HIGH COURT

[2021] IEHC 569

[Record No. 2020/6137 P]

BETWEEN

DARDANIA HOLDINGS LIMITED

PLAINTIFF

AND

ADVANCED LIFE SAFETY
(TRADING AS ADVANCED FIRE PROTECTION)

DEFENDANT

RULING of Mr. Justice Mark Heslin delivered on the 31st day of August 2021

Introduction

1. This judgment concerns a dispute between the parties concerning costs. The hearing in relation to this dispute took the entire day of Friday 09 July, 2021. The first half of the day was taken up by the court, at the helpful suggestion of the parties, reading the pleadings comprising items 1 to 37 inclusive in the books which were provided to the court; with the second half of the day taken up by oral submissions made with skill by Mr. Marray BL for the plaintiff and Mr. Downey BL for the defendant.

2. I have since taken the opportunity to consider again and with care the entire of the pleadings and all the inter-partes correspondence and the written legal submissions furnished by the plaintiff and defendant respectively (the foregoing material comprising Tabs 1 to 64, inclusive, of the books provided to the court. For the sake of clarity, the material considered by me prior to reaching the decision detailed in this ruling comprised the following:

   (1) *Ex parte* docket dated 02 September, 2020.

   (2) Plenary summons, issued 02 September, 2020.

   (3) Affidavit sworn by the plaintiff's solicitor on 02 September, 2020.

   (4) Exhibits "LS1" to "LS3" thereto.

   (5) Order made by this Court on 02 September, 2020.

   (6) Supplemental affidavit sworn by Mr. Agim Gashi on 02 October, 2020.

   (7) Supplemental affidavit sworn by the plaintiff's solicitor on 01 October, 2020.

   (8) Second supplemental affidavit sworn by the plaintiff's solicitor on 02 October, 2020.

   (9) Exhibit "AH3" to "AH8" thereto.

   (10) Order made by this Court on 05 October 2020 vacating the 02 September 2020 order.

   (11) Memorandum of appearance dated 05 October, 2020.

(12) Replying affidavit of Padraig McEnaney sworn 05 October, 2020.

(13) Exhibit "PMc1" to "PMcE17" thereto.

(14) Statutory declaration re mediation dated 28 October, 2020.

(15) Inter-partes correspondence which passed between the plaintiff and defendant and/or their respective solicitors (covering the period 20 April, 2020 to 10 March, 2021, including emails, invoices, quotes, correspondence etc).

3. The crux of the dispute is the plaintiff's contention that it should be awarded its costs arising from an *ex parte* application for an interim injunction made by the plaintiff on 02 September, 2020, which resulted in an order granted by the court on that date. Not only does the defendant oppose the plaintiff's application for costs in respect of the said *ex parte* order and the associated response by the defendant, it contends that the defendant should be awarded its costs.

The 02 September, 2020 Order

4. The operative part of the court's 02 September, 2020 order which was made in response to an ex parte application by the plaintiff states as follows:-

> *"IT IS ORDERED that the Defendant its servants or agents or any persons having notice of this Order whatsoever do deliver up to the Plaintiff forthwith the keys alarm codes locks and all other security and access devices and equipment or information in respect of the commercial fire alarm system panels or any other item required to permit the repair or service of the fire safety system installed by the Defendant at each of the four properties at 4 Campbell's Court, Dublin 7, 14 Lower Dorset Street, Dublin 1, 19-20 Meath Street, Dublin 8 and 46 Bolton Street, Dublin – said alarm codes to include the fire alarm system panel engineer's code (including as varied from the default setting by the Defendant its servant(s) and/or agents) and the fire alarm system panel manufacturer's code (including as varied from the default setting by the Defendant its servant(s) and/or agents)."*

The urgent need for engineer's codes

5. Before proceeding further, it is appropriate to make clear that, when this Court granted the foregoing order, it did so having been given to understand by the plaintiff, that the following was the position:-

- that the matter was acutely urgent, in particular with regard to the Meath Street property, being a mixed-use property combining residential and commercial use, holding 20 occupants at any one time, mostly students;

- that the application was brought in the interest of making sure that there was a working fire safety system in place;

- that a key issue was the defendant's refusal to release to the plaintiff the "*engineer's code*" necessary to access the fire safety alarm panels for further essential maintenance;

- that, as of 02 September, 2020 the fire safety system at the Meath Street premises "*may not be active;"*

- that in view of "*the risk to life*" as well as "*statutory legal and moral duties of the plaintiff*" it had given instructions for the application to be brought "*as a matter of utmost urgency*" in order to seek "*the engineer's code*" for the fire safety system's control panel;

- that the defendant was withholding the codes "*essential for the proper operation*" of the fire safety systems installed at each of the properties;

- that without these codes, including the engineer's code, the plaintiff could not ensure the proper operation and maintenance of the fire safety systems, in particular at the Meath Street property;

- that the plaintiff had paid, in full, the balance demanded by the defendant (€150) on or about 20th August, 2020;

- that as well as making the aforesaid payment, the plaintiff had requested the defendant to deliver immediately *"the codes required for activating and/or maintaining the installed fire safety systems*";

- that despite the aforesaid payment and request, the defendant was refusing to deliver the codes;

- that, by its action, the defendant was continuing "*to refuse to permit or enable the plaintiff to have a fully operative fire safety system in the city-centre buildings which contain private residences…"*;

- that the relevant order was required "*to ensure the safety, against fire, of residential premises"*.

6. The foregoing position as outlined to the court at the *ex parte* stage is perfectly clear from any objective analysis of the affidavit which grounded the *ex parte* application and which was sworn on 02 September, 2020 by the plaintiff's solicitor. In other words, there is no doubt about the fact that the court was told that the only way to address an urgent fire safety risk, with the potential to affect scores of residents in the buildings themselves as well as those in neighbouring buildings abutting the relevant premises, was to require the defendant to hand over relevant codes, including the "*engineer's code*" which the defendant was said to be withholding impermissibly. The court was given very clearly to understand that there was no alternative means of addressing this urgent fire safety risk. In short, the court was assured that these urgent problems could not be resolved by any other means and that the injunction sought was essential. In particular, the plaintiff's stance was that, without the defendant being required, by court order, to hand over the engineer's code, essential repairs to ensure the safety of the fire alarm system simply could not happen. In this regard, it is appropriate to quote verbatim, paras. 37-40 inclusive, from the affidavit which grounded the ex parte application for the injunction:-

"***Balance of convenience***.

37 I say that the Order can be granted without prejudice to the position of the defendant, but I say and believe and am advised that the defendant can pursue any matter by ordinary means and that withholding of the alarm codes cannot reasonably be pretended as legitimate on the facts pertaining. The overwhelming balance of convenience lies in favour of allowing essential repairs to proceed by a third-party fire safety firm.

Damages as to Remedy.

38. If the Plaintiff is not permitted to service the fire safety systems by having an engineer code, it is impossible to say what adverse consequence may arise, but the nature of the potential consequences is clear. Damages could not conceivably undo a loss of life.

Undertaking as to Damages.

39. I say that the requirement for the plaintiffs [sic] to give an undertaking to this Honourable Court in respect of any damages which the defendant might suffer as a result of the injunction sought being granted has been explained to the plaintiff and to Mr. Gashi, Principal and Director of the Plaintiff Company.

40. I say that the Plaintiff fully understands the requirement and its implications, and I say that the Plaintiff has authorised your deponent to give such an Undertaking, which I hereby confirm." (emphasis added)

Affidavit sworn by the Plaintiff's Director confirming the contents of his solicitor's affidavit

7. It is important to note that although the grounding affidavit in respect of the ex parte application was sworn by the plaintiff's solicitor on 02 September, 2020, Mr. Gashi, a director and the principal of the plaintiff company swore an affidavit on 01 October, 2020 on behalf of the plaintiff company with its consent and authority. At para. 6 thereof, Mr. Gashi approved and affirmed the factual matters set out in the grounding affidavit which had been sworn by his solicitor concerning the contract between the plaintiff and the defendant. At para. 7 Mr. Gashi averred that he approved and affirmed matters set out in the grounding affidavit "*as to the dealings and correspondence*" between the defendant company and himself, as the plaintiff's principal and director and he also affirmed the correspondence, including letters and emails, as exhibited by his solicitor in the grounding affidavit.

Communication exhibited by the Plaintiff

8. Turning to the correspondence exhibited in the grounding affidavit which was sworn on 02 September, 2020, email communication between the parties covering the period from Monday 20 April, 2020 (16:19) to Wednesday 22 July, 2020 (15:27) was exhibited. In other words, no email *after* 15:27pm on Wednesday 22 July, 2020 was exhibited. Thus, the court was very clearly given to understand that either there had been no further email

sent by the defendant *after* 22 July, 2020 or any such email was not relevant to the issues in dispute.

9. In the manner which will be more particularly explained in this judgment, there was in fact a later email, being one sent by the defendant to the plaintiff on 20 August, 2020 (12:22) and I am satisfied that this was highly relevant to the issues in dispute and to the factual position which pertained as at the date the *ex parte* injunction was sought. Inexplicably, however, it was not exhibited. I deliberately say inexplicably, because, in the context of the hearing of the costs dispute, no explanation was made on affidavit by the plaintiff regarding the failure to exhibit the 20 August, 2020 email which had been sent by Ms. Martina Smith, Managing Director of the defendant to Mr. Gashi.

10. It will be recalled that at paras. 6 and 7 of his 01 October, 2020 affidavit, Mr. Gashi very explicitly approved and affirmed the contents of the affidavit which had been sworn on 02 September, 2020 by his solicitor, including "as to the dealings and correspondence" between the defendant company and him. Yet, nowhere in that affidavit does he address the fact that a relevant piece of correspondence was not put before the court at all. It is also appropriate to say that Mr. Gashi's affidavit which was sworn on 01 October, 2020 was plainly not sworn under the same type of time pressure which might well attend the hasty preparation of an urgent application for an injunction. It was sworn a month later. Despite this, nowhere does Mr. Gashi make any reference to the 20 August, 2020 email. This too, is inexplicable and, in my view, unacceptable.

Relevant communication omitted by the Plaintiff

11. In saying the foregoing, I direct no criticism at the plaintiff's solicitor. To do so would not be fair as this Court has no evidence from which it could conclude that there was a deliberate intention on the part of the plaintiff's solicitor to omit relevant material. I also wish to make clear that learned counsel who represented the Plaintiff at this costs hearing was not instructed at the time the *ex parte* injunction was applied for or discharged and it appears that Mr. Marray came into the case relatively soon before the costs hearing itself. Thus, no criticism whatsoever can be directed at counsel for the plaintiff. It is, however, an incontrovertible fact, that relevant material was omitted from the plaintiff's *ex parte* application and the responsibility for that must rest with the plaintiff.

Injunction not required on the merits

12. Before looking at the significance of the communication which was omitted, it is appropriate to emphasise two points with regard to the *ex parte* brought on 02 September, 2020. Firstly, the order sought was said to be essential having regard to the merits. In other words, the court was given to understand that the order was necessary and that there was no alternative means by which the plaintiff could address what were said to be pressing fire safety concerns. In the manner which will be explained in this judgment, that was not the true position. There were, in fact, several ways in which the plaintiff could have resolved any issue of concern regarding the fire safety systems *without* the defendant being required to hand over the "*engineer's code*". In fact, the defendant never did hand same over, yet the plaintiff resolved its issues without reference to the defendant and without the requirement for the engineer's code.

The duty to make full and frank disclosure

13. Secondly, the court was entitled to take the view that, in seeking injunctive relief on an *ex parte* basis, the plaintiff had made full and frank disclosure. There is no dispute in relation to the relevant principles and it is sufficient, for present purposes, to refer to the decision in *Bambrick v. Cobley* [2006] 1 ILRM 81 in which Clarke J (as he then was) referred to the decision of *Brown-Wilkinson VC in Tate Access Floors Inc. v. Boswell* [1991] Ch 512 (at 532) wherein the English Court stated: -

> *"No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the ex parte order and may, to mark its displeasure, refuse the plaintiff further inter-partes relief even though the circumstances would otherwise justify the grant of such relief."*

14. With regard to the material facts which ought to be disclosed to the court, Mr. Justice Clarke (at p.87) in *Banbrick* put the test in the following terms, namely: *Whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner."*

15. This Court is not being asked to adjudicate in relation to the underlying proceedings. As the court understands it, the proceedings themselves are resolved, subject to the question of costs. In opposing the application for costs, the defendant submits, firstly, there was a clear lack of "*full and frank disclosure"* on the part of the plaintiff when seeking, and obtaining, an interim injunction *ex parte*. Secondly, the defendant argues that, on the merits of the application, no relief should have been granted. Thus, the present application is not one to *discharge* an interim injunction by reason of an alleged failure to make full and frank disclosure. The injunction has long since been discharged. The defendant submits, however, that the principles in forming such a discharge application should also inform the court with regard to determining the costs issue. I agree with this submission.

16. As regards the foregoing, the defendant draws the court's attention to the factors identified by Clarke J (as he then was) in *Bambrick* as follows: -

> *"1. The materiality of the facts not disclosed.*
>
> *2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obvious intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.*

3. *The overall circumstances of the case which lead to the application in the first place."*

Ex parte injunction vacated

17. At this juncture it is appropriate to point out that the interim injunction which I granted on 02 September, 2020 - on the very clear understanding conveyed to the court by the plaintiff, that the relevant order was the one and only way to deal with an urgent fire safety concern - was later vacated. It was vacated arising from an application brought by the defendant which saw both sides legally represented and, as a result of relatively brief submissions, it emerged that, without the defendant ever having handed over engineer codes, there was no need for the Court's order to continue. It transpired that, without the defendant having handed over any codes, the plaintiff had promptly resolved its issues and, in essence, had no objection to and could make no opposition to the discharge of the *ex parte* interim injunction. It is now appropriate to refer, at least in broad outline, to the background to the dispute and to the chronology of events leading to the *ex parte* application.

The Plaintiff's claim as per the Plenary Summons

18. In the relevant plenary summons, which the plaintiff issued on 02 September, 2020, the following relief is sought as against the defendant:-

"1. An order for a specific performance of the Agreement made between the parties on or about the 4th July, 2019, relating to the installation and/or service (including parts and labour) of inter alia, commercial fire alarm system panels at each and all of the 4 properties…;

2. If appropriate, damages in lieu of or in addition to specific performance;

3. Damages, including aggravated punitive damages if appropriate for breach of contract (including fundamental breach of contract), negligence, breach of duty, (including statutory duty) and/or unlawful interference with the economic interests of the plaintiff;

4. Such further or other order as this Honourable Court deems fit;

5. Interest pursuant to statute;

6. Costs".

19. It is appropriate to note that, despite pleading reliance on what was said to be "*the Agreement"* made between the parties on or about 04 July, 2019, no such agreement was exhibited and the defendant maintains that there was never, in fact, any such agreement. It is not in dispute that the defendant company supplied certain alarm systems and carried out certain commissioning work in relation to same. Nor is it in dispute that the defendant provided a quote to the plaintiff in respect of an annual service contract and the plaintiff declined to enter into that service contract.

Relevant events

20. The chronology of relevant events giving rise to the *ex parte* application include the following. It appears that a tenant did something in the premises to cause a fault on one of the alarms to be returned. The court has no evidence as to the nature or extent of the fault. The plaintiff wished the defendant to call out to the relevant premises and the defendant was willing to arrange an emergency call-out at a cost of €150, excluding VAT. This was on 22 July, 2020. The plaintiff did not make the foregoing payment and does not claim to have made the foregoing payment at that juncture.

20 July 2020

21. It is appropriate to pause at this stage to observe that, if an alarm was showing a *"fault",* the plaintiff's concerns in respect of the risk to life were concerns which arose on or about 20 July, 2020 when the "*fault*" was first returned. Rather than paying €150 plus VAT, the plaintiff requested that the defendant provide *"the passwords for all the panels you installed at the following properties*" and named the four relevant properties.

22 July 2020

22. The foregoing is clear from the email sent by Mr. Gashi to the defendant on 22nd July, 2020 (14:24) which the plaintiff exhibited in the *ex parte* application. That email concluded with the following statement: *"These fire alarm panels are our property and we need access to them immediately. Please forward the access passwords for each of the above properties ASAP. Thanks!"*

23. In a reply sent by Ms. Smith of the defendant on 22nd July, 2020 (2:28pm) she referred Mr. Gashi "*to the contracts that have been issued 'for details in respect of what was included in 'maintenance'"* being a request Mr. Gashi had made in his earlier email. With regard to codes, the defendant made its position clear, namely: "*We are not at liberty to give over engineer codes for various reasons*". In a reply sent by Mr. Gashi on 22nd July, 2020 (14:43) he took issue with the defendant declining to "*send the passwords of the alarm panels"*. There followed an exchange in relation to the balance of an account owing by the plaintiff to the defendant, according to the latter, with the plaintiff asserting that no amount was due (emails of 22nd July, 2020 exchanged at 2:53pm and 15:04). The last two emails in the "*chain*" of emails (which were exhibited in the 02 September, 2020 affidavit grounding the *ex parte* application) comprised the following. The first was an email from Ms. Smith of the defendant to Mr. Gashi which stated:-

> *"Jimmy,*
>
> *The deal as I understand included service contracts and parts to be paid for in full, notwithstanding labour costs. This was not honoured. We reserve the right to call in the account as it stands as per original quote agreement."*
>
> *Kind regards,*
>
> *Martina Smith*
>
> *Managing Director".*

24. The very final email put before the court by the plaintiff was one sent at 15:25 on Wednesday 22 July, 2020, from the plaintiff to the defendant which stated:

> *"Martina,*
>
> *You are leaving us with no choice but to instruct our solicitors and you would have to pay more by instructing yours. You've sent us your apprentice and charged us the same for a qualified electrician. That's terrible and we never agreed to that. When we found out that there was an apprentice sent out we contacted Padraigh and he agreed to reduce the bill. We paid the bill as per the agreement with Padraigh and now I find it difficult dealing with you by charging more for Meath Street. You mentioned that it was €100 for maintenance but would want to charge €150 for coming in and fixing the issue. You never described what the maintenance entails. From the beginning I mentioned that I would be happy to pay €150 for Meath Street fixing and maintenance but in turn you are making everything more difficult and I would rather not deal with you anymore. Please send the passwords/codes today by 17.00 as previously described.*
>
> *Kind regards."*

The Defendant's 05 October 2020 Affidavit

25. Mr. Padraigh McEnaney, a Director of the defendant, swore an affidavit on 05 October, 2020. This was done in the context of the defendant pressing for the matter to come back before the court so that an application to discharge the *ex parte* injunction could be heard. Mr. McEnaney also averred that he was swearing his affidavit for the purposes of opposing any interlocutory relief and he asserted *inter alia*, that there had been a lack of full and frank disclosure in the affidavit grounding the application. At para. 8, he averred that the defendant installed and commissioned fully functioning fire alarm systems in 4 premises belonging to the plaintiff. The foregoing does not appear to be in dispute. He goes on to assert that, following the completion of the works and successfully commissioning of each system, the sum of €2,229.80 remained owing by the plaintiff to the defendant and he also avers that the plaintiff failed, refused and/or neglected to put a service contract in place to ensure routine maintenance of the fire alarm system. The foregoing is certainly the defendant's position and it is fair to say that the plaintiff has neither exhibited any maintenance contract nor exhibited any exchange of emails which could fairly be considered to evidence any such maintenance contract.

26. Mr. McEnaney goes on to aver that, when a third party caused the fire alarm panel to register a fault on 21 July, 2020, the plaintiff refused to schedule an emergency callout by an engineer to investigate the fault. It is averred that Mr. Gashi on behalf of the plaintiff initially agreed to pay a callout charge of €150 (ex VAT) but later queried the charge and subsequently declined to schedule the emergency call. The foregoing does not appear to me to be in dispute. Said payment was certainly not made by the plaintiff on 21 July or in the weeks that followed and, thus, no emergency callout was in fact scheduled. Mr. McEnaney then avers (at para. 8(v)) that:

"In lieu of paying €150.00 (ex VAT) the Plaintiff demanded the Defendant should furnish the Plaintiff with the Defendant's unique Engineers' code (a code personal to the Defendant which is used to access all fire panels installed by the Defendant for its (currently) 1250 strong client base)".

27. There is no doubt about the fact that the foregoing was requested by the plaintiff. This is clear from the plaintiff's emails of 22 July, 2020 (14:24), (14:43) and (3:27pm). Furthermore, the plaintiff's solicitor avers repeatedly in the plaintiff's grounding affidavit that the "*engineer's code*" is required urgently (see paras. 4, 5, 19, 20, 21, 22, 23, 34, 37 and 38). It is clear from the foregoing paragraphs that it was averred on behalf of the plaintiff that the defendant's engineer codes were essential for the proper operation and maintenance of the fire safety systems and that they were being withheld by the defendant and that the plaintiff was, thus, forced to bring the proceedings and seek the injunction, having no other alternative means of dealing with what the court was given to understand was an acutely urgent matter involving potential fire risk which could conceivably result in what the plaintiff described variously as "*harm to innocent third parties"* (para. 35) and "*loss of life*" (para. 38).

28. Mr. McEnaney's affidavit went on to make the following averment at para. 8(vi):

"(vi) To resolve the issue and in lieu of furnishing the defendant's unique Engineers' Code, the defendant offered (verbally on 22 July, 2020) and in writing on 20 August, 2020) to reset the fire alarm panels to the Manufacturer's Code – this permitted the Plaintiff unrestricted access to the alarm panel.

(vii) This Plaintiff refused the defendant's offer despite it giving the plaintiff identical unrestricted access to the fire alarm panels as if it had received the defendant's unique Engineer's code."

Defendant's 20 August 2020 (12:22) email which the Plaintiff failed to exhibit

29. Exhibit "*PME 11*" to Mr. McEnaney's affidavit contained, *inter alia*, a string of emails. Whereas those exhibited by the plaintiff ceased with emails sent by the plaintiff to the defendant at 3:25pm on 22 July, 2020, Mr. McEnaney exhibited a further email which the plaintiff omitted to put before the court. This was an email sent by Martina Smith, Managing Director of the defendant to Mr. Gashi, of the plaintiff on 20 August, 2020 (12:22). The text stated as follows:

"Jimmy,

In response to your email.

It is your prerogative to instruct a solicitor.

The original quote for works were given at reduced hourly rate to be conducted by an engineer.

Maintenance contracts were issued at a reduced rate on the basis of all properties being serviced on a contracted basis.

We offered to attend site to de-fault panels to manufacturer codes. Cost stands at €150.00 (ex. VAT) per site visit.

We are within our rights to protect the integrity of the information on the panels. You might find the following document useful: http://www.dublincity.ie/print/mainmenuservicesdublinfirerescueandemergencyambulanceservicefiresafetylegislation/Living.

It is also useful to speak to your local fire officer to discuss regulations.

Lastly, there is a residual balance outstanding on your account as per previous correspondence. Kindly address.

Kind regards." (emphasis added)

The position as of 20 August 2020

30. For the purposes of the present application concerning costs, it is fair to say that the averments made by Mr. McEnaney are uncontested. In other words, there is no affidavit before me in which the plaintiff asserts that what Mr. McEnaney has averred at para. 8(vi) and (vii) is not factually correct. In particular, there is no dispute whatsoever in respect of the following facts:

    (1) the engineer's code is unique and personal to the defendant;

    (2) the defendant's engineer's code is used by the defendant to access all fire panels installed by the defendant across its 1,250-strong client base;

    (3) there was an offer made by the defendant to the plaintiff on 20 August, 2020 to reset the fire alarm panels to the manufacturer's codes; and

    (4) this would have permitted the plaintiff unrestricted access to the alarm panel, thus dealing with any and all concerns the plaintiff may have had.

31. Before proceeding further, it is appropriate to highlight that it is a matter of fact that, had the plaintiff immediately accepted the 20 August, 2020 offer by paying a mere €150 plus VAT and contacting the defendant to arrange a site visit so that the defendant could reset the relevant fire alarm panels to the manufacturer's codes, the issue of fire safety and the plaintiff's concerns as articulated to the court in the grounding affidavit, would have been fully and finally resolved. In skilled submissions, counsel for the plaintiff, whilst acknowledging that the foregoing offer was made on 20 August, 2020, seeks to focus the attention on Mr. McEnaney's averment that the same offer was made verbally on 22 July, 2020.

The 22 July 2020 offer

32. In circumstances where Mr. McEnaney avers that the same offer made on 20 August 2020 was made verbally by Ms. Smith on 22 July 2020, counsel for the plaintiff points out that no affidavit was sworn by Ms. Smith and he further points out that there is no reference in the email correspondence which was exchanged between the parties on 22 July, 2020 to the verbal offer to reset the fire alarm panels to the manufacturer's code.

33. It is, of course, entirely correct that the emails of 22 July, 2020 do not refer to that verbal offer. Nevertheless, this Court has before it an uncontested averment made by Mr. McEnaney that such an offer was made. Furthermore, the 20 August 2020 email which the plaintiff chose not to put before the court plainly refers to a similar offer made in the *past*. This is clear from the use of the words "*We offered to attend site to de-fault panels to manufacturer codes"* (emphasis added). The past tense is used. To have "*offered*" is to have made an offer previously.

34. For these reasons, I am entirely satisfied that the offer which was made by the defendant on 20 August, 2020 was in fact a *repeat* of the self-same offer previously made by the defendant to the plaintiff. Given the fact that it was on 22 July, 2020 that the parties were in communication, coupled with Mr. McEnaney's uncontroverted averment to that effect, I am satisfied that, as a matter of fact, the same offer was made both on 22 July, 2020 (verbally) and on 20 August, 2020 (in writing), namely, that the defendant was willing to re-set the alarm panels to manufacturer codes. I am also entirely satisfied that had the plaintiff accepted that offer, either immediately in the wake of 22 July, 2020 or immediately after 20 August, 2020, all issues would have been resolved insofar as those canvassed before the court as a basis for an *ex parte* interim injunction were concerned.

35. Even if I am entirely wrong in respect of the fact that such an offer was made on 22 July, 2020, it is incontrovertible that the same offer was made on 20 August, 2020. That offer was of fundamental significance but was not something the court was informed about. I am entitled to conclude that there was a deliberate decision made by the plaintiff that the court would not be made aware of this fundamentally relevant issue.

36. The foregoing speaks to two important factors. Firstly, the existence of this offer demonstrates that there was no necessity whatsoever for the interim injunction to be granted. Secondly, it demonstrates that there was a failure on the part of the plaintiff to make full and frank disclosure.

37. Knowing, as the plaintiff undoubtedly did on 20 August 2020, that the defendant was willing to attend the relevant premises and to reset the fire alarm panels to the manufacturer's codes, it was utterly inappropriate and completely unnecessary for the plaintiff subsequently to move the ex parte application and to give the court to understand, on 02 September 2020, that there was an urgent fire safety risk which could not be addressed without the defendant being ordered by the court to hand over engineer's codes.

38. The foregoing was most certainly the impression conveyed to the court, as is clear from the grounding affidavit. It was a false impression. The engineer's codes were not

necessary at all and the court was not told about a fundamentally relevant offer which the defendant had made and which would have resolved matters entirely.

39. It should be recalled that the relevant "fault" manifested as of 20 or 21 July 2020 and the plaintiff was undoubtedly in contact with the defendant as of 22 July 2020. I am satisfied that, as a matter of fact, the offer repeated on 20 August 2020 was first made on or about 22 July 2020. If the plaintiff generally had a real and pressing concern as regards fire safety, it was one which arose as of 22 July 2020. Yet, inexplicably, the plaintiff, who could very readily have addressed this concern (by paying €150 plus VAT and having the defendant attend its premises) did not do so. This utter inaction on the part of the plaintiff continued from 22 July 2020 throughout the entire of the ensuing month. If there was genuinely an urgent fire safety risk of concern to the plaintiff, this inaction on their part, knowing that there was a solution to be availed of at the cost of a mere €150 plus VAT is utterly incomprehensible. It also utterly undermines the proposition that what prompted the plaintiff to seek an injunction, ex parte, on 02 September 2020 was an urgent and pressing fire safety concern. Rather, it now seems clear that the motivation for the application was, at its heart, a desire on the part of the plaintiff to extract from the defendant the engineer's codes.

40. Furthermore, even if it was entirely unfair for this court to hold that the relevant offer was made by the defendant to the plaintiff for the first time on 22 July 2020 (and I am very satisfied that this is a view the court can fairly hold) it is beyond doubt - indeed accepted on behalf of the plaintiff and properly so - that the relevant offer was made on 20 August 2020 to reset the fire alarm panels to the manufacturer codes. That being the position, it is important to examine what the plaintiff did in response to the defendant's 20 August 2020 offer (being, of course, an offer the plaintiff did not make the court aware of when seeking an injunction on an ex parte basis).

41. It is appropriate at this juncture to set out, verbatim, certain uncontested averments made by Mr. McEnaney in his 05 October 2020 affidavit in which he refers to communication between the parties in July 2020. As well as being uncontested (in the sense that there is no replying affidavit before the court in which the plaintiff takes issue with the facts averred to by Mr. McEnaney), I am satisfied, in light of a careful consideration of the entirety of the evidence before the court, that the averments accurately reflect the factual position. From para. 37, onwards, of his 05 October 2020 affidavit, Mr. McEnaney on behalf of the defendant avers as follows:

> "37. Following receipt of an invoice for €150.00 (ex-VAT) Mr. Gashi telephoned and emailed Ms. Smith requesting the passwords and engineering codes for all of the panels located in all of the plaintiff's premises. As set out in more detail below, it was explained to Mr. Gashi that this was not possible. However, he was offered the alternative of an engineer attending each of the premises to revert each individual Fire Alarm Panel to their default manufacturer's codes.
>
> 38. It was not possible to furnish Mr. Gashi directly with the defendant's Engineering Codes. This is because the Engineering Code is a unique code personal to the

Defendant and is used on all of its installations for all customers. An Engineering Code is a 'Master Key' to any appliance installed by the defendant and possession of same allows the holder to gain access to another customer's fire detection systems and to compromise its configuration. Delivery of the Engineering Code to a third party would constitute a significant security breach on the defendant's part and if used improperly would result in another customer's fire panel being compromised, or disabled entirely. Use of the defendant's Engineering code on another customer's fire system would also give an unauthorised user access to confidential security information belonging to that customer.

39. It was apparent to me that Mr. Gashi simply wanted full access to the panel so that he could either access the settings himself or otherwise engage another person to access the settings on his behalf and/or on behalf of the Plaintiff.

40. To this end the offer by the defendant to attend at the site and to reset the panel to the manufacturer's settings makes the same objective. In simple terms, the Defendant would send an Engineer to access the panel using the Defendant's own Engineering Code and reprogram the Plaintiff's panels so that the panel would be reset to the manufacturer's settings e.g. 0-0-0-0 or 1-2-3-4 or similar, rather than disclosing the Defendant's unique Engineering Code. Once reprogrammed to the manufacturer's setting the Plaintiff, its servants or agents, have full and unrestricted access to the Plaintiff's own panels using the generic manufacturer's codes rather than the Defendant's unique Engineering Code. This in turn removes the danger of any other customer's appliances being compromised.

41. Once panels are reset, the Plaintiff, its servants or agents, can investigate any fault and repair it themselves without any further reliance on the defendant.

42. I say that this offer was made verbally by telephone to Mr. Gashi on the 22nd July, 2020 and again by email on the 20th August, 2020.

43. In respect of the Meath Street property, I note from the grounding affidavit that whilst a default had displayed on the Fire Alarm Panel this does not mean that the system was malfunctioning. A simple call out from the Defendant company at a cost of €150.00 plus VAT (only where the Plaintiff had refused to put a Service Contract in place) is likely to have resolved the issue. It must also be said at this juncture that if the plaintiff had scheduled an emergency call (by the payment of €150.00 & VAT) the Defendant would have responded to that call regardless of any other sums which were due by the Plaintiff.

44. Further, there is no indication that there are any problems in respect of any of the other three properties despite the fact that the plaintiff requested the Engineering Codes to the other panels."

42. It is also appropriate to quote verbatim paras. 48 and 49 of Mr. McEnaney's affidavit which, I am also satisfied, are factually accurate:

"48. Despite the offer of the 22nd July, 2020 and the reply of 24th July, 2020 the Plaintiff, its servants or agents, did not accept the Defendant's offer and ceased communication with the Defendant for almost one month. Having not heard from the Plaintiff since 24th July, 2020 Ms. Martina Smith, Managing Director of the Defendant company emailed Mr. Gashi on the 20th August, 2020 setting out the Defendant's position and reiterating the offer to default the Defendant's panels to the manufacturer's codes. The said email reiterates the cost per site visit and went on to explain why the defendant was required to protect the integrity of the information on the panels.

49. It is noteworthy that this correspondence was not exhibited in the grounding affidavit sworn in support of the application for the ex parte order obtained on 2nd September, 2020."

The submission that the Defendant's 20 August 2020 offer was "immediately accepted"

43. In skilled oral submissions, counsel for the plaintiff suggested that when the defendant's email arrived on 20 August 2020 making the relevant order "it was immediately accepted". To see if this was so, requires an analysis of the correspondence which post-dates the 20 August 2020 offer by the defendant. In my view the foregoing submission is wholly undermined by the contents of the letter which was sent on 20 August 2020 by the plaintiff's solicitors, the contents of which state as follows:

"Re: Alarm System Panel Passwords

Dear Mr. McEnaney,

We refer to the above matter and to our letter to you, Ms. Smith and the company address dated 24th July 2020 to which we did not receive the courtesy of a response.

Ms. Smith informed our client that there was an outstanding balance of €150.00 on his account in respect of works carried out by your company. Accordingly, please find enclosed postal order in the sum of €150.00. We now call upon you to release the alarm codes for all the panels your Company installed at the following properties:

4 Campbell's Court, Dublin 1

14 Lower Dorset Street, Dublin 1

19-20 Meath Street, Dublin 8

46 Bolton Street, Dublin 7

Should you fail to provide the necessary codes and passwords within 24-hours, our client reserves the right to issue proceedings against you for any damage incurred

as a result of same, including, but not limited to, the costs of removal and replacement of the fire alarm panels and any associated equipment.

Sincerely yours"

44. The foregoing is submitted to be the plaintiff's acceptance of the defendant's offer to reset the fire alarm panels in respect of the Meath Street property to the manufacturer's code, the only cost which the plaintiff would have to discharge being €150 plus VAT. The letter from the plaintiff's solicitors of 20 August 2020 is nothing of the sort. I say this for several reasons.

(1) Firstly, it does not accept the offer made by the defendant (an offer made for a second time on 20 August 2020) that the defendant would be willing to send an engineer to the plaintiff's premises to reset or default the codes to the manufacturer's code;

(2) On the contrary, it constitutes a demand that the defendant supply codes and that it do so for four properties, three of which it now transpires, there was no "fault" showing on the alarm panel;

(3) No reference is made whatsoever by the plaintiff's solicitors to the defendant's 20 August 2020 email which had been sent at 12:22. Rather, the letter from the plaintiff's solicitors begins by referring to previous correspondence sent by the relevant firm on 24 July 2020.

(4) That being so, the court is entitled to infer that the plaintiff did not inform his solicitors of the fact or content of the 20 August 2020 letter which Ms. Smith, Managing director of the defendant, had undoubtedly sent to Mr. Gashi that day;

(5) As to the 24 July 2020 letter, its purpose was to demand that the defendant immediately furnish the plaintiff with "the password to the panels installed at 'the plaintiff's four properties'", being, I am satisfied, a demand for the defendant's engineer's code, which the plaintiff subsequently applied for when seeking the ex parte injunction.

45. Plainly, the letter from the plaintiff's solicitors (which I am entitled to hold was sent on foot of the plaintiff's instructions and accurately reflected them) demanded the release of the defendant's codes, even though, as the plaintiff well knew, the defendant had offered to attend the relevant property and reset the fire alarm panels to the manufacturer's code if €150.00 plus VAT was paid.

46. Not only did the letter from the plaintiff's solicitors not accept the offer made by email on 20 August 2020 (to which it did not even refer) the letter did not make the relevant payment. The payment required was €150.00 plus VAT and that payment was plainly due to the defendant. If the letter from the plaintiff's solicitors was truly accepting the offer made by email, one would expect:-

(a) immediate payment; (b) made to the defendant; (c) of €150.00 plus VAT; and (d) accompanied by a request made by the plaintiff for the defendant to attend the premises to reset the fire alarm panels.

47. As to (a) there was not immediate payment. On the contrary, instead of making arrangements for electronic transfer or agreeing to deliver a cheque (or such other prompt payment method as would reflect any urgent wish on the part of the plaintiff to deal with any allegedly urgent fire safety risk), what did the plaintiff do insofar as making payment was concerned? The plaintiff obtained a postal money order and enclosed it in a letter sent by registered post to the Cavan address of the defendant company.

48. If, from the plaintiff's perspective, it truly believed that there was an urgent fire safety issue (being the impression conveyed to the court in the context of the ex parte injunction application made almost a fortnight later) it is incomprehensible why immediate payment was not made on 20 August 2020 and why, instead, the plaintiff chose to send a postal order by post. Indeed, it is difficult to conceive of a slower method of paying the defendant.

49. As to (b) the plaintiff did not pay the full amount. It is beyond doubt that, as the plaintiff well knew, the call-out charge quoted by the defendant was €150.00 excluding VAT. Despite this, the postal order is for just €150.00. In other words, it is plainly for less than was due to the defendant if, that is, the plaintiff wished the defendant to call out to reset the fire alarm panels to the manufacturer's code. This is also inexplicable, particularly if the plaintiff genuinely had an urgent or pressing concern as to fire safety.

50. As to (c) the postal order was made out to the wrong entity. The plaintiff well knew, at all material times, that it was dealing with Advanced Life Safety Limited (trading as Advanced Fire Protection). Not only was that perfectly clear from the emails exchanged between the parties, the plaintiff sued that entity on 02 September 2020. Despite the foregoing, and for an inexplicable reason, the postal order which was sent by the plaintiff to the defendant's Cavan address, as well as being for the wrong amount, was made out to the wrong payee. Instead of being marked payable to the defendant, the plaintiff made it payable to "Padraigh McEnaney". The foregoing is impossible to understand if it was truly the case that the plaintiff had a pressing concern as regards fire safety issues at one or any of its premises.

51. Fairly considered, what the plaintiff did on 20 August 2020 was to proffer insufficient payment to the wrong party via the slowest method one could conceive of. That is not to accept the offer made. The analysis does not end there, however. As to (d), nowhere in the letter from the plaintiff's solicitors dated 20 August 2020 is there any request that one of the defendant's engineers call to the Meath Street property at any specific time or date, or that they contact the plaintiff (or its solicitors) to make such arrangements for the purposes of defaulting or resetting panels to the manufacturer codes (being what the defendant offered to do in the 20 August 2020 email, an offer made for the second time by the defendant). The plaintiff, via its solicitors, made no such request because, in reality, it had no interest in resolving the problem. Rather, its sole focus was to extract

engineer's codes from the defendant, being codes it did not need to resolve any genuine concern it had as regards fire safety. In short, the Plaintiff certainly did not accept immediately or at all the Defendant's 20 August 2020 offer.

25 August 2020 letter sent by the Plaintiff's solicitors

52. It is also appropriate to examine what occurred next, in terms of the relevant chronology. The letter from the plaintiff's solicitors dated 20 August 2020 was received by the defendant on 25 August 2020 and this is not in dispute. Upon reading the letter, the defendant could not have understood the plaintiff to be accepting the offer made by the defendant on 20 August 2020 (being a repeat of the very same offer made on 22 July 2020). Even if the court were to accept the submission that, by sending the 20 August 2020 letter from the plaintiff's solicitors, the plaintiff understood that it was accepting the offer made by the defendant to reset the fire alarm panels to the manufacturer's code (and this cannot be accepted), the question must be posed as to what the plaintiff did next. This arises in circumstances where, even if the plaintiff believed (and I am satisfied that it did not) that it had accepted the defendant's offer, the plaintiff well knew that it had accepted it by post and that a period of time would inevitably elapse before the letter posted to Cavan was safely received and considered. Furthermore, in circumstances where the defendant's offer was to send out an engineer, the plaintiff well knew that to accept the offer, would involve contacting the defendant to make arrangements to provide access to the defendant's engineer so that they could enter the relevant property and reset the fire alarm panels to the manufacturer's code. In the manner analysed, no such arrangements were proposed by the plaintiff in the letter sent by its solicitors on 20 August 2020. Therefore, did the plaintiff ever contact the defendant with a view to making such arrangements? The answer is in the negative. This is also inexplicable.

53. If the plaintiff truly believed that, by sending, via its solicitors, the letter dated 20 August 2020, it had "accepted" the offer made by the defendant via email on 20 August 2020, it was the plaintiff's obligation to do at least the following before moving an ex parte application for injunctive relief. Firstly, the plaintiff should have made sure that the letter was safely received; Secondly, it should have made arrangements with the defendant to provide access to its Meath Street property so that one of the defendant's engineers could promptly attend to reset the fire alarm panels.

54. Had the plaintiff made such contact, it would readily have been made aware that the wrong payment made out to the wrong party had been sent and if it was truly the case that, despite the explicit contents of the 20 August 2020 letter which demanded alarm codes, that the plaintiff (as their counsel submits) really wanted to accept the defendant's offer to have an engineer attend the Meath Street premises) that could have been clarified and the arrangements made. The fact is that the plaintiff did not follow up the 20 August 2020 letter in any way prior to applying to the court by means of an ex parte application on 02 September 2020 which failed to disclose relevant material and which conveyed a wholly incorrect impression to the court.

The Defendant's 27 August 2020 letter

55. As Mr. McEnaney avers, upon receipt, on 25 August 2020, of the letter sent by the plaintiff's solicitors, dated 20 August 2020, the defendant replied by means of a letter dated 27 August, 2020 which, it is not in dispute, was received by the plaintiff immediately after it applied to court, ex parte and obtained the relevant injunction. That being so, the contents of the defendant's 27 August, 2020 letter are not particularly relevant insofar as a determination by this Court of the costs issue. For the sake of completeness, however, the contents of the defendant's 27 August, 2020 letter to the plaintiff's solicitors were as follows: -

> "Re: Jimmy Gashi – Dardania Holdings
>
> Dear Sirs,
>
> We refer to your recent correspondence and we correct information therein as follows: -
>
> As communicated to Mr. Gashi, we offered to attend site to de-fault panels to manufacturer codes at a cost of €150 (ex. VAT) per visit per site. VAT will be charged at 13.5%. Invoices to be raised and payment of same to be received in advance via electronic bank transfer or if by postal money order strictly made payable to Advanced Fire Protection, in which case it will take five working days for a payment to clear.
>
> Residual balance of unpaid invoices to be remitted also.
>
> We enclose returned postal money order made payable to Padraigh McEnaney for the sum of €150 as being incorrect.
>
> We are most eager to resolve the matter, therefore revert at your earliest convenience as per above and we can get working on same.
>
> Yours sincerely,
>
> Martina Smith,
>
> Advanced Fire Protection."

56. It is fair to say that the contents of same, although not received by the applicant until after it sought and obtained an ex parte injunction, accurately reflect what the plaintiff already knew prior to seeking an order from this Court in an application which, on any reasonable analysis, conveyed a materially incorrect impression to the court and omitted to put before the court relevant material.

57. I want to emphasise again that the criticism in respect of the foregoing is not directed at the plaintiff's solicitor or counsel, but it is entirely fair to direct that criticism at the plaintiff.

58. It is fair to say that there were no less than a trinity of separate and distinct methods by which the plaintiff could have resolved any issue with regard to fire safety without recourse to this Court. Firstly, if there was truly a risk to life, it was open to the plaintiff to enter into commercial terms with the defendant as regards maintenance for the alarm systems at such premises as the plaintiff believed represented a fire safety risk. The plaintiff could have done so entirely without prejudice to any commercial dispute. In other words, it seems entirely possible that any underlying or parallel dispute over monies historically due or not, could have been "hived off" to be mediated or litigated at another point, with the central issue of fire safety being addressed by the entering into of a maintenance contract if, that is, there was truly a fire safety concern held on the part of the plaintiff. For the reasons explained in this decision it does not at all appear that the plaintiff's application for an interim injunction which was brought ex parte, was truly motivated by an urgent concern in respect of fire safety issues.

59. A second method of resolving entirely any concerns held by the plaintiff arising out of fire safety in respect of the Meath Street property (which, in truth, appears to be the only property where the fire safety alarm panel registered or returned a "default") was to pay, promptly, on or about 22 July 2020, the sum of €150 plus VAT to the defendant company, in response of which, the evidence demonstrates uncontrovertibly, the defendant would have promptly sent an engineer to reset the relevant fire alarm panels to the manufacturer codes. This was an option available to the plaintiff at all material times from 22 July 2020 onwards. Even if this Court was not satisfied on the balance of probabilities, that the relevant offer was made orally on 22 July, 2020 (and it is) it is incontrovertible that the self-same offer was made, in writing, as evidenced by the defendant's 20 August, 2020 email sent (at 12:22) by Ms. Smith, Managing Director of the defendant to Mr. Gashi, Director and Principal of the plaintiff. Despite this, the plaintiff did not accept the offer on 20 August, 2020. On the contrary, the plaintiff never accepted this offer. Accepting the offer would have dealt entirely with any fire safety concerns on the part of the plaintiff, had this been the real issue. The evidence reveals that it was not the real issue and was never the issue. Rather, the plaintiff wanted to extract, from the defendant, the latter's engineer's code, not to pay a very modest sum in return for which the defendant's engineer would promptly attend at the relevant property, reset the panel to the manufacturer's settings and, thereby give the plaintiff full and unrestricted access to the fire alarm panels in question. The fact that the plaintiff did not, truly, want any supposed fire safety risk addressed but, instead, wanted the defendant's engineering codes to which the plaintiff was not entitled is underscored by firstly, the failure on the part of the plaintiff to accept the 20 August, 2020 offer made by the defendant (and the letter from the plaintiff's solicitors dated 20 August, 2020 is most certainly not acceptance of that offer) and, secondly, the averments in the grounding affidavit sworn on 02 September, 2020 (wherein no mention is made of the defendant's email dated 20 August, 2020 and, moreover, it is averred (at para. 22) that, by email sent on 02 September 2020, the plaintiff's solicitors "again requested the handover of essential codes"). Thus, the plaintiff failed to take a second option by which any fire safety concerns it had could have been fully, promptly and inexpensively addressed (i.e. it

failed to accept the offer made by the Defendant to reset the alarm to the manufacturer codes).

60. There was also a third means by which the plaintiff could readily have addressed any fire safety concerns if it truly had same. This was by engaging the services of a third party. That was ultimately what occurred. In other words, the plaintiff was, in fact, in a position, without the assistance of the defendant and without ever obtaining access to the defendant's engineering codes, to access the manufacturer's codes in respect of the alarm codes in question by using the services of a third party. This, too, highlights the fact that it was utterly unnecessary for the ex parte injunction to be obtained and, thus, it should never have been sought. In an affidavit sworn by Mr. Gashi on 01 October, 2020, he avers inter alia, that the relevant fire safety equipment "has…had to be repaired and made functional by third-party engineers from a fire safety engineering firm commissioned by the plaintiff." The foregoing averment does not explain or excuse the fact that it was never necessary to ask the court to order the defendant to hand over its engineer code. The evidence before this Court demonstrates that very shortly after the court made the interim order on 02 September 2020, the plaintiff did what it could have done at any time from 22 July, 2020 onwards i.e. it retained a third party firm of fire safety engineers who attended the relevant premises and who resolved the issue promptly. The court is not aware what that cost the plaintiff, but it seems fair to infer that retaining a third party came at some cost. Whether there was a cost imposed by the third party and the extent of that cost is not, however, germane to the issue before this Court. What is relevant is the indisputable fact that the defendant's engineer code was never required by the plaintiff and should not have been sought by the plaintiff who had no entitlement to same but clearly gave this Court to understand that, not only had it such an entitlement, this code was vital to address a pressing fire safety issue. It was never so.

61. Despite having a trinity of means by which, at all material times, the plaintiff could and should have addressed such fire safety concerns as it truly had, and despite the fact that it chose the third of those methods but only did so after obtaining, improperly and on a materially misleading basis, an ex parte interim injunction for this Court, Mr. Gashi averred, at para. 25 of his affidavit sworn on 01 October, 2020 that: "…at the date of the swearing hereof the Defendant, has not made any offer to hand over alarm codes even in return for monies."

62. The foregoing averment highlights very clearly what the plaintiff's aim was at all material times including after the issue had already been resolved. Weighing up all the evidence before this Court, it was an aim which the plaintiff pursued by impermissibly and inappropriately seeking ex parte interim relief without making full and frank disclosure of material of fundamental relevance to the application made by the plaintiff, being an application which was utterly devoid of merit, unnecessary and inappropriately made.

63. Supplemental affidavits were also sworn in October 2020 by the plaintiff's solicitor. At para. 7 of the first of these supplemental affidavits, the plaintiff's solicitor refers, inter

alia, to the "…scale of potential damage in respect of multiple city-centre properties from fire" (para. 7). That averment does not sit easily with the reality of the position both at that juncture in October and when the ex parte application was made in September. It was, of course, the risk to life posed by a potential fire which prompted this Court to grant the injunction on an ex parte basis. What the court did not know on 02 September 2020 was that there was not truly an urgent concern as regards fire safety risk held on the part of the plaintiff, nor was the injunction at all necessary for the plaintiff to address such concerns, if ever genuinely held. Moreover, the court was not provided with fundamentally relevant material by a plaintiff who was willing to deploy, impermissibly, the processes of this Court to further what seems to have been a commercial agenda, specifically to extract the engineer code, in respect of four properties from the defendant, to which the plaintiff was never entitled and which the plaintiff never in fact needed.

64. Had full and frank disclosure been made, this Court would not have acceded to the application for interim relief at all. Furthermore, it is now clear from a consideration of evidence which should have been before the court at the ex parte stage that, on its merits, the plaintiff was not entitled to injunctive relief. In other words, even if the plaintiff had made full and frank disclosure, an injunction was unnecessary and, thus, should neither have been sought nor granted. When the matter was listed for mention on 05 October, 2020, a replying affidavit having been sworn by Mr. McEnaney on that date, the ex parte interim injunction was vacated after short submissions and this was done in circumstances where the plaintiff had no objection to the injunction being vacated, the court being advised that the plaintiff had taken steps to get the fire alarms at the premises in Meath Street operable. These steps were taken entirely without recourse to the defendant, underlining the absence of any necessity for an order requiring the defendant to hand over engineer's codes.

Conclusion

65. For the reasons detailed in this ruling, I am entirely satisfied that the plaintiff is not entitled to costs and that the defendant is entitled to its costs, both on the basis of a lack of full and frank disclosure on the part of the plaintiff when it sought and obtained ex parte interim relief and on the merits of the plaintiff's application for such relief. The defendant is, for the same reasons, entitled to its costs in respect of such steps as it had to take in response to the interim injunction impermissibly obtained by the plaintiff, in order to resolve matters, with such costs to be adjudicated in default of agreement. I would invite the parties to liaise, forthwith, with regard to the appropriate form of order reflecting this Court's decision and in default of agreement on the appropriate form of order, to apply for the matter to be listed at a date convenient to the parties and the court for the purposes of oral submissions as to the appropriate form of order.

66. Given the facts which emerge from the analysis of the evidence before this Court, I need to emphasise, in the very clearest of terms, this Court's severe displeasure at the failure on the part of a plaintiff to comply with the golden rule which mandates that a party seeking discretional relief by way of an injunction from this Court on the basis of an ex parte application, must disclose to the court all matters relevant to the exercise by this

Court of its discretion. That duty requires the relevant party to disclose matters which may strengthen or may weaken their case for the relief contended for. Compliance with this golden rule requires a plaintiff to ensure that full and proper instructions are given by them to their solicitor, so that, consistent with the latter's duties as an officer of the court, full and frank disclosure can be made in the context of an ex parte application for injunctive relief.

67. The sin of omission is no less a grievous sin in this regard and, given the evidence before it, this Court must signal its severe displeasure in the very clearest of terms at what occurred in the present case, the blame for which must be laid squarely at the door of the Director and Principal of the plaintiff who, it will be recalled, made averments on 01 October, 2020 in which he affirmed and approved the matters set out in the grounding affidavit sworn by his solicitor on 02 September, 2020. What was approved and affirmed was neither a full, nor an accurate account of all relevant matters. Such an approach to seeking an ex parte injunction must be deplored as it creates a patent unfairness, misleads the court, creates a real risk of injustice and is likely to involve a waste of costs and makes impermissible demands in respect of what are limited court resources.