the basis upon which Murphy Concrete purports to do so and please provide the full and detailed particulars in that regards;*
- ii. *insofar as Murphy Concrete purports to assert an entitlement to an indemnity or contribution from Ballymore and/or Cross Winds, and to seek such an indemnity or contribution by reference to the amount(s) if any that is paid to the plaintiff in settlement of the claim of the plaintiff against Murphy Concrete, please provide full and detailed particulars in effect of*
  - 1) *each of the payments made and/or to be made including the amount(s) of each of the payments;*
  - 2) *each of the terms of settlement agreement by which Murphy Concrete settled the claim of the plaintiff and;*
  - 3) *the state of the settlement agreement by which Murphy Concrete settled the claim of the plaintiff."*

35. Mr. Gardiner said that his motion of the 21st August 2020 seeking particulars which broadly speaking are simply *"tell me what you are now claiming against me"*, in money terms – not the basis for the claim. He cites Murphy Concrete's response as per the affidavit of Ms. Ciara Smyth solicitor dated the 15th September 2020 that there are two bases which are put forward by her. Firstly, that the sanctity of the Mediation Agreement would be breached and second is that when Ballymore and Cross Winds settled with the plaintiff, McLoughlin, Ballymore and Cross Winds did not tell Murphy Concrete the terms of that settlement agreement. Mr. Gardiner made the point that it was pleaded in the third party statement of claim that his clients refused to tell Murphy Concrete the terms of the settlement. What is pleaded is that Mr. McLoughlin refused to tell Murphy Concrete the terms of the settlement. There is no admission of any refusal on his client's part because there is no plea to that effect in the case.

36. Mr. Gardiner referred to the order made by this Court on the 16th of December 2019 as follows: -

*"It is ordered that the proceedings issued against Murphy Concrete Ltd. only as identified in the second schedule hereto shall be struck out on the consent of the parties thereto with no orders and any existing costs orders to be vacated".*

The second schedule refers to recovery actions in the Drumnigh Wood development. There were 52 subrogated proceedings concerning Drumnigh Wood. Mr. Gardiner also referred to the affidavit of Mr. Lavelle as follows: -

*"The mediation and subsequent mediation settlement agreement related not only to Drumnigh Wood Estate but also to other developments including Tayleur's Point, Delvin Banks and Chapel Farm. I beg to refer to letters from Eugene F. Collins to LK Shields and Arthur Cox dated 13th December 2018. I also refer to the order of this Court dated the 16th of December 2019 pursuant to which proceedings against Murphy Concrete in relation to not only Drumnigh Wood but also Tayleur's point, Delvin Banks Wood and Chapel Farm were struck out".*

He further quoted from Mr. Lavelle's affidavit as follows: -

*"I say and believe that the settlement particulars now sought by the third parties can only relate to the property that is the subject matter of the within proceedings namely 74 Drumnigh Wood".*

Mr. Gardiner said that he agrees that they are seeking particulars only in respect of 74 Drumnigh Wood. His clients want to know what is paid to McLoughlin/Liberty Insurance in settlement of the proceedings brought by McLoughlin/Liberty Insurance against Murphy Concrete because that case has been settled. He said his clients want particulars of what was paid or agreed to be paid to McLoughlin. He also submitted that the mediation settlement agreement which extended to properties beyond Drumnigh Wood have nothing to do with Ballymore. Mr. Gardiner quoted from the third party statement of claim delivered by Murphy Concrete saying: -

*"(1) Murphy wants an indemnity from Ballymore for the damages that they have had to pay the plaintiff if any".*

37. Mr. Gardiner confirmed that the motion is confined to 74 Drumnigh Wood. He also referred to Mr. Lavelle's affidavit saying that he would not be able to comply with any order of the court and Mr. Gardiner said failure to comply with it will result either in the proceedings being dismissed or contempt of a court order.
38. Mr. Gardiner referred to a quote from the replies to particulars that were furnished as follows: -

*"By contrast, the settlement agreement is a compromise in respect of all disputed matters between Liberty and Murphy, indeed it is broader even than Drumnigh Wood because as Ms. Gibbons observes in para. 7 of her grounding affidavit, the case management of Eagar J. extends to many other developments in which Ballymore have no interest. Murphy however did have interest in several other developments covered by the case management and those disputes too were covered by the compromise".*

The result is that it will be extremely difficult to say how the settlement agreement relates specifically to the McLoughlin and Flannery proceedings. It is well understood that such negotiated settlements are concluded on the basis of a global view and he submitted that how can he be facing a claim for indemnity when the person seeking the indemnity cannot tell him how much he wants? It is fundamental to a claim for indemnity that you tell the other party what it is you are seeking with the plaintiff in respect of whom you are seeking indemnity. He invited Mr. Steen to tell the court whether that is what he is saying.

39. Mr. Gardiner referred to para. 8 of Mr. Lavelle's affidavit and says that the third parties just want the information as to what he is paying McLoughlin both in damages and in costs because he is seeking from his clients an indemnity in respect of damages and

costs. He submits that Murphy Concrete won't quantify it for his clients. He said he has to continue the case as a defendant and have Murphy Concrete come and give evidence that *"the infill is defective, or I did defective work and I gave McLoughlin – I can't tell you"*. He submitted that Mr. Lavelle in his affidavit basically says that details of the settlement will not be given to McLoughlin, not at the trial or even after the trial because he can't quantify it. He submits that the position of Murphy Concrete is *"the settlement agreement is 'a compromise in respect of all disputed matters between Liberty and Murphy'. Indeed, it is broadly even the Drumnigh Wood as Ms. Gibbons observes in para. 7 of her grounding affidavit"*. Mr. Gardiner stated that the settlement agreement does not prescribe a sum of money from McLoughlin and does not prescribe a sum for costs from McLoughlin. He queried how he could be facing a claim for indemnity when the person seeking the indemnity cannot tell him how much he wants? He said it is fundamental to a claim for indemnity that where you have settled with the plaintiff in respect of whom you are seeking indemnity that you tell the other party what you are seeking. It is a special damages claim now.

40. Mr. Steen SC, instructed by LK Shields Solicitors on behalf of Murphy Concrete Manufacturing Ltd., submitted as follows. He said that his client had been dealing with a very large number of claims involving a very large number of developments, involving a very large number of parties, all of whom attended at the mediation under the chairmanship of Mr. Dermot Gleeson SC. He said his clients have characterised seeking the details of any payment in respect of the settlement agreement as an attempt to interrogate his client with regard to the terms of the confidential settlement agreement which they are constrained in terms of how they can deal with it. He referred to Ballymore and Cross Winds being plaintiffs in the Stone Supplier proceedings. He characterised the position as follows: -

*"This is a case where there is a question of principle to be resolved and that question is, are we obliged to indemnify Ballymore? Is Ballymore obliged to indemnify us? And once that issue of principle is determined, what the court would normally expect is for the reasonable parties, acting reasonably, to come to terms based on that determination"*.

The court asked Mr. Steen what happens if the court declined to accede to the request in the notice of motion?

41. Mr. Steen said in the first instance the pleadings in these cases are perhaps nearly closed, possibly not quite closed. There may be certain issues arising from the fact that Mr. Gardiner so far has refused to provide any particulars to the settlement agreement which he entered into with Liberty which resulted in the proceedings initially against him being struck out or discontinued in the McLoughlin proceedings. He said that may have to be explored. He said that once the pleadings are closed they will then enter into the normal phase in which discovery will be requested and one of the points that they made is that Mr. Gardiner says the settlement agreement is directly relevant to an issue in these proceedings he is entitled to request it on discovery. He said that if a document is

discovered, it is discovered subject to certain implied undertakings on the part of the person who receives it. One of those undertakings is that the document may not be used for any purposes other than the purposes in the proceedings in which it is discovered and secondly there is an obligation of confidentiality with regard to it. He submitted that if Mr. Gardiner can seek the information contained in the settlement agreement by way of discovery. He also submitted that things may alter as they come closer to a trial but he said they were not close to a trial yet. The pleadings haven't been closed and discovery has not started.

42. In answer to a question by this Judge: "*But, you can see why the court faced with the prospect of a full proceedings in two years' time or three years' time would at this stage seek to clarify the issues which are for instance in relation to Ballymore's proceedings and settlement and you haven't got that information that you sought*". The court is asking whether or not it would be quicker or more expedient for the court to direct that in relation to the premises in Drumnigh Wood for which the claim is making against Ballymore.
43. Mr. Steen suggested that these proceedings be stayed in favour of Murphy J.'s proceedings and Murphy Concrete suggests that this be dealt with in the context of the litigation before Murphy J. Mr. Gardiner then noted that Mr. Steen talks about the next step of discovery and that there is a possibility that Ballymore and Cross Winds might get a glimpse of the settlement agreement through discovery, but that was for another day. He submitted that the issue is simple in that Ballymore and Cross Winds are entitled to know the amount they are being sued for. He said that before they embark upon discovery, which is a massive expensive part of any litigation, and before they embark upon a trial, they are entitled to know what the trial is about. That is absolutely straightforward.
44. Mr. Gardiner spoke about the notice of discontinuance against his clients by the plaintiff on the 1st October 2014 and said that he was out of the case and remained out of the case for 18 months until the 30th May 2016 when Murphy Concrete brought his clients back into the case, and he said that all that is left is Murphy Concrete as plaintiff against him, the defendant in the third party action and his clients having brought in Roadstone because of a plea made by Murphy Concrete in the third party action.
45. He then set out the details of the pleadings that had been passed between Murphy Concrete, Ballymore and Cross Winds in the third party action.
46. Mr. Steen also submitted that Mr. Gardiner had suggested that the proceedings must necessarily be at an end on the basis that his clients cannot tell him what the claim is. Mr Steen submitted that this was simply not the case. The court will appreciate that you end up with a claim which is particularised at a later stage in the proceedings closer to trial. He referred to the fourth party proceedings brought by Ballymore and Cross Winds against Roadstone and CRH which claims an indemnity and contribution from them of all costs of the compromise and Roadstone raised particulars on that request and said "*what are the costs of compromise, since you've compromised with Liberty as far back as*

2014?" and the response to that was "we can't tell you now but we'll tell you later". In that vein, Mr Steen said that what is sauce for the goose is sauce for the gander.

47. Mr. Steen referred to the *Perestrello v United Paints* [1969] 1 WLR 570 hereinafter *Perestrello* at p. 479. The *Perestrello* case indicates that the principal basis for that is to allow a defendant to consider making a payment into court so the basis upon which you are entitled to early information with regard to special damages is to allow you to quantify the claim into court if you wish. However, Mr. Gardiner's client said there will be no payment from us, we will completely refute any basis upon which you could possibly be entitled to any contribution from us under any circumstances. You can see why the court faced with the prospect of full proceedings in three years' time in circumstances where all the main claims have been settled, would at this stage, seek to clarify the issues which are for instance likely to result in a much quicker or speedier determination of the issues. While the court accepts what Mr. Steen said that the court could have dealt with the matter in relation to Ballymore's proceedings and settlement by way of any notice of motion which Murphy Concrete wished to bring, however they have not done so. He said the issue between them is whether Ballymore is liable to indemnify Murphy Concrete in respect of the losses that have been suffered by a number of homeowners across the Drumnigh Woods development. The issue related to the specific amount attributable to this specific house is very great. Mr. Steen submitted that its first basis was that the issue may be resolved by Murphy J. or through those proceedings being case managed by her. The second basis is that this Court will refuse the motion and the proceedings will be prepared for the next steps.
48. In response, Mr. Gardiner said that many of the matters which have been put before this Court are many of the matters which are in his written submissions. Mr. Gardiner said the fundamental difference between the Stone Suppliers' proceedings and these proceedings is that the stone suppliers' proceedings have not crystallised in any settlement. These proceedings have settled. The change is dramatic. The third party statement of claim when delivered by Murphy Concrete claimed simply an indemnity against such sum as Murphy Concrete might ultimately end up to pay McLoughlin. Now, Murphy has settled with the plaintiff, without finding out the terms of the settlement between Ballymore, Cross Winds and the Plaintiff, that is a matter for himself. He said there was no response to the motion that addresses the fundamental question that if a party is seeking an indemnity from another party in respect of monies that the first party may have to pay a plaintiff and the first party is settled with the plaintiff. We now have to tell the party he was suing which is Ballymore and Cross Winds, how much Murphy is seeking.
49. Mr. Gardiner referred to *O'Meara v. Goodbody Stockbrokers* [2016] IEHC 456 [hereinafter *O'Meara*] in which Barrett J. characterised a statement of claim of the plaintiff and stated that the statement of claim: -

*" . . . is light on detail, and it is light on certain detail, it is precisely the type of detail that one would expect largely to be fleshed out by way of replies to particulars"*

And at para. 6, Barrett J. says: -

*"[the plaintiff] indicates that he will confine his replies to his case insofar as it relates to one defendant only; the balance of his case, even though joint and several liability is alleged, is to be kept secret..."*

*Mr O'Meara has failed completely at this time to apprise Goodbody Stockbrokers of the type of information to which Lord Donovan refers and of which he must be in possession"*

Barrett J. made an order directing that further and better particulars be provided.

50. Mr. Gardiner referred to the case of *Quinn v. PWC* [2019] IESC 13 [hereinafter *Quinn*] and states that the Supreme Court judgement delivered by O'Donnell J. says that if you have the capacity to provide particulars then you have to provide them.
51. In response, Mr. Steen suggested that the *O'Meara* case only related to a single case brought by a single plaintiff against a single defendant in respect of a single transaction. It is myopic to regard the McLoughlin proceedings in the same way. He also submitted that the issue in this case is the respective degrees of fault and liability to make contribution as between the various parties including Ballymore and Murphy Concrete on the basis of the fourth party proceedings that Mr. Gardiner has issued and on the basis that he has also joined Roadstone and CRH to his own Stone Supplier proceedings.
52. Mr. Steen stated that the issue is not how much it cost to remediate the McLoughlin house or even how much is paid with regard to settling the claim with regard to the McLoughlin house. The issue is the respective degrees of fault and liabilities to make contribution as between the various parties including Ballymore, Murphy Concrete on the basis of the fourth party proceedings that Mr. Gardiner has issued and on the basis that he has also joined Roadstone, CRH, his own Stone Suppliers proceedings also involving Ms. Egan McGrath's client and that is the central issue. He submitted that he did not think it fair, appropriate or helpful to view the McLoughlin proceedings in isolation the way that Mr. Gardiner does. He said the fact of the matter is that seeking particulars in these proceedings is confined to these proceedings. That is part of the reason why in his submission the matter is best dealt with as an issue of principle. It is better litigated in the context of the proceedings which focus on the issue of principle, namely Mr. Gardiner's own proceedings. He referred to Ciara Smyth's affidavit and he submitted that the first category is a category of particulars seeking information as to whether the claim for indemnity is being maintained and there are several particulars raised with regard to that particular. The second relates to the basis for that claim. Mr. Gardiner repeatedly said in his submission that he is not looking for that information but that is exactly what his particulars look for under certain headings. Thirdly, we have the issue which is a real point of conflict between the parties which are the particulars that Ms. Smyth describes as the "*Settlement Particulars*". It is claimed that those are the particulars looking to be used as interrogatories against us with regard to the Settlement Agreement that we have reached.

53. Mr Steen submitted that there is simply no basis for any of the requests in Categories 1 and 2 because they are all comprehensively dealt with in the two previous sets of requests for particulars that have been made and responded to in these third party proceedings. He submits the court has not been addressed as to how those particulars are justified or merited.
54. Mr. Steen said that the court is well familiar that McLoughlin and Flannery are the two lead cases in the set that relate to Drumnigh Woods.
55. Mr. Steen then turned to the legal principles and set out O. 19, r. 7(1) of the Rules of the Superior Courts. He relied on the case of *Armstrong v. Moffett* [2013] IEHC 148 and he quoted Hogan J. where he stated: -

*"The underlined words make clear that the particulars sought must relate a matter stated in the pleading".*

He also quoted from O'Donnell in *Quinn* where O'Donnell J. stated: -

*"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.*

*This reflects the classic distinction, dating at least from . . . the Rules of Court scheduled to the Supreme Court of Judicature Act. . . . 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'.*

*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.*

*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.*

*In complex cases, more detailed particulars may properly be required.*

*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.*

*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. . .”*

56. Mr. Steen further submitted that the settlement particulars are the nub of the dispute between the parties. As Mr. Gardiner has identified, Mr. Steen sets out a number of broad reasons as to why he thinks in the peculiar circumstances of this case and in the light of this case management regime, these particulars should not be ordered off stage. The principal one is the idea that the focus should be on the question of principle. The issue of principle being about determining the respective levels of fault and responsibility among the various stone suppliers and Ballymore in connection with the issue of pyritic heave which is the basis of all these claims. He then submitted that the confidentiality of the mediation that the Settlement Agreement is confidential. He said there is a policy which inspires expression in the Mediation Act and in O. 56(a) of the Rules of the Superior Court to encourage litigants to resolve their disputes using alternative dispute resolution if necessary. Ballymore were invited to participate in the mediation under the chairmanship of Dermot Gleeson SC but declined to do so. This has resulted in a settlement agreement which has final and binding compromise in respect of all disputed matters between them. Mr Steen says it covers the entirety of the dispute. He went on to say that if the agreement or its terms were liable to be disclosed to other parties who declined to participate in the mediation but whose interests were still adverse to his clients it would create a strong disincentive to settlement and mediation in a multi – party dispute. He asserts that would be a regressive development which should be avoided if possible. The pleadings may not be closed and it is highly unlikely even if mitigation would take its own recourse that there would be any trial before Michaelmas 2021 at the very earliest. It is likely to be significantly longer given the requirement for expert engagement and so on in the median times. He quoted O’Donnell J. in *Quinn* saying: -

*“. . . hard fought litigation is, like other endeavours, a game of inches”.*

57. He then set out to deal with the individual requests on their own terms. The request for particulars were as follows: -
- (a) *Please clarify whether Murphy Concrete made any payments to the plaintiff in connection with his claim against Murphy Concrete arising from the supply by Murphy Concrete of infill material to Ballymore for use in the construction of the development or more specifically the construction of 74 Drumnigh Wood. The reply was the plaintiff’s claim against Murphy Concrete was compromised pursuant to a confidential agreement and the proceedings are therefore the subject of an order of Eagar J. dated the 16th December 2019 which records that the plaintiff’s proceedings against Murphy Concrete had been struck out by consent. Murphy Concrete is not at liberty to discuss, publish or disseminate any details of the compromise save for the fact that the parties to the compromise have reached a final and binding compromise in respect of all disputed matters between them. If*

*Murphy Concrete did make such payments please provide full and detailed particulars in respect of each of the payments to be made including:*

*(i) the amounts of each of the payments;*

*(ii) each of the terms of settlement agreed by which Murphy Concrete settled the claim of the plaintiff;*

*(iii) the date of the settlement agreement which Murphy Concrete settled the claim of the plaintiff.*

*The reply was that this particular does not arise from para. 11 of the third party statement of claim.*

58. Mr. Steen submitted that the points of principle are the better answer to this particular motion at this stage in these proceedings. He continues to say that even if this court was prepared to engage with the requests that the particulars if analysed in detail do not arise out of the pleadings for the most part. It is actually delivered between the parties and therefore are not cognisable.

59. In response, Mr. Gardiner suggested that the court would be led into fundamental error by virtue of the fact that what is sought to be done in answer to the straightforward application for particulars of what it is has been paid. He states that the court is being asked to look at absolutely extraneous matters. He suggested that Mr. Steen said that he will ultimately have to provide the breakdown of the amount claimed in respect of the McLoughlin claim. Mr Gardiner says this can be done now although it might be difficult. What he has not done is explained why he will not do it now. He said it is clear from *Armstrong v. Moffatt* [2013] IEHC 148 that this is basic. Mr. Gardiner referred to the judgment delivered by Hogan J. and quoted from the following at para. 41: -

*"It follows, therefore, that particulars will be ordered in the interests of fair procedures and to ensure that a litigant will not be surprised by the nature of the case which he has to meet. The case-law shows that this is essentially the governing principle in all cases where the issue of whether the particulars should be ordered has been considered".*

60. Mr. Gardiner said that this was the governing or guiding principle as to whether or not particulars should be ordered. Hogan J. continued: -

*"You can only have particulars of what is pleaded".*

Mr. Gardiner said the pleading here is the third party's statement of claim. At the time it was delivered there had not been a settlement of the proceedings. He said it is a totally different arena when the plaintiff's claim against the defendants is settled. He stated that Mr. Steen says he is going to trial on this third party statement of claim without ever telling him what it is he is claiming. Mr. Gardiner said that Murphy Concrete has no stateable claim for loss and what he is looking for is a stay on his third party action

without ever bringing an application for a stay. He has never brought an application for a stay and Mr. Gardiner says that Mr. Steen says he is happy to prosecute the third party proceedings, but wants to stay them. The proceedings are fifteen cases. Murphy Concrete referred the court to case managing hundreds of cases. Most of the cases have been settled except sixteen. The only ones left are the third party actions. Mr. Gardiner opened para. 31 of *Quinn* in which O'Donnell J. said: -

*"The plaintiff has the capacity to provide substantial detail at this stage of the proceedings, and should, in my view, be required to do so. It is perhaps inevitable that any particular so provided would be qualified by reference to the limits of the information available, and pending the receipt of discovery. However, this motion raises a fundamental issue of principle as to whether the plaintiff is entitled to refuse this level of detail, whether at this stage of the proceedings, or even after discovery, because the plaintiff contends it is a 'matter of evidence'. In my view, it is at least possible that the delivery of these particulars at this stage will advance the understanding of the case to be made, tighten its focus, and therefore reduce the scale and cost of the work which must be undertaken to prepare for what is on any version a very detailed, complex and lengthy case. That, I think, is the proper function of further particulars".*

61. Mr. Gardiner also quoted from *Perestrello* as follows: -

*"There is plenty of authority for the proposition that a plaintiff need not plead general damage but since the expressions 'special damage' and 'special damages' are used in such a wide variety of meaning, it is safer to approach this case by considering what is a plaintiff required to plead rather than what he is not. The Rules of the Superior Courts are of no direct assistance. Order 18, r. 7 requires every pleading shall contain some material facts. Rule 12: - "Every pleading contains necessary particulars of any claim". Rule 15 - "A statement of claim must state specifically a relief for remedy claim". It follows that the necessity of pleading damage (meaning injury) or damages (meaning the amount claimed to be recoverable)" if it arises at all does so as an example of the general requirement of any statement of claim and shall put the defendants on their guard and tell them what they have to meet when the case comes for a trial".*

62. Mr. Gardiner added that is what pleadings are for. He further quoted from the judgment:

*"Accordingly if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful action, he must warn the defendant in the pleadings that the compensation claims will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notion as to what is general special damage, but by the circumstance of the particular case. The question to be decided is not one of words, but is one of substance".*

63. He further quoted from Lord Donovan in *Perestrello*: -

*“. . . if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act. . .”*

Mr. Gardiner said it is unusual damage that you would not normally expect to be in the consequence of the act, then he must put the defendant on guard that his claim extends to this unusual damage.

64. He then further quoted from Lord Donovan: -

*“The same principle gives rise to a plaintiff’s undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation”.*

65. Mr. Gardiner said the next matter that he wanted to reply to was Mr. Steen’s statement that he should not have to reveal the settlement terms because the court could stay the proceedings based on a proposition. He said there had been no interrogation of the terms of the settlement agreement. There could be 600 individual settlement agreements, it is only today that the court has been told there is a global settlement agreement in the written submissions and the correspondence from Byrne Wallace requests a copy of the settlement agreement with McLoughlin or the settlement agreements with the other parties.

66. Mr. Gardiner said the other point raised was that the third parties have not revealed the details of their settlement with McLoughlin. He said that Roadstone, the cross party, has not seen fit to seek any settlement agreement between the plaintiff and Ballymore Residential. He said this is not an answer for this application.

67. Mr. Gardiner then said the other point that is made is in relation to the Stone Supplier’s proceedings and the Homeowner proceedings, none of which is before the court. He said 584 cases have been settled and there are just sixteen left. Mr. Gardiner said that the case law is clear, the court has the capacity to do it and if the court does so the third parties will see where they are, they will know what they are facing and they will take a different attitude to the litigation if Murphy indicate they had settled fifteen cases for €100 a head and are in for €1,500 there is no necessity to spend €100,000 on discovery regardless of discovery. Therefore, Murphy have to tell him as a matter of fair procedures.

### **Jurisprudence**

68. The relevant provision of the Rules of the Superior Courts, 1986 is order 19, Rule 7 which provides:

*“(1) A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.*

- (2) *Before applying under this rule to the Court a party may apply for particulars by letter. The costs of each letter and of any particulars delivered pursuant thereto shall be allowable on taxation. In dealing with the costs of any application for particulars, the provisions of this paragraph shall be taken into consideration by the Court.*
- (3) *Particulars shall not be ordered under this rule to be delivered before defence or reply, as the case may be, unless the Court shall be of opinion that they are necessary or desirable to enable the defendant or plaintiff, as the case may be, to plead or ought for any other special reason to be so delivered."*

The purpose of this Order 19, r. 7 is to compel a party to furnish further and better particulars to a party where one is unsure of the case it has to meet. This is argued by the party who brought the motion before this court.

69. The court accepts the general principles succinctly summarised by O'Donnell J in *Quinn* para. 20 of his judgment. It is not necessary for the Court to quote this passage at this point as it will be addressed at a later point.
70. In particular, the court notes the following principles arising in the jurisprudence:
  - i. It is well established now that the seeking of further and better particulars ought not to be used as a means of interrogation. As Hogan J. characterised the misuse in *Moffatt v. Armstrong* [2013] IEHC 148 which amounts to an "*interrogatory dressed up as a request for particulars*".
  - ii. The important relationship between particulars and discovery was discussed in *ASI Sugar Ltd.v. Greencore Group* [2003] IEHC 131. It was noted that properly particularised pleadings enables discovery to be sought on the issues which minimises cost which is particularly important in complex cases. This was reiterated by Barrett J. in *O'Meara v. Goodbody Stockbrokers* [2016] IEHC 456. In a similar vein, Clarke J. notes that detailed particulars are necessary in complex cases to limit the range of discovery in *Thema International Fund plc v. Institutional Trust Services (Ireland) Ltd.* [2010] IEHC 19
  - iii. Baker J. explained in *Playboy Enterprises International Inc v Entertainment Media Networks Ltd.* [2015] IEHC 102 that a greater degree of particularity in pleading was important in complex cases stating:

"It is in the interests of the parties, as well as appropriate in the interests of justice generally, and the efficient use of court time and resources, that the issues in complex litigation be identified, and if necessary be reduced prior to trial, or indeed prior to the making by the parties of discovery, especially when one considers in the modern age of computers, discovery can be so voluminous as to require an army of lawyers and advisors to analyse."

The court will now elucidate on the application of the appropriate principles to be applied to the particular circumstances of the complex proceedings before the court.

### **Discussion**

71. The notice of motion brought by Ballymore Residential Ltd. and Cross Winds Cottages Ltd. seeks details of the terms of the settlement agreement made between Murphy Concrete and the plaintiffs. It emerged in the course of the proceedings that there were no separate agreements in relation to each of the estates but that there was a comprehensive settlement agreement. The third party notice dated the 30th May 2016 seeks: -
- (i) An indemnity against the full amount of the plaintiff's claim together with the plaintiff's costs. The third parties have engaged in exchange of pleadings but in the main seeking the details of the amounts which are being sought by Murphy concrete.
72. This is being resisted by Murphy Concrete on the following basis: -
- (i) The settlement agreement was confidential and that it would be a breach of that confidence should they disclose this matter;
  - (ii) That the court should adjourn this notice of motion until the matters which are before Murphy J., that is the Homeowner's proceedings and the Stone Suppliers proceedings are dealt with by Murphy J.
  - (iii) In an alternative the court should refuse the request in the notice of motion and should get to the closing of the pleadings and then perhaps in discovery, the third party will find out the details of the claim;
73. In response to this, the third party cites the Supreme Court decision delivered by O'Donnell J. in *Quinn*.
74. The court is satisfied that it should not adjourn these matters until the Stone Suppliers and the Homeowner's proceedings are dealt with by Murphy J. This Court has been case managing these proceedings, the subrogated proceedings since 2017 and proposes to retain the proceedings. The court also notes that faced with very substantial litigation which had it come to trial might have taken 100 or more days to be heard. The main proceedings have been settled, save insofar as the third party notice and fourth party notice are extant.
75. The court notes that at the hearing of this matter the issue of confidentiality was raised and Mr. Steen rightly commented that for mediation in commercial disputes to be successful, this element of confidentiality should be maintained by the court.
76. However, it is also clear that there was no issue of confidentiality in the order made by this judge on the 16th December 2019. It is also noted by the court that although Murphy Concrete made the plea that the agreement is confidential, nevertheless in the third party

notice they are seeking indemnity against the full amount of the plaintiff's claim together with the plaintiff's costs or a contribution in the alternative and yet will not indicate to the third parties what exactly is being sought against them.

77. The court also notes the prospects of this proceeding to discovery at the expense of court time, large costs and substantial delay in getting to the nub of the case.

78. The court notes at this juncture para. 20 of the decision of O'Donnell J. in Quinn: -

*"The guidance to be gleaned from the case law on O. 19, r. 7 (1) RSC can, I think, be summarised as follows: -*

*(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. (In this case it is what the third party are seeking, a broad outline of what penalty or contribution has been sought against them)*

*(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. (as he then was), 20 October 2005), para. 7.2".*

In this case, it is quite clear that neither Ballymore Residential and Cross Winds Cottage Limited are aware of the true facts.

- (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".*

This Court is satisfied that this is a complex case.

- (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".*

Again, Ballymore Residential Ltd. and Cross Winds Cottages Ltd. are entitled to know the range of evidence with which they will have to deal with at trial.

At para. 23, O'Donnell J. says: -

*"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 . . ."*

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".*
25. *One reason why a complex case requires detailed particulars is, as Clarke J. pointed out in Thema International Fund plc v. Institutional Trust Services (Ireland) Ltd. [2010] IEHC 19, (Unreported, High Court, Clarke J., 26 January 2010), to limit the range of discovery. Discovery is an essential tool in any significant litigation, but it can place an onerous, expensive, and therefore oppressive burden on the parties, which risks creating, rather than avoiding, injustice . . ."*

## **Decision**

79. The court is satisfied that this is a complex case which requires detailed particulars. The Court notes the following:

- (I) This is the final issue in relation to a very complex and potentially very long and difficult hearing which would require a judge to have considered the claims and counterclaims in the litigation to date to have occupied the court's time for a very long time.
  - (II) The court is absolutely satisfied that these proceedings would continue for a period of considerable time and expense if this matter was to continue without the particulars being replied to properly. In such a matter it appears to the court in the absolute interests of the litigation to require that Murphy Concrete provide full and proper particulars which they entered into with the plaintiffs in this case.
  - (III) The court notes that in the order dated 16th December 2019 there is no mention of the proceedings being struck out on the basis that there is a requirement of confidentiality.
  - (IV) The court also notes that there was not a settlement agreement in respect of Drumnigh Woods development but a settlement agreement dealing with all the developments.
  - (V) The court therefore grants relief in terms of the notice of motion dated the 21st August 2020 in favour of Ballymore Residential Ltd. and Cross Winds Cottage Ltd. in terms of the reliefs sought at 1 and 2 in the notice of motion.
80. The basic particulars which are sought by Ballymore Residential Ltd. and Cross Winds Cottage Ltd. are seeking exactly what they are being required to produce and what they are required to provide an indemnity for when Murphy Concrete refused to give them the details of the settlement agreement. The court notes that there is no mention of the proceedings being struck out on the basis that there is a requirement of confidentiality in its order dated the 16th December 2019. The court also notes that there was not a settlement agreement in respect of the Drumnigh Woods development but a settlement agreement dealing with all the developments. The court is also cognisant of the substantial time and cost of the third party's full and proper particulars in respect of the settlement agreement be provided to Ballymore Residential Limited and Cross Winds Cottage Limited by Murphy Concrete (Manufacturing) Ltd. pursuant to O. 19, r. 7 of the RSC. The court is directing that the settlement agreement be made within four weeks of the date of perfection of the order in this case.
81. As this judgment is being delivered electronically, the court will direct that the case be listed for mention on the 18th December 2020 for the making of the formal order in circumstances where there may be some movement on the part of the parties in the case, for further case management and for the issue of costs of the motion.
82. Murphy Concrete (Manufacturing) Ltd. are entitled to seek the details of the basis on which the proceedings against Ballymore Residential Ltd. and Cross Winds Cottage Ltd. was not proceeded with by the plaintiff, and any terms in that regard, but such an application must be made by notice of motion and a date fixed for the hearing of same.

83. The court requests that any applications by the fourth named defendants, Roadstone Ltd., CRH plc., and William Miley Ltd. be made by way of notice of motion to this Court.